

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

SPECIAL ADVISORY COMMITTEE ON TRINITY WESTERN'S PROPOSED SCHOOL OF LAW

FINAL REPORT

December 2013

Introduction

1. In 2010, Canada's law societies approved a uniform national requirement that graduates of Canadian common law programs must meet to enter law society admission programs. Developed by the Federation of Law Societies of Canada (the "Federation")¹ Task Force on the Canadian Common Law Degree, the national requirement specifies the competencies and skills graduates must have attained and the law school academic program and learning resources law schools must have in place. The national requirement will apply to graduates of existing and prospective Canadian law schools effective 2015.
2. The Federation's Canadian Common Law Program Approval Committee (the "Approval Committee"), is mandated to review existing and proposed law school programs to determine whether they comply with the national requirement. In the case of new law school programs, a positive determination by the Approval Committee is but one step in the process. New law school programs must also be approved by the relevant provincial government authority.
3. In June 2012, Trinity Western University ("TWU"), a Christian faith-based university in British Columbia, submitted a proposal for a law school program to the Approval Committee. Founded in 1962, TWU has been recognized as a university by the government of British Columbia since 1985. It currently offers 42 undergraduate and graduate degree programs and has a student enrollment of approximately 4,000.
4. The TWU proposal, which identified as one of its objectives the integration of a Christian worldview into the law school curriculum, provoked a strong response from many in the legal community. Many written submissions from groups and individuals were made to the Federation and the Approval Committee. Copies of those submissions are available at <http://www.flsc.ca/en/twu-submissions/>. Many of those writing alleged that TWU would discriminate against lesbian, gay, bisexual and transgendered ("LGBT") individuals and called on the Approval Committee to reject the TWU proposal. Others wrote in favour of the proposed law school citing the right of religious freedom, the value of diversity in law school education and TWU's reputation as an educational institution.
5. At the heart of the debate is TWU's Community Covenant, a statement of commitment to the Christian faith that includes an undertaking to refrain from "sexual intimacy that violates the sacredness of marriage between a man and a woman."² All students, faculty and staff are required to abide by the Community Covenant. The proposal to integrate a Christian worldview into the curriculum of the law school has also raised concerns amongst those who made submissions to the Federation.

¹ The Federation of Law Societies of Canada is the umbrella organization of Canada's 14 provincial and territorial law societies.

² Trinity Western University (TWU), *Community Covenant Agreement*, <http://twu.ca/studenthandbook/university-policies/community-covenant-agreement.html>.

6. The Approval Committee is responsible for assessing whether the law school program proposed by TWU would meet the national requirement. That assessment process is currently underway. There are, however, a number of issues raised in the various submissions made to the Federation about the TWU proposal that are outside of the mandate of the Approval Committee. Recognizing the importance of addressing these issues, the Federation established the Special Advisory Committee on Trinity Western University's Proposed School of Law (the "Special Advisory Committee"). In establishing the Special Advisory Committee, the Council of the Federation approved the following mandate:

1. *The specific mandate of the Special Advisory Committee is to provide advice to the Council of the Federation on the following question:*

What additional considerations, if any, should be taken into account 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, given the requirement that all students and faculty of TWU must agree to abide by TWU's Community Covenant Agreement as a condition of admission and employment, respectively?

2. *In its consideration of the question, the Special Advisory Committee shall take into account:*

- (a) all representations received by the Federation to date including any responses to those representations by TWU;*
- (b) applicable law, including the Canadian Charter of Rights and Freedoms, human rights legislation, and the Supreme Court of Canada decision in Trinity Western University v. British Columbia College of Teachers (2001 SCC 31); and*
- (c) any other information that the Special Advisory Committee determines is relevant to the question.*

7. John J.L. Hunter, Q.C., Past-President of the Federation and the Law Society of British Columbia was appointed to chair the Special Advisory Committee. The other members of the committee are:

- Mona T. Duckett, Q.C., former Council member representing the Law Society of Alberta and Past-President of the Law Society of Alberta
- Derry Millar, former Treasurer of the Law Society of Upper Canada
- Madame la Bâtonnière Madeleine Lemieux, Ad. E., former Council member representing the Barreau du Québec and former Bâtonnière of the Barreau
- Morgan C. Cooper, Past-President of the Law Society of Newfoundland and Labrador

Support to the Special Advisory Committee is provided by Frederica Wilson, Federation Senior Director, Regulatory and Public Affairs and Daphne Keevil Harrold, Federation Policy Counsel.

8. In considering the question put to it, the Special Advisory Committee reviewed all of the submissions made to the Federation, together with responses to those submissions received from TWU. A number of email submissions from individuals sent directly to members of the committee were also considered. In addition, the Special Advisory Committee reviewed relevant law, and considered legal advice obtained by the Federation on the applicability of the Supreme Court of Canada's decision in *Trinity Western University v. British Columbia College of Teachers*³ ("BCCT"). The committee's review of the issues and its conclusions are set out below.

Role of Federation and Law Societies

9. In correspondence to the Federation dated April 24, 2013 and May 17, 2013 (copies attached as Appendices "A" and "B" respectively) TWU questioned whether consideration of broader public interest issues in relation to its application for approval of its proposed law school program is within the jurisdiction of the Federation. TWU also suggested that in establishing the Special Advisory Committee the Federation is "interposing itself into an area that the law societies themselves may not wish, or be statutorily permitted, to tread," and have not asked the Federation to enquire into.
10. The Special Advisory Committee believes that the Federation can and should consider whether there are any broader public interest issues outside of compliance with the national requirement raised by TWU's proposed school of law.
11. Canada's law societies are mandated by statute to regulate the legal profession in the public interest, and as the umbrella organization of the law societies the Federation shares a public interest focus. Examples from some of the relevant provincial statutes serve to illustrate the point.

Section 4.2 of Ontario *Law Society Act* provides in part:

- 4.2. In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:

. . . .

3. The Society has a duty to protect the public interest.

The Saskatchewan *Legal Profession Act* contains a similar provision:

³ 2001 SCC 31 (CanLII), <http://canlii.ca/t/dmd>.

- 3.1 In the exercise of its powers and the discharge of its responsibilities, it is the duty of the society, at all times:

(a) to act in the public interest;

...

The *British Columbia Legal Profession Act* includes an obligation to preserve and protect the rights and freedoms of all persons within its statutory duty to uphold and protect the public interest. Section 3 of that Act reads in part:

3. It is the object and duty of the society to uphold and protect the public interest in the administration of justice by

(a) preserving and protecting the rights and freedoms of all persons,

(b) ensuring the independence, integrity, honour and competence of lawyers,

(c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,

...

12. The Federation's public interest focus is evident from its mission statement, which opens with the words "[a]cting in the public interest."
13. In its decision in *BCCT* the Supreme Court of Canada held that the public interest jurisdiction of the teachers college permitted it to consider broad public interest issues such as those related to equality. The court held that the power of the teachers college to establish standards for entrance into the profession must be interpreted in light of the general purpose of its constating statute and in particular its public interest mandate.⁴ In reaching this conclusion, the Court rejected the argument put forward by TWU that the powers of the teachers college were limited to establishing standards to ensure that teachers were properly trained, competent, and of good character.⁵
14. The Special Advisory Committee can see no reason for coming to a different conclusion in the case of TWU's application for approval of its proposed law school. Like the teachers college in the *BCCT* case, Canada's law societies are required to exercise their overall mandate in the public interest. Setting appropriate standards for admission to the legal profession is an essential component of the public interest mandate shared by Canada's law societies. The national requirement approved by each of the law societies was developed as part of this public interest mandate. It reflects the law societies' collective view of the competencies new members of the profession must possess to be able to practise. Assessing whether an applicant meets the national requirement is, however, only one aspect of the admissions process. Law societies must, for example, determine what

⁴ *Ibid*, at paragraph 26.

⁵ *Ibid*, at paragraphs 12-13.

additional training or exams applicants must undertake and must assess whether applicants are fit to practise and are of good character. In each case, the ultimate decision on admissibility rests with the individual law societies.

15. The consideration of public interest issues is one aspect of the overall responsibility of law societies for determining whether an applicant should be admitted to the legal profession. Assisting the law societies with the exercise of this responsibility is entirely consistent with the mandate of the Federation. The decision to establish the Special Advisory Committee was made by the Council of the Federation, a body comprised of representatives from every law society in Canada. The advice to be provided by the Special Advisory Committee is intended to assist the law societies, the bodies ultimately charged with determining whether graduates from the proposed TWU school of law should be admitted to the profession.
16. It is important to distinguish the task assigned to the Special Advisory Committee from the role of the Approval Committee. As noted above, the mandate of the Approval Committee is to determine whether TWU's proposed law school program, if implemented in a manner consistent with its proposal, would meet the national requirement. That matter is currently under consideration by the Approval Committee. The mandate of the Special Advisory Committee is quite different. The committee has no power to decide whether TWU's application should be approved. It has been asked only to provide advice on whether the application raises any additional public interest considerations.

The Law

17. As is more fully described below, many of the individuals and groups who made submissions to the Federation on the subject of TWU's proposed law school raised concerns about the Community Covenant that students, faculty, and staff are required to abide by. More particularly, many of the submissions argued that given what they see as the inherently discriminatory nature of the Community Covenant, approving a law school at TWU would be contrary to the public interest. Others, writing in support of TWU, cited the right of freedom of religion and argued that withholding approval of TWU's proposed school of law would violate the rights of those wishing to study law at a faith-based school.
18. In considering these issues and answering the question put to it by its terms of reference, the Special Advisory Committee has taken into account relevant case law, statutes, and the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). The committee has also considered a legal opinion on the applicability of the Supreme Court of Canada's decision in *BCCT* prepared for the Council of the Federation by John B. Laskin, (see Appendix "C") a copy of which was provided to the Special Advisory Committee.
19. TWU is a private institution to which the *Charter* does not apply and which is exempt, in part, from the provisions of the British Columbia *Human Rights Code* (the "*Human Rights Code*"). Section 41(1) of that statute states:

41 (1) If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a physical or mental disability or by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or corporation must not be considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons.

20. In the *BCCT* case the Supreme Court held that although the *Charter* does not apply to TWU (as it is a private institution) and the university is exempt from certain provisions of the *Human Rights Code*, the rights and values articulated in the *Charter* and human rights legislation are relevant in considering broader issues of public interest.⁶

21. The *BCCT* case involved an application by TWU to the British Columbia College of Teachers for approval of its teacher education program. The college rejected the application, basing its decision on the fact that students, faculty and staff were required to abide by a Community Standards agreement (the forerunner to the current Community Covenant) that forbid “biblically condemned” practices including “homosexual behaviour.” In finding that the teachers college erred in rejecting the TWU application, the Court noted that the *Charter* both protects against discrimination on the basis of sexual orientation and guarantees freedom of religion. The Court held that equality rights and freedom of religion must be balanced, and that neither right is to be preferred over the other.⁷

22. In reaching this finding, the Supreme Court confirmed the approach to reconciling different rights and values under the *Charter* articulated in its decision in *Dagenais v. Canadian Broadcasting Corp.*:

A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict . . . *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.⁸

23. The majority held that “the admissions policy of TWU alone is not in itself sufficient to establish discrimination as it is understood in our s. 15 jurisprudence.”⁹ The Court held:

It is important to note that this is a private institution that is exempted, in part, from the British Columbia human rights legislation and to which the *Charter* does not apply. To state that the voluntary adoption of a code of conduct based on a person’s own religious

⁶ *Ibid*, at paragraph 27.

⁷ *Ibid*, paragraphs 27-30.

⁸ 1994 CanLII 39 (SCC), <http://canlii.ca/t/1frng>, as cited in *BCCT* supra, note 3 at paragraph 31.

⁹ *Ibid*, at paragraph 25.

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.¹⁰

24. The Court found that section 41 of the *Human Rights Code* protects a religious institution from a finding that it is in breach of the *Human Rights Code* "where it prefers adherents of its religious constituency."¹¹ The Court also held that this statutory exemption accommodates religious freedom.

25. In reaching these findings the Supreme Court distinguished between belief and conduct stating:

. . . the proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them. Absent 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. The BCCT, rightfully, does not require public universities with teacher education programs to screen out applicants who hold sexist, racist or homophobic beliefs. For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society.¹²

26. Some of those making submissions to the Federation about TWU's proposed school of law have suggested that the Court would take a different approach today to reconciling competing *Charter* rights. It has also been suggested that the Court might not require evidence of actual harm as it did in *BCCT*.

27. The Special Advisory Committee notes that since the *BCCT* case the Supreme Court has confirmed its approach to reconciling competing rights, most recently in its decision in *Saskatchewan (Human Rights Commission) v. Whatcott*, released in February 2013.¹³ In its decision in *Whatcott*, a case involving the prohibition of hate speech contained in Saskatchewan human rights legislation, the Court described its task as requiring it:

to balance the fundamental values underlying freedom of expression (and, later, freedom of religion) in the context in which they are invoked, with competing *Charter* rights and other values essential to a free and democratic society, in this case, a commitment to equality and respect for group identity and the inherent dignity owed to all human beings.¹⁴

28. It is the view of the Special Advisory Committee that the approach of the Supreme Court in *BCCT* to reconciling competing rights under the *Charter* and the requirement of evidence of

¹⁰ *Ibid.*

¹¹ *Ibid.*, at paragraph 35.

¹² *Ibid.*, at paragraph 36.

¹³ 2013 SCC 11 (CanLII), <http://canlii.ca/t/1frng>, at paragraphs 6, 66, and 145. See also *Reference re Same-Sex Marriage*, 2004 SCC 79 (CanLII) (SCC), <http://canlii.ca/t/1jdhv>, at paragraph 50.

¹⁴ *Ibid.*, at paragraph 66.

actual harm continue to be the law in Canada. Although the Special Advisory Committee cannot know what evidence might be presented in the event of a court challenge to TWU's proposed school of law, the committee has not received evidence that would, in its opinion, lead to a different outcome than occurred in the *BCCT* case.

Issues raised in submissions

29. The Federation has received representations from a number of individuals, organizations and groups of individuals (including TWU). These submissions, and a number of the emails sent directly to members of the committee, raise important issues that the Special Advisory Committee has considered in its deliberations. The committee has also considered the arguments made by Professor Elaine Craig in her paper *The Case for the Federation of Law Societies Rejecting Trinity Western University's Proposed Law Degree Program*.¹⁵
30. Many writing in opposition to TWU's proposed law school argue that the policies of TWU, particularly its Community Covenant agreement, discriminate against LGBT individuals and are contrary to societal values of equality and non-discrimination. Approval of the proposed law school program, they argue, would thus not be in the public interest.
31. Some express concern that approval of TWU's proposed law school would result in LGBT students having fewer choices and opportunities than other students. Others question the ability of TWU to provide a balanced, high quality legal education and suggest that its stated intention to teach law from a Christian worldview would make TWU incapable of teaching legal ethics, constitutional and human rights law. A related argument suggests that students would not be taught important critical thinking skills. Concerns were also expressed about TWU's respect for academic freedom and the impact this would have on the legal education students would receive.
32. One submission points to the United States experience and suggests that the American Bar Association ("ABA") has adopted a new standard that prohibits law schools from discriminating on the basis *inter alia* of sexual orientation.
33. It must be noted, however, that not all individuals and organizations who wrote to the Federation oppose the TWU application. A number of the submissions argue in favour of approval of the proposed law school citing TWU's record as a high quality educational institution and suggesting, for example, that as a faith-based institution it would be well placed to impart an ethical view to its students. Others argue that secular schools should not have a monopoly on legal education in Canada and that the legal profession benefits from a diversity of views amongst its members. Many challenge the suggestion that a TWU law school would not properly teach Canadian law and legal values. They argue that in the absence of evidence that TWU would fail to do so, there is no reason to deny approval of its proposed law school program.

¹⁵ Canadian Journal of Women and the Law, Vol. 25, No. 1, 2013.

34. The Special Advisory Committee's consideration of these issues follows.

Whether approving TWU's proposed law school would be contrary to the public interest

35. The Special Advisory Committee has concluded that consideration of the public interest is clearly relevant in determining whether it would be appropriate to permit future graduates of TWU's proposed school of law to enroll in law society admission programs. As noted above, in the *BCCT* case the Supreme Court held that consideration of human rights principles and the values enunciated in the *Charter* are relevant to this consideration notwithstanding that TWU is a private institution that is exempt from certain provisions of British Columbia human rights legislation and is not bound by the *Charter*.
36. Recent submissions to the Federation have argued that TWU bans LGBT individuals from attending the school. They argue that approving a law school at an institution that bans students on the basis of sexual orientation would be contrary to the public interest. To the knowledge of the Special Advisory Committee, however, the suggestion that TWU bans LGBT individuals is inaccurate. The Special Advisory Committee recognizes that the Community Covenant may result in differential treatment of LGBT individuals. Faced with a requirement to commit to a code of behaviour that prohibits sexual activity outside of marriage between a man and a woman, LGBT students would legitimately feel unwelcome at a TWU law school. The Supreme Court has made it clear, however, that the religious freedom rights of those who might wish to attend such a faith-based institution must also be considered and it is clear from the submissions received by the Federation that there are many such students.
37. The Court also made it clear in *BCCT* that the assessment of the public interest cannot be based solely on the religious precepts of the school, or in this case, the proposed school and that the admissions policy requiring students to adhere to the Community Covenant is not sufficient to establish unlawful discrimination. Absent evidence for example, that graduates of the proposed law school would engage in discriminatory conduct or would fail to uphold the law, freedom of religion must be accommodated. No such evidence has been brought to the attention of the Special Advisory Committee; nor is it aware of any.
38. It has been suggested by some, that while TWU's policies may be lawful in British Columbia by virtue of the specific provisions of the BC *Human Rights Code*, the university's policies would be contrary to human rights legislation in other jurisdictions. In light of the Supreme Court of Canada's findings on the requirement to balance equality rights and freedom of religion, it is not evident to the Special Advisory Committee that this would be the case. In any event, the Special Advisory Committee has concluded that this suggestion misconstrues the nature of the analysis required in determining whether approval of the proposed TWU law school and admission of future graduates of the program to law society admission programs would be consistent with the public interest.

39. TWU has been recognized by the government of British Columbia as a degree granting institution. The issue is not whether TWU could operate in the same manner in another jurisdiction, but whether it is operating lawfully in the jurisdiction in which it is located and whether its policies are consistent with the values expressed in the *Charter* and human rights legislation. The Supreme Court of Canada concluded in the *BCCT* case that the Community Standards document, a forerunner to the Community Covenant that was more explicit in its prohibition of homosexual behaviour than the current Community Covenant, was not contrary to human rights values given the need to balance equality rights and freedom of religion. The Special Advisory Committee is not persuaded to reach a different conclusion in relation to TWU's proposed law school program.
40. The Special Advisory Committee believes that it is important to note that if TWU's proposed school receives preliminary approval from the Approval Committee and if evidence of actual harm emerges following such approval it would be appropriate to address it at that time.

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

41. Some opponents of TWU's proposed law school argue that it will not provide a balanced, quality legal education. They suggest that TWU's policies and intention to teach from a Christian worldview would prevent free, open dialogue and that students in such a program would, as a consequence, fail to develop necessary critical thinking skills. It has also been suggested that TWU's intention to teach law from a Christian worldview would interfere with effective teaching of legal ethics, constitutional and human rights law. The inability to effectively teach legal ethics, particularly to teach students to think critically about ethics, is also one of the central arguments advanced by Professor Elaine Craig in her article, *The Case for the Federation of Law Societies Rejecting Trinity Western University's Proposed Law Degree Program*.¹⁶
42. Others take the opposite view, arguing that as a faith-based institution TWU would be well placed to impart ethics to its students and that teaching from a Christian worldview might actually stimulate discussion and debate. It has also been suggested that "[t]he legal profession and the classrooms of Canada's law schools would benefit greatly from the expansion of legal education in institutions that hold non-mainstream views."¹⁷
43. TWU has made strong representations in response to the suggestion that it cannot and will not teach legal ethics, constitutional and human rights law appropriately and that students in its proposed program will not develop critical thinking skills. The May 17, 2013 letter from TWU to the Federation includes a clear commitment to "fully and appropriately" teaching legal ethics and professionalism and a recognition of its duty to teach equality and non-

¹⁶ Note 15, supra.

¹⁷ March 19, 2013 letter from UBC law students – Group 2, Submissions to the Special Advisory Committee, <http://www.flsc.ca/en/twu-submissions/>

discrimination in both its legal ethics and substantive law courses.¹⁸ The letter highlights the fact that course outlines contained in its proposal indicate that TWU intends to rely on standard texts for teaching in the areas of legal ethics, constitutional and human rights law. TWU has also unambiguously acknowledged “its duty to teach equality and meet its public obligation with respect to promulgating non-discriminatory principles in its teaching of substantive law and ethics and professionalism.” In its May 17th letter, TWU also states that “TWU agrees with Egale Canada that ‘the dignity and value of all individuals irrespective of their sexual orientation . . . now form part of the fabric of professional ethics and the rule of law.’”

44. In the view of the Special Advisory Committee the argument that TWU's Christian worldview will have a negative impact on the quality of legal education at the proposed law school and that students will fail to acquire necessary critical thinking skills is without merit. Such a finding cannot be based on TWU's stated religious perspective or its Community Covenant; as the Supreme Court made clear in *BCCT* it could be based only on concrete evidence.¹⁹ Not only has no such evidence been brought to the attention of the Special Advisory Committee, the evidence that we do have demonstrates an understanding by TWU of its obligation to appropriately teach legal ethics and other substantive law subjects. We see no basis to conclude, as some have suggested, that individuals holding particular religious views are incapable of critical thinking and of understanding their ethical obligations, or that the quality of the legal education provided by a law school at TWU would not meet expected standards. There can be no doubt that TWU's Christian worldview is shared by many current members of the profession and the judiciary. There is no evidence that such individuals are any less capable of critical thinking or any less likely to conduct themselves ethically than any other members of the bar or the bench. Graduates of the proposed law school admitted to the profession would be subject to the supervision of the law societies and would be obliged to follow the ethical rules governing all members of the profession. Individuals breaching those ethical rules would be subject to disciplinary sanctions.
45. It is also worth noting that the proposed law school would not be the only professional faculty at TWU. The university operates both nursing and teacher education programs and has done so for many years. Graduates of those programs licensed to practise their respective professions must meet codes of professional conduct.²⁰ To the knowledge of the Special Advisory Committee, there is no evidence that graduates of the nursing and teaching programs at TWU are any less able to fulfill their ethical obligations than are graduates from programs at other schools.

¹⁸ See Appendix “B”.

¹⁹ *BCCT*, paragraphs 32-33.

²⁰ See, for example, *Standards for the Education, Competence, and Professional Conduct of Educators in British Columbia*, http://www.bcteacherregulation.ca/documents/AboutUs/Standards/edu_stds.pdf and the *Profession Standards* of the College of Registered Nurses of British Columbia, <https://www.crnbc.ca/Standards/ProfessionalStandards/Pages/Default.aspx>. Similar professional codes apply to teachers and nurses licensed in other Canadian jurisdictions.

Whether TWU respects academic freedom

46. Some of the submissions to the Federation have argued that TWU fails to respect academic freedom. Support for this argument is drawn from an October 2009 report published by the Canadian Association of University Teachers (the “CAUT”) that concluded that TWU’s policy on academic freedom allowed for “unwarranted and unacceptable constraints on academic freedom.”²¹ The CAUT report followed an investigation by an *ad hoc* committee charged with determining whether TWU employed a “faith test” in employment and whether “all academic staff at TWU have a full measure of academic freedom.”²²

47. The *ad hoc* committee concluded that although TWU’s policy on academic freedom “appears to affirm a commitment to open critical thought in teaching and research” that commitment is qualified by a requirement that the teaching and investigation occur “from a stated perspective” and as such violates academic freedom.²³ In reaching its finding the *ad hoc* committee also relied on the CAUT Academic Freedom Policy²⁴ which states, in part:

Academic freedom includes the right, without restriction by prescribed doctrine, to freedom to teach and discuss; freedom to carry out research and disseminate and publish the results thereof; freedom to produce and perform creative works; freedom to engage in service to the institution and the community; freedom to express one’s opinion about the institution, its administration, and the system in which one works; freedom to acquire, preserve, and provide access to documentary material in all formats; and freedom to participate in professional and representative academic bodies. Academic freedom always entails freedom from institutional censorship.

48. The Special Advisory Committee agrees that a commitment to academic freedom is important in a law school program. We note, however, that there is no single definition of academic freedom. In October 2011, the Association Universities and Colleges of Canada (the “AUCC”), the national organization of Canadian universities and colleges,²⁵ adopted a Statement on Academic Freedom²⁶ that includes a more limited definition. The AUCC statement provides for the possibility that academic freedom may be limited by the “academic mission” of the educational institution. Key provisions of the statement include the following:

Unlike the broader concept of freedom of speech, academic freedom must be based on institutional integrity, rigorous standards for enquiry and institutional autonomy, which allows universities to set their research and educational priorities.

²¹ *Report of an Inquiry Regarding Trinity Western University*, p. 10, <http://www.caut.ca/docs/reports/report-of-caut-ad-hoc-investigatory-committee-on-twu.pdf?sfvrsn=0>.

²² *Ibid*, at p. 1.

²³ *Ibid*, at p. 4.

²⁴ <http://www.caut.ca/about-us/caut-policy/lists/general-caut-policies/policy-statement-on-academic-freedom>.

²⁵ The AUCC is a member-based organization representing 97 universities and colleges.

²⁶ <http://www.aucc.ca/media-room/news-and-commentary/canadas-universities-adopt-new-statement-on-academic-freedom/>.

. . .

Academic freedom is constrained by the professional standards of the relevant discipline and the responsibility of the institution to organize its academic mission. The insistence on professional standards speaks to the rigor of the enquiry and not to its outcome.

49. The criteria for membership in the AUCC include a requirement to respect the spirit of the AUCC Statement on Academic Freedom.²⁷
50. The academic freedom policy of TWU, a member of the AUCC, recognizes that it “is an essential ingredient in an effective university program.”²⁸ The full policy reads as follows:

Trinity Western University recognizes that academic freedom, though varyingly defined, is an essential ingredient in an effective university program. Jesus Christ taught the importance of a high regard for integrity, truth, and freedom. Indeed, He saw His role as in part setting people free from bondage to ignorance, fear, evil, and material things while providing the ultimate definition of truth.

Accordingly, Trinity Western University maintains that arbitrary indoctrination and simplistic, prefabricated answers to questions are incompatible with a Christian respect for truth, a Christian understanding of human dignity and freedom, and quality Christian educational techniques and objectives.

On the other hand, Trinity Western University rejects as incompatible with human nature and revelational theism a definition of academic freedom which arbitrarily and exclusively requires pluralism without commitment, denies the existence of any fixed points of reference, maximizes the quest for truth to the extent of assuming it is never knowable, and implies an absolute freedom from moral and religious responsibility to its community.

Rather, for itself, Trinity Western University is committed to academic freedom in teaching and investigation from a stated perspective, i.e., within parameters consistent with the confessional basis of the constituency to which the University is responsible, but practiced in an environment of free inquiry and discussion and of encouragement to integrity in research. Students also have freedom to inquire, right of access to the broad spectrum of representative information in each discipline, and assurance of a reasonable attempt at a fair and balanced presentation and evaluation of all material by their instructors. Truth does not fear honest investigation.

²⁷ Association of Universities and Colleges of Canada, *Criteria to Become a Member*, <http://www.aucc.ca/about-us/member-universities/membership-eligibility/criteria-to-become-a-member/>.

²⁸ <https://twu.ca/academics/calendar/2012-2013/academic-information/academic-policies/>.

51. In the view of the Special Advisory Committee, the qualification in the TWU policy that academic freedom be exercised from “a stated perspective” is consistent with the provision in the AUCC statement recognizing the right of an institution to constrain academic freedom to accord with its academic mission. In these circumstances, it is not open to the Special Advisory Committee to conclude that academic freedom will not be respected at the proposed law school.

Whether approving TWU's proposed law school would result in LGBT students having fewer opportunities and choices than others

52. If approved, a law school at TWU will bring to 20²⁹ the number of law schools in Canada offering common law programs and will result in an increase of the overall number of available law school places. Some have argued that even with this increase, approval of the TWU proposal would result in fewer choices for LGBT individuals wishing to attend law school than would exist for other students as TWU would not be a choice for LGBT students.
53. As a starting point, we are not aware of any evidence that TWU limits or bans the admission to the university of LGBT individuals. A number of those who made submissions to the Federation noted that there are LGBT students at TWU. It is reasonable to conclude that the requirement to adhere to the Community Covenant would make TWU an unwelcoming place for LGBT individuals and would likely discourage most from applying to a law school at the university, but it may also be that a faith-based law school would be an attractive option for some prospective law students, whatever their sexual orientation. It is also clear that approval of the TWU law school would not result in any fewer choices for LGBT students than they have currently. Indeed, an overall increase in law school places in Canada seems certain to expand the choices for all students.

The ABA standards on discrimination on the basis of sexual orientation

54. In their joint submission³⁰ urging the Federation to consider the public interest issues related to TWU's proposed law school, the Canadian Bar Association's Sexual Orientation and Gender Identity Conference (“SOGIC”) and its Equality Committee referred to the experience in the United States. The submission cites the American Bar Association's (“ABA”) *Standards and Rules of Procedure for Approval of Law Schools* and in particular Standard 211 as a potential source of “inspiration” as to how to balance freedom of religion and equality.

²⁹ This number includes existing law schools and law schools that have received preliminary approval from the Approval Committee.

³⁰ March 18, 2013 letter to Gérald R. Tremblay, Submissions to the Special Advisory Committee, <http://www.flsc.ca/en/twu-submissions/>

55. ABA Standard 211 prohibits discrimination in law school admission and hiring practices. Since 1981, when Standard 211 was amended in settlement of a lawsuit brought by Oral Roberts University, law schools with religious affiliations have been permitted to have admission or employment policies that relate to the institution's religious affiliation. The relevant section of Standard 211 reads:

(c) This Standard does not prevent a law school from having a religious affiliation or purpose and adopting and applying policies of admission of students and employment of faculty and staff that directly relate to this affiliation or purpose so long as (i) notice of these policies has been given to applicants, students, faculty, and staff before their affiliation with the law school, and (ii) the religious affiliation, purpose, or policies do not contravene any other Standard, including standard 405(b) concerning academic freedom. These policies may provide a preference for persons adhering to the religious affiliation or purpose of the law school, but shall not be applied to use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability. This Standard permits religious affiliation or purpose policies as to admission, retention, and employment only to the extent that these policies are protected by the United States Constitution. It is administered as though the First Amendment of the United States Constitution governs its application.

56. Pursuant to the current version of the standard, law schools are precluded from discriminating against applicants or students on the basis, *inter alia*, of sexual orientation. According to Interpretation 211-2 (which forms part of the official standard), however, "the prohibition concerning sexual orientation does not require a religiously affiliated school to act inconsistently with the essential elements of its religious values and beliefs." The ABA has confirmed that the standard distinguishes between discrimination on the basis of a person's status, and rules or codes that prohibit certain conduct. The former is prohibited, the latter permitted.

57. In considering the American treatment of religiously affiliated law schools, the Special Advisory Committee also considered the bylaws of the Association of American Law Schools ("AALS"), a voluntary member-based organization dedicated to "the improvement of the legal profession through legal education."³¹ Membership is open to law schools that have been operating for at least five years and have graduated their third class. Members are also required to adhere to a comprehensive list of requirements set out in the association's bylaws similar to those contained in the ABA standards.³² The list of members of the AALS includes a number of religiously-affiliated schools. Several other religiously-affiliated schools are in a category of "non-member, fee paid schools", which receive many of the benefits of full membership, including access to AALS publications and resources, but are not required to conform to all of the membership requirements.

³¹ AALS Bylaws, Article 1, Section 1-2, http://www.aals.org/about_handbook_bylaws.php.

³² AALS Bylaws, Article 6.

58. Section 6-3(a) of the bylaws of the AALS prohibits discrimination on the basis, *inter alia*, of sexual orientation. Guidance on the application of this section of the bylaws to religiously-affiliated law schools is provided by the AALS Executive Committee Regulations. Like ABA Standard 211, AALS Executive Committee Regulation 6-3.1 permits religiously-affiliated schools to have admissions and employment policies based on their religious affiliation provided such policies do not directly discriminate on the basis of sexual orientation and are consistent with the association's regulations on academic freedom. Notice of such policies must be provided in advance of a student, faculty or staff member becoming affiliated with the school.
59. Further guidance on the application of the non-discrimination bylaw to religiously affiliated law schools is provided in the AALS Statements of Good Practices. *Interpretive Principles to Guide Religiously Affiliated Member Schools as They Implement Bylaw Section 6-3(a) and Executive Committee Regulation 6-3.*³³ opens with the following paragraph:
- These principles are intended to guide religiously affiliated member schools as they implement Bylaw Section 6-3(a) and revised ECR 6-3.1. They seek to strike a fair and sensitive balance between the values of religious liberty and nondiscrimination based upon sexual orientation. These principles are based on the premise that Bylaw 6-3(a) protects against discrimination on the basis of sexual orientation. When applied to religiously affiliated schools, that absolute protection of the status of sexual orientation continues, but in the unique context of religious liberty, Bylaw 6-3(a) and ECR 6-3.1 should be interpreted to permit the regulation of conduct when that conduct is directly incompatible with the essential religious tenets and values of a member school. These principles will guide the Accreditation Committee in reviewing whether a member school is in compliance with the Association's Bylaws and Executive Committee Regulations.
60. There are currently more than 50 religiously affiliated law schools in the United States, the majority of them ABA approved schools. Many religiously affiliated law schools are also members of the AALS. Religiously-affiliated law schools in the United States span a broad spectrum of religious beliefs. In some, there is little overt focus on the religious orientation of the institution, but in others the religious affiliation is reflected in the course content and the perspective from which the law is taught. At least some law schools approved by the ABA require students, faculty and staff to abide by codes of conduct or policies that include prohibitions on same-sex sexual conduct. Examples of such law schools include Baylor University, a Baptist institution, that bans "sexual misconduct" defined as "sexual abuse, sexual harassment, sexual assault, incest, adultery, fornication and homosexual acts";³⁴ J. Reuben Clark Law School at Brigham Young University (affiliated with the Mormon Church), which requires students to abide by an Honour Code that expressly prohibits homosexual

³³ http://www.aals.org/about_handbook_sgp_rel.php.

³⁴ Baylor University, Sexual Misconduct Policy, <http://www.baylor.edu/content/services/document.php?id=39247>.

conduct;³⁵ and Liberty Law School, a self-described Christian institution, whose non-discrimination policy states expressly that while not discriminating on the basis of sexual orientation the school does “discriminate on the basis of sexual misconduct including . . . any form of sexual behaviour that would undermine the Christian identity or faith mission of the University.”³⁶

61. Approval by the ABA and membership in the AALS of religiously-affiliated schools that restrict same-sex sexual conduct is consistent with the distinction that the policies of both organizations draw between discrimination on the basis of status and restrictions on specified conduct. Although both the ABA and the AALS require as a condition of approval or membership that law schools not “preclude admission of applicants or retention of students on the basis of . . . sexual orientation . . .” neither the ABA standard nor the bylaws of the AALS prevent religiously-affiliated law schools from imposing restrictions on sexual conduct similar to those imposed by the TWU Community Covenant.
62. The Special Advisory Committee sees merit in the non-discrimination provisions of the ABA and the AALS discussed above and recommends that the Federation consider whether it would be desirable to add a similar provision to the national requirement. We note, however, that if the national requirement included a standard similar to that of the ABA and the AALS it would not be a bar to approval of the TWU proposal. Although those standards prohibit discrimination on the basis of sexual orientation, both permit the prohibition of certain conduct deemed incompatible with the religious values of the institutions.

Conclusion

63. The Special Advisory Committee was asked to consider whether the requirement that students and faculty at TWU must agree to abide by the Community Covenant raises additional considerations that should be taken into account in determining whether graduates of the proposed law school program should be permitted to enter law society admission programs.
64. Although the Approval Committee is charged with reviewing TWU's proposal to determine whether it would, if implemented as described, meet the national requirement, it is the individual law societies that must decide on the eligibility of each individual applicant to their bar admission programs. The public interest issues considered by the Special Advisory Committee are expected to be relevant to those decisions.
65. In carrying out its mandate, the Special Advisory Committee carefully reviewed all of the submissions received by the Federation, and reviewed and analyzed applicable law and statutes. While the arguments made in the various submissions raise important issues that

³⁵ Brigham Young University, Honor Code, http://www.law2.byu.edu/page/categories/admissions/pdf_documents/part3_byu_law_application.pdf.

³⁶ Liberty University, Notice of Nondiscrimination, <http://www.liberty.edu/law/index.cfm?PID=8533>.

implicate both equality rights and freedom of religion, 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.

66. It is the conclusion of the Special Advisory Committee that if the Approval Committee concludes that the TWU proposal would meet the national requirement if implemented as proposed there will be no public interest reason to exclude future graduates of the program from law society bar admission programs.



APPENDIX "A"

BY E-MAIL
(Original By Mail)

April 24, 2013

Canadian Common Law Program Approval Committee
Federation of Law Societies of Canada
World Exchange Plaza
45 O'Connor Street, Suite 1810
Ottawa, ON
K1P 1A4

Attention: Gérald R. Tremblay, President

Dear Mr. Tremblay:

RE: CREATION OF A SPECIAL ADVISORY COMMITTEE

Thank you for your phone call last week and subsequent letter dated April 22, 2013. We also very much appreciate the time and work that the Federation of Law Societies of Canada (the "Federation") is putting into the review of Trinity Western University's (TWU) School of Law proposal.

Your letter raised two significant concerns. The first is with respect to the mandate of the Special Advisory Committee and the Federation itself. Your letter of December 4, 2012 to Dean Flanagan, along with your letter of April 22, 2013, indicates that consideration of TWU's Community Covenant is outside of the mandate of the Approvals Committee. It is clearly stated in the Terms of Reference that "*certain issues have been raised regarding the proposal that are outside of the mandate of the Approval Committee.*" If these issues are



outside of the mandate of the Approval Committee, why would they be within the mandate of the Special Advisory Committee?

Our understanding of the correct mandate of the Federation and the Approval Committee is exactly as set out in the Terms of Reference; which is to determine whether graduates of a School of Law at TWU would meet the national requirements. Consideration of other issues, whether by the Approval Committee or the Special Advisory Committee, would be extraneous to that mandate. Consideration of other issues would also be amending the requirements for approval part way through the approval process which is contrary to principles of procedural fairness.

Should the Federation elect to proceed with the Special Advisory Committee notwithstanding the above noted concern, a second concern would then be with respect to the record and representations available for consideration by the Special Advisory Council. The terms of reference indicate that the Special Advisory Committee *would take into account all representations received by the Federation to date including any representations by TWU*. This creates procedural unfairness. TWU is aware that the Federation has received letters from various people and groups. However, in reliance on the advice in your December 4, 2012 letter to Dean Flanagan (copied to us) that such matters are not relevant to the Approval Committee's consideration of TWU's proposal, the University did not deem it necessary to fully respond to each of those letters.

There is considerable support for the School of Law across the country. Again, in reliance on your letter we have intentionally not requested supporters of the School of Law to write to the Federation. There has clearly been an organized campaign by opponents of TWU's proposal that has largely gone unanswered by TWU. We have not attempted to "balance the ledger" or make substantive submissions as we had no notice or any indication whatsoever that such was necessary. In fact, the converse was communicated to TWU. If the record on which this matter is now to be reviewed is "representations received by the Federation to date," the University is placed at a significant disadvantage which, in our view, would constitute procedural unfairness.





We trust the Federation will reconsider the creation of a Special Advisory Committee and proceed with a review by the Approval Committee of TWU's proposal pursuant to its stated mandate.

Yours truly,

TRINITY WESTERN UNIVERSITY

A handwritten signature in cursive script that reads 'Jonathan S. Raymond'.

Jonathan S. Raymond, Ph.D.
President

JSR/hkp



APPENDIX "B"

BY E-MAIL
(Original By Mail)

May 17, 2013

Federation of Law Societies of Canada
World Exchange Plaza
45 O'Connor Street, Suite 1810
Ottawa, ON K1P 1A4

Attention: John J. L. Hunter, QC
Chair of the Special Advisory Committee on Trinity Western University's
Proposed School of Law (the "Special Advisory Committee")

Dear Sirs/Mesdames:

Re: Response to Special Advisory Committee

We write in relation to your letter of May 3, 2013 to Dr. Jonathan Raymond and the mandate given to the Special Advisory Committee by the Federation of Law Societies of Canada (the "Federation"). We thank you for your letter, but TWU continues to have serious concerns with the creation of the Special Advisory Committee.

Canada's law societies are charged with regulating the legal profession in the public interest. They have each approved a national requirement that reflects their collective view as to what is necessary to ensure that potential new members graduating from a law degree program in Canada are competent to practice and understand their professional and ethical obligations. With the express approval of each law society in Canada, the Federation established the Canada Common Law Program Approval Committee (the "Approval Committee"), which applies the national requirement to each proposed new law degree program. As you have noted, TWU's Proposal for a School of Law (the "Proposal") is in the process of being reviewed by the Approval Committee.

As has been clearly and correctly articulated by the Federation, the Approval Committee has no mandate or authority to consider TWU's Community Covenant (the "Covenant") outside of the national requirement. The authority of the Federation arises only from the express approval



given by each of the 14 Canadian law societies to the national requirement and the Approval Committee. The Federation has no mandate with respect to matters outside of the national requirement. You have attempted to address this lack of mandate by indicating that the Special Advisory Committee will only provide advice to the Federation. While this may be true, it does not address the fact that the Federation itself has no jurisdiction from the law societies to consider or make recommendations with respect to the Covenant.

On its website, the Federation attempts to justify the existence and role of the Special Advisory Committee on the basis that issues raised about the Covenant by certain advocates opposing TWU's Proposal "were not anticipated when the national requirement was developed".¹ With respect, this is not a justification for reaching outside of the Federation's mandate. In accordance with administrative law principles, the Federation must remain within that mandate.

TWU accepts that it must, and will, provide an institutional setting that appropriately prepares lawyers for public practice and for the diversity that its graduates will encounter. In *Trinity Western University v. B.C. College of Teachers*² ("TWU v. BCCT"), the Supreme Court of Canada found that such was the case with respect to TWU's education program and further held that denial of approval was unlawful since there was no "specific evidence"³ that graduates would not uphold the basic values of non-discrimination. If such were not also the case with respect to TWU's School of Law Proposal, presumably the Approval Committee would address that in considering whether graduates would meet the "Ethics and Professionalism" component of the "Competency Requirements" of the national requirement. In the context of the national requirement and the role of the Approval Committee, it is not relevant that the Covenant was not specifically anticipated. Either TWU's Proposal meets the national requirement or it does not (and we obviously believe strongly that it does).

The only purpose for the proposed work of the Special Advisory Committee is to provide advice to the Federation, and presumably through the Federation to its member law societies, pertaining to the religious foundations of TWU. It does not appear that the law societies have solicited this advice. The Federation is interposing itself into an area that the law societies themselves may not wish, or be statutorily permitted, to tread. For these reasons, TWU objects to the establishment and mandate of the Special Advisory Committee. We urge the Special Advisory Committee to recommend to the Federation that this matter is, as has been maintained by the Federation in the past, outside of the Federation's mandate. To the extent that matters are external to the national requirement and the work of the Approval Committee, they are of a political nature and, if relevant at all, best left to the Ministry of Advanced Education in British Columbia.

¹ <http://www.flsc.ca/documents/TWUQuestionsandAnswers.pdf>

² [2001] 1 S.C.R. 772

³ TWU v. BCCT at para.38 . See also paras. 12-13.

It is clear that there has been an organized political campaign to oppose TWU's Proposal, which commenced with the letter from the Council of Canadian Law Deans. You should be aware that in preparing the Proposal, TWU specifically consulted with a number of law deans, including all of the law deans in British Columbia. None of them raised any issues or concerns about the Covenant or TWU's religious nature.

All of that having been said, there are responses to all of the significant objections raised in the various submissions that you provided TWU with your letter of May 3, 2013. Below you will find TWU's responses, but these are provided with an express reservation of all of TWU's rights to seek legal redress against the Federation and any individual law society arising from the work of the Special Advisory Committee, including with respect to jurisdictional challenges, should that be necessary in the future.

RESPONSES TO OBJECTIONS RAISED BY OPPONENTS OF TWU'S PROPOSED SCHOOL OF LAW

It would be very difficult to respond to each and every discrete point raised in the unsolicited letters and submissions sent to the Federation, particularly given the short period of time you allowed. The letters in opposition to the Covenant and TWU's Proposal raise a number of similar arguments and we will address these in a summary format. We will provide examples of statements of opposition as appropriate to demonstrate the flaws in the reasoning of TWU's opponents. As part of the legal team that represented TWU in *TWU v. BCCT*, the writer can say that most of these arguments were also made in that case and were rejected by the Supreme Court of Canada.

(a) Compatibility of the Covenant with Training in Ethics and Professionalism

A number of opponents have suggested that the Covenant is incompatible "with the ethical and legal training appropriately required of those seeking entry into the legal profession"⁴. West Coast LEAF has gone so far as to argue that, because of the Covenant, TWU "cannot impart on prospective lawyers a sufficient understanding of the ethical duty not to discriminate and to honour the obligations enumerated in human rights laws"⁵. Others suggest that TWU is "not up to the challenge of having an open, honest, meaningful discussion about its policies and practices"⁶ and that TWU "cannot be trusted to promote [a] constitutionally mandated understanding" of equality⁷.

4 Egale Canada letter, January 25, 2013

5 See West Coast LEAF letter, February 25, 2013, page 3.

6 Letter from students of Schulich School of Law, undated

7 National Association of Women and the Law, March 8, 2013

These arguments are wrong at law, intellectually flawed, discriminatory in themselves and, at a minimum, deeply offensive to lawyers and students who hold religious beliefs similar to those on which TWU is founded.

It should be beyond question that TWU acknowledges that human rights laws and section 15 of the *Charter* protect against and prohibit discrimination on the basis of sexual orientation. The courses that will be offered at the TWU School of Law will ensure that students understand the full scope of these protections in the public and private spheres of Canadian life. We trust that you have access to TWU's full proposal, including the course outlines contained therein. You will note that standard texts are proposed for such topics, which reference the historical inequality suffered by homosexuals. No course covering section 15 of the *Charter* or educating students on provincial human rights protections would be complete without fully addressing cases such as *Vriend v. Alberta*⁸, *Egan v. Canada*⁹, and *Reference re Same-Sex Marriage*.¹⁰ We are certain that the Approval Committee will be reviewing these course outlines as part of its work in assessing the academic program to be offered at TWU.

You will also note that TWU's program of study will include a required first year course (LAW 508) that will introduce students to professionalism and ethics. There will also be a required second year course on Ethics and Professionalism (LAW 602). A summary description of this mandatory course in TWU's proposal states:

Is law a calling, a job or a business? The lawyer, as a professional, is governed by a professional body of peers that establishes a code of conduct and general practices. This course focuses on the practice of law as public service and addresses the question of what does it mean to be a professional? It will also address the principles of ethical practice, particularly issues covered by the Code of Ethics. *It challenges students to reconcile their personal and professional beliefs within a framework of service to clients and community while respecting and performing their professional obligations and responsibilities.*¹¹ [Emphasis added]

TWU is committed to fully and appropriately addressing ethics and professionalism and the opponents of the Proposal cannot credibly argue otherwise. We are certain that the Approval Committee will find more than sufficient coverage of these topics.

The opponents of our Proposal must therefore be suggesting that *the very fact of* the Covenant and the religious beliefs inherent therein, undermine the otherwise appropriate education to be provided at TWU on ethics and professionalism. This is the same error made by the B.C. College of Teachers, which argued that teachers graduating from TWU would not be "equipped to deal with students" and be unable to "offer comfort and support to

8 [1998] 1 S.C.R. 493

9 [1995] 2 S.C.R. 513

10 [2004] 3 S.C.R. 698

11 TWU Proposal, page 22. See also full description of course at page 93.

the students”¹². The Supreme Court of Canada clearly rejected this argument and line of reasoning:

While the BCCT says that it is not denying the right to TWU students and faculty to hold particular religious views, it has inferred without any concrete evidence that such views will limit consideration of social issues by TWU graduates and have a detrimental effect on the learning environment in public schools. ...

TWU’s Community Standards, which are limited to prescribing conduct of members while at TWU, are not sufficient to support the conclusion that the BCCT should anticipate intolerant behaviour in the public schools.¹³

TWU recognizes its duty to teach equality and meet its public obligation with respect to promulgating non-discriminatory principles in its teaching of substantive law and ethics and professionalism. TWU agrees with *Egale Canada* that “the dignity and value of all individuals irrespective of their sexual orientation ... now form part of the fabric of professional ethics and the rule of law”.¹⁴ Each graduate of a TWU School of Law will be expected to meet all of their professional obligations once in practice, including those related to non-discrimination and equality. This is no different than the obligation of lawyers already in practice who hold religious beliefs similar to those articulated in the Covenant. In this regard, we note that there are many TWU graduates who have gone on to Canadian law schools and are now successfully practicing law across Canada.

As evident from the submissions received by the Federation, there are students currently at public law schools that hold these same religious beliefs¹⁵. They are and will be expected to uphold the law and meet their ethical and legal obligations when in practice and no one suggests that they will not do so.

The oaths that graduating law students will take before being admitted to practice law require them to uphold the laws and rights and freedoms of all persons. For example, the oaths used in Ontario and British Columbia contain the following statements, respectively:

12 B.C. College of Teachers Factum in *TWU v. BCCT*, para. 121. Note that when intervening in *TWU v. BCCT*, *Egale Canada* made similar arguments.

13 *TWU v. BCCT*, paras. 32-33

14 See letter from *Egale Canada*, dated January 25, 2013

15 See letter from “Christian law students across Canada” dated March 10, 2013 indicating that the students “hold [the Biblical principles on which TWU’s Covenant is based] trust regardless of the law school [they] attend”. See also letter from current UBC law students dated March 19, 2013 where they make this same point: “Students at TWU law school would be taught the law, and will be required to uphold the law. To suggest otherwise does not accord with how our justice system works: judge and lawyers, regardless of their personal beliefs, are expected to apply the law.”

I shall champion the rule of law and safeguard the rights and freedoms of all persons¹⁶.

...uphold the rule of law and the rights and freedoms of all persons according to the laws of Canada and of the Province of British Columbia.¹⁷

If the opponents' line of reasoning prevails, it equates to denying accreditation to individuals on the basis of religious belief. The Supreme Court of Canada specifically addressed this concern in *TWU v. BCCT*:

Indeed, if TWU's Community Standards could be sufficient in themselves to justify denying accreditation, it is difficult to see how the same logic would not result in the denial of accreditation to members of a particular church.¹⁸

...

Absent 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. The BCCT, rightfully, does not require public universities with teacher education programs to screen out applicants who hold sexist, racist or homophobic beliefs. For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society.¹⁹

It would clearly be abhorrent to suggest that the many lawyers across Canada holding similar religious views to those addressed in the Covenant are unworthy to practice law or unable to uphold their professional obligations. We have long ago moved away from prejudging behaviours based on personal beliefs²⁰. While the opponents of TWU's Proposal clearly do not share its religious beliefs, neither those beliefs nor their manifestation in the Covenant are a basis upon which TWU's application should be delayed or denied. As found by the Supreme Court of Canada, they are not a basis upon which the Federation should anticipate that graduates will fail to meet their professional and ethical obligations.

(b) TWU Graduates will require "Additional Study"

In a related argument, a number of opponents say that TWU should not have a School of Law as its students should "undertake additional study ... similar to the process for foreign trained lawyers"²¹ or that TWU graduates should not "become licensed to practice law without

16 Oath to practice law in Ontario as a barrister and solicitor (Bylaw 4(21):

<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147485805>

17 Barristers' and Solicitors' Oath: <http://www.lawsociety.bc.ca/docs/publications/mm/oath.pdf>

18 *TWU v. BCCT*, para. 33.

19 *TWU v. BCCT*, para. 36

20 See *Martin v. Law Society of British Columbia*, [1950] 3 D.L.R. 173 where admission to practice law was denied as the applicant was a communist. See also *Smith & Rhuland v. The Queen*, [1953] 2 S.C.R. 95 in which the court overturned an administrative decision which denied certifying a union because its secretary-treasurer was communist.

21 West Coast LEAF letter, February 5, 2013.

further study and entrance requirements”²². This is presumably because such opponents believe that the Covenant will “impair the development of critical thought and legal analytical skill”²³ or the TWU students will not “remain independent and appropriately value-oriented”²⁴.

We have already noted how deeply offensive this reasoning is to lawyers and law students holding religious beliefs similar to those embodied in the Covenant. It suggests that persons holding such beliefs, or wishing to be educated in an environment that respects and encourages them, require some form of contrary educational experience in order that they be competent to practice law.

There is a serious logical flaw in the argument. It is clear from the submissions sent to the Federation that existing law schools have: (1) students currently enrolled who hold religious beliefs similar to those on which TWU is founded; and (2) have produced lawyers who also hold such views. The current law schools have apparently not undermined these students’ and lawyers’ religious beliefs; and neither should they try to do so. Lawyers are not required to all believe the same way concerning issues of sexual morality. It is only required that their conduct be ethical and professional.

Again, we note that this same point was argued in *TWU v. BCCT*. The College of Teachers said that TWU education students should be required to “complete their fifth year of professional teacher education through an approved program at a public university”²⁵. The Supreme Court of Canada rejected this reasoning:

There is no denying that the decision of the BCCT 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. If TWU does not abandon its Community Standards, it renounces certification and full control of a teacher education program permitting access to the public school system. *Students are likewise affected because the affirmation of their religious beliefs and attendance at TWU will not lead to certification as public school teachers unless they attend a public university for at least one year.*²⁶

[Emphasis added]

These arguments evidence a presumption about TWU students (and in fact all those holding similar religious beliefs) and stereotypes them as intolerant. As stated by a number of Christian law students across the country in their submission to the Federation: “If commitment to Biblical principles results in the denial of a private institution as capable of

²² National Association of Women and the Law letter, March 8, 2013.

²³ Letter from UBC law students, March 14, 2013.

²⁴ Letters from students at a number of law schools. See for example, letter from UVic law students dated March 12, 2013.

²⁵ B.C. College of Teachers Factum in *TWU v. BCCT*, para. 118.

²⁶ *TWU v. BCCT*, para. 32.

teaching law, this implicates our competence as future lawyers also. ... [A]dhering to religious beliefs does not equate to future discriminatory conduct”.²⁷ The Supreme Court of Canada agrees with these Christian students:

The evidence in this case is speculative, involving consideration of the potential future beliefs and conduct of graduates from a teacher education program taught exclusively at TWU.²⁸

...

TWU’s Community Standards, which are limited to prescribing conduct of members while at TWU, are not sufficient to support the conclusion that the BCCT should anticipate intolerant behaviour in the public schools.²⁹

...

In addition, there is nothing in the TWU Community Standards that indicates that graduates of TWU will not treat homosexuals fairly and respectfully. Indeed, the evidence to date is that graduates from the joint TWU-SFU teacher education program have become competent public school teachers, and there is no evidence before this Court of discriminatory conduct by any graduate. ... 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.³⁰

...

Absent 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.³¹

The Supreme Court of Canada equated this type of argument with a failure to accommodate religious belief and a denial of full participation in Canada. This should be conclusive in your deliberations as well.

(c) *TWU v. BCCT is Binding Law*

The opponents of TWU argue that *TWU v. BCCT* is not determinative. This argument takes a number of forms.

Some TWU opponents suggest that acknowledging TWU’s freedom of religion and association rights to maintain the Covenant would involve a “race to the bottom”³² since not all human rights legislation across the country contain the same provisions.

Similarly, others argue that the Supreme Court of Canada’s analysis related to TWU’s right to equal treatment is “limited to BC law” and is simply a finding that TWU is in “compliance with B.C. legislation”³³. It has been argued that human rights provisions recognizing religious associational rights are not applicable (despite the Supreme Court of Canada’s

²⁷ Letter from “Christian law students across Canada” dated March 10, 2013.

²⁸ *TWU v. BCCT*, para. 19

²⁹ *TWU v. BCCT*, para. 33

³⁰ *TWU v. BCCT*, para. 35

³¹ *TWU v. BCCT*, para. 36

³² Letter from Ruby Shiller Chan Hassan dated February 28, 2013

³³ For example, see SOGIC letter, dated March 18, 2013, pages 2 and 4.

ruling in *TWU v. BCCT*) and that refusing TWU's application because of the Covenant would not violate freedom of religion or freedom of association. In particular, SOGIC draws on American jurisprudence, where there is no constitutional equality guarantee such as s.15 of the *Charter*, to argue that it is acceptable to allow TWU to exist, but also deny it approval of its programs. This is a surprisingly impoverished view of Canadian equality rights.

As already noted, many of the arguments advanced by the opponents of TWU's Proposal were also made by the B.C. College of Teachers and expressly rejected by the Supreme Court of Canada. It should be clear that the decision in *TWU v. BCCT* was a recognition and balancing of TWU's constitutional rights and not, as suggested by others, a narrow and reluctant decision to allow TWU to exist within British Columbia. We will address a number of the specific legal arguments made by opponents in their attempt to distinguish *TWU v. BCCT*.

(i) *Section 41 of the B.C. Human Rights Code (and similar provisions)*

In *TWU v. BCCT*, the Court made reference to section 41 of the *Human Rights Code* in acknowledging that the B.C. legislature recognized the right of TWU to be a religious institution³⁴. These were passing references, but the Court's analysis was much broader, based on preserving human rights and *Charter* values in acknowledging TWU's right to a teacher education program. This is conveniently summarized by the following quotes:

Consideration of human rights values in these circumstances encompasses consideration of the place of private institutions in our society and the reconciling of competing rights and values. Freedom of religion, conscience and association coexist with the right to be free of discrimination based on sexual orientation...

...It cannot be reasonably concluded that private institutions are protected but that their graduates are de facto considered unworthy of fully participating in public activities. In *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at p. 554, McIntyre J. observed that a "natural corollary to the recognition of a right must be the social acceptance of a general duty to respect and to act within reason to protect it". ... 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.³⁵

This is consistent with the broad interpretation that courts have afforded provisions such as section 41. They are treated as rights-granting provisions deserving of an expansive interpretation, and not as narrow exemptions. In *Caldwell v. Stuart*³⁶, the Supreme Court of Canada wrote that the predecessor of section 41 "confers and protects rights" and "permits the promotion of religion"³⁷. In *Brossard (Town) v. Quebec (Commission des droits de la*

34 *TWU v. BCCT*, paras.32 and 35.

35 *TWU v. BCCT*, paras. 34-35

36 [1984] 2 S.C.R. 603

37 At 626 (S.C.R.)

personne)³⁸ Beetz J. held that a similar provision promotes “the fundamental rights of individuals to freely associate in groups for the purpose of expressing particular views or engaging in particular pursuits”³⁹. Provisions such as s.41 protect freedom of religion and freedom of association, but also serve an important equality seeking purpose, recognizing that true equality sometimes allows, or even necessitates, treating different people differently in ways that recognize their actual needs.⁴⁰

This approach is consistent with how courts and tribunals protect religious beliefs in the context of all human rights legislation in Canada, not just in B.C..⁴¹ It is trite to point out that all such legislation must be interpreted and applied in a manner consistent with *Charter* rights and freedoms, including the freedom of religion, freedom of association and equality rights of TWU and the members of its community. It is nonsensical to suggest that TWU is permitted to exist as a religious educational community only in British Columbia or possibly a few other jurisdictions within Canada. The *Charter* applies to protect TWU and the members of its community across the country.

We would also note that SOGIC has been under inclusive in listing protections granted to religious groups such as TWU in human rights legislation. For example, no reference is made to sections 4 and 6 of the *Saskatchewan Human Rights Code*, which state:

Right to freedom of conscience

4 Every person and every class of persons shall enjoy the right to freedom of conscience, opinion and belief and freedom of religious association, teaching, practice and worship.

Right to free association

6 Every person and every class of persons shall enjoy the right to peaceable assembly with others and to form with others associations of any character under the law.

SOGIC also argues that s.41 and similar provisions do not protect TWU as, they say, TWU does not promote the interests of individuals as members of an identifiable group nor “exclude individuals who do not share its religious beliefs”⁴². This misinterprets and misapplies the *Human Rights Code*. Specifically, it ignores the decision in *Vancouver Rape Relief Society v. Nixon*⁴³ where the Court of Appeal held that an organization is **not** required

38 [1988] 2 S.C.R. 279

39 At 324 (S.C.R.). See also *St. James Community Service Society v. Johnson*, 2004 B.C.S.C. 1807 and *Sahota and Shergill v. Shri Guru Ravidass Sabha Temple*, 2008 B.C.H.R.T. 269

40 *Gillis v. United Nations Native Society*, [2005] BCHRT 301 at para. 21, *Sahota, supra.* at para. 37

41 See, for example, *Ontario (Human Rights Commission) v. Brockie*, 43 C.H.R.R. D/90 (Ont. Div. Ct.); *Smith v. Knights of Columbus*, 2005 BCHRT 544; *Garrod v. Rhema Christian School* (1992), 15 C.H.R.R. D/477 (Ont. Bd. Inq.); *Kearley v. Pentecostal Assemblies Board of Education*, [1993] N.H.R.B.I.D. no. 1 (Nfld. Bd. Inq.); *Schroen v. Steinbach Bible College* (1999), 35 C.H.R.R. D/1 (Man. Bd. Inq.)

42 SOGIC letter, March 18, 2013, page 5.

43 2005 B.C.C.A. 601 (leave application denied, February 1, 2007, S.C.C. No.31633)

to demonstrate that it exclusively provides services to a group enumerated under s. 41 in order to be protected by that section⁴⁴.

(ii) *Civil Marriage Act*

While it is without question that there have been some important societal changes since *TWU v. BCCT* was decided, these changes have not undermined the constitutional protection afforded TWU and the members of its community. In this regard, the preamble and section 3.1 of the *Civil Marriage Act*⁴⁵ are worth noting:

WHEREAS nothing in this Act affects the guarantee of freedom of conscience and religion and, in particular, the freedom of members of religious groups to hold and declare their religious beliefs and the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs;

WHEREAS it is not against the public interest to hold and publicly express diverse views on marriage;

...

- 3.1 For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the Canadian Charter of Rights and Freedoms or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom.

This language again shows that the recognition of same-sex marriage was not intended to undermine freedom of religion or freedom of association by those holding religious beliefs that marriage is “the union of a man and woman to the exclusion of all others”. The portion of the Covenant to which TWU’s opponents object indicates nothing beyond such religious beliefs.

(iii) *Hindering Freedom of Religion, Freedom of Association and Equality Rights*

Opponents have argued that denying approval of TWU’s School of Law Proposal because of the Covenant will not impair the constitutional rights of TWU and the individuals comprising its community⁴⁶. They promote a penurious view of these *Charter* rights.

Citing *Saskatchewan (Human Rights Commission) v. Whatcott*⁴⁷, SOGIC argues that denying TWU’s application for a School of Law would not infringe s.2(a) of the *Charter* as it would not threaten religious belief or conduct. This ignores the fact that the Supreme Court of

⁴⁴ *Nixon, supra.*, para. 58.

⁴⁵ <http://laws-lois.justice.gc.ca/eng/acts/C-31.5/page-1.html>

⁴⁶ SOGIC letter, March 18, 2013, pages 5-6

⁴⁷ 2013 SCC 11

Canada in *Whatcott* also relied on the oft-cited words of Dickson J. in *R. v. Big M Drug Mart*⁴⁸ that the “essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and **without fear of hindrance** or reprisal...”⁴⁹ (emphasis added).

In *Alberta v. Hutterian Brethren of Wilson Colony*⁵⁰, it was accepted that Alberta’s mandatory photo requirement for driver’s licensing breached the s.2(a) rights of the Hutterian Brethren because of their religious objection to having their photos taken. Applying the logic of TWU’s opponents, there would have been no breach of freedom of religion since the Hutterian Brethren would be able to maintain their beliefs without having driver’s licenses. The courts disagree, as removing or denying a benefit as a result of religious belief imposes a burden on, and hinders, religious belief and practice. This is precisely how the Supreme Court of Canada analyzed the matter in *TWU v. BCCT*:

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.⁵¹

SOGIC draws on American jurisprudence to suggest that only the **existence** of TWU as a religious community ought to be tolerated, but that its programs need not receive “official imprimatur” or be granted “equal access”⁵². In *TWU v. BCCT*, the College of Teachers made the same argument, relying on similar cases (including *Bob Jones University*), that it was right to withhold the imprimatur that approval of TWU’s program would bring.⁵³ These arguments were clearly rejected by the Supreme Court of Canada.

Further, and surprisingly, SOGIC fails to recognize the importance of the equality right in the Canadian context. Section 15 of the *Charter* prohibits the imposition of burdens or withholding of benefits on account of personal characteristics, including based on religion. The leading definition of discrimination is still as articulated by McIntyre J. in *Andrews v. Law Society of British Columbia*⁵⁴:

... discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which **has the effect of imposing burdens, obligations, or disadvantages** on such individual or group not imposed upon others, **or which withholds or limits access to opportunities, benefits, and advantages** available to other members of society.

48 [1985] 1 S.C.R. 295

49 At p.336

50 [2009] SCC 37

51 *TWU v. BCCT*, para. 35

52 SOGIC letter, March 18, 2013, page 7.

53 B.C. College of Teachers Factum in *TWU v. BCCT*, paras. 57, 79, 111, 116

54 [1989] 1 S.C.R. 143

Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.⁵⁵ [Emphasis added]

The denial of approval of TWU's School of Law application because of the Covenant would unquestionably deny access to an opportunity or benefit available to students at public institutions based on the religious beliefs of the TWU community. As evidenced by many of submissions received by the Federation, opponents of TWU's proposal presume that Christians at TWU have "hostility to gay and lesbian people"⁵⁶ and hide "homophobia in Christian values"⁵⁷. There is absolutely no evidence for these statements about TWU or the members of its community. These opponents are guilty of the same type of prejudice and stereotyping about which they say the Federation should be concerned.

All of the opponents of TWU's proposal focus solely on the Covenant. This is, in fact, a focus by them on TWU's sectarian nature⁵⁸. The Federation's creation of the Special Advisory Committee continues this disturbing focus and we strongly encourage both the Special Advisory Committee and the Federation to carefully consider the following words of the majority in *TWU v. BCCT*:

We would add that *the continuing focus of the BCCT on the sectarian nature of TWU is disturbing*. It should be clear that the focus on the sectarian nature of TWU is the same as the original focus on the alleged discriminatory practices. It is not open to the BCCT to consider the sectarian nature of TWU in determining whether its graduates will provide an appropriate learning environment for public school students as long as there is no evidence that the particularities of TWU pose a real risk to the public educational system.⁵⁹ [Emphasis added]

If there are pedagogical or other problems with the education to be provided at TWU's proposed School of Law, they will presumably be detected by the Approval Committee, the Ministry of Advanced Education, or both. As a matter of constitutional and human rights, it is not open for the Federation to focus solely on the sectarian nature of TWU, as communicated by the Covenant, to undermine the normal approval processes. The Federation and its law society members are not permitted to express moral disapprobation of the Christian beliefs on which TWU is founded. Again, we urge that the Special Advisory Committee advise the Federation to discontinue any further consideration of the Covenant and TWU's religious nature as separate from the Approval Committee.

⁵⁵ At pp.174-175. This definition recently reiterated by the S.C.C. in *Withler v. Canada*, [2011] 1 S.C.R. 396 at para. 29 and *Hutterian Brethren*, *supra*. at para. 108

⁵⁶ Letter from Ruby Shiller Chan Hassan dated February 28, 2013

⁵⁷ Letter from UBC law students, dated March 14, 2013

⁵⁸ Which is derided by the lawyers at Ruby Shiller Chan Hassan as a "fundamentalist and narrow interpretation of Christianity"

⁵⁹ *TWU v. BCCT*, para. 42

(d) Diversity in the Legal Profession and Academic Freedom

Some opponents suggest that approval of TWU's program will "diminish diversity in the legal profession"⁶⁰. It is peculiar, to say the least, that these advocates seek to silence a perspective different from their own within the Canadian legal community in name of diversity. While they express a concern that TWU's School of Law will have a "limited tolerance of diversity", their opposition exhibits exactly that trait.

There is nothing inimical to Canadian society contained in the Covenant. Its contents are to be expected in the context of an evangelical Christian university. As noted by a number of others, including uOttawa OUTLaw, the Covenant promotes positive values, expecting community members to "treat all persons with respect" and "cultivate Christian virtues such as love, joy, peace, patience, kindness, goodness, faithfulness, gentleness, self-control, compassion, humility, forgiveness, peacemaking, mercy and justice". As we are sure you will agree, the legal profession encourages lawyers to be inculcated in these values. All opponents focus on only one aspect of the Covenant, ignoring the balance of its contents, which are not only unobjectionable but universally laudable.

As stated by Dickson J. in *Big M Drug Mart*, "a truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct"⁶¹. As then noted in *TWU v. BCCT*, "the diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected"⁶². The TWU School of Law would enhance, not undermine, diversity in legal education in Canada.

TWU's proposed School of Law should be assessed on its merits, based on the national requirement. As the only privately funded law school in Canada, it may provide a slightly different perspective, but this should be welcomed. As the Supreme Court of Canada suggested, Canada is enriched by having a diversity of institutions. There is no principled reason that secular, public institutions should have a monopoly on legal education in Canada⁶³.

A few opponents have questioned academic freedom at TWU. While we expect that this issue is outside of what will be considered by the Special Advisory Committee, we would note for your benefit that TWU maintains a strong policy on academic freedom that was

60 Letter from UBC law students, dated March 14, 2013

61 At p.336.

62 *TWU v. BCCT*, para. 33.

63 Law students from UBC have written in their letter of March 19, 2013 that, in their experience, their religious beliefs are "often openly derided" in the context of the explicitly secular emphasis at that institution. Not all secular law schools should be judged by this experience, but it does provide context for the opposition made by students at a number of law schools in Canada.

affirmed by British Columbia's Degree Quality Assessment Board in 2004. TWU is a member of the Association of Universities and Colleges of Canada and fully complies with its Statement on Academic Freedom and Institutional Autonomy. TWU has a long history of excellence in research and scholarship. During its almost thirty year history as a university there has not been a single allegation of a lack of academic freedom related to research despite a broad range of scholarship. There will be a full range of academic inquiry and debate within TWU's School of Law.

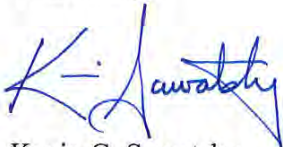
Conclusion

The arguments of opponents to TWU's proposed School of Law relate to the Covenant and TWU's religious character. As set out above, most of these arguments have already had a thorough hearing before, and been rejected by, the Supreme Court of Canada. One opponent, *Egale Canada*, raised some of the exactly same arguments as an intervenor in *TWU v. BCCT* as it now references in its letter to the Federation. The Supreme Court of Canada decision in that case should be considered determinative for the reasons set out above.

There is no "specific evidence" that TWU graduates will fail to uphold the basic values of non-discrimination⁶⁴. This does not leave a legitimate role for the Special Advisory Committee. We submit that the appropriate course is for the Special Advisory Committee to advise the Federation and its members that there are no relevant additional considerations to be taken into account in determining whether graduates of a TWU School of Law should be eligible to enroll in the admissions program of any Canadian law society.

We believe that we have answered the important points raised by TWU's opponents. If there are other issues on which you would like to receive TWU's position or views, or if there are additional documents that you would like to review that we may be able to provide, please do not hesitate to contact the writer.

Yours truly,



Kevin G. Sawatsky
Vice-Provost (Business) and University Legal Counsel

cc: Gerald R. Tremblay, President
Kuhn LLP

⁶⁴ *TWU v. BCCT* at para.38 . See also paras. 12-13.



MEMORANDUM

PRIVILEGED AND CONFIDENTIAL

To Gérald R. Tremblay, C.M., O.Q., Q.C., **Date** March 21, 2013
 Ad. E.
 President
 Federation of Law Societies of Canada

 Jonathan G. Herman
 Chief Executive Officer
 Federation of Law Societies of Canada

From John B. Laskin

Re Trinity Western University School of Law Proposal –
 Applicability of Supreme Court decision in *Trinity Western University v. British
 Columbia College of Teachers*

Overview

You have asked for my advice on the extent to which the decision of the Supreme Court of Canada in *Trinity Western University v. British Columbia College of Teachers*,¹ rendered in 2001, applies to consideration of the Trinity Western University School of Law proposal, which TWU has submitted to the Canadian Common Law Program Approval Committee.

Before setting out my advice on this question I will first review in some detail the Supreme **Court's decision**. Next, I will discuss the stage of the approval process at which the *BCCT* case could come into play. I will then proceed to my conclusion: that if approval of the TWU proposal were refused on the basis of concerns about its discriminatory practices, and that decision were challenged, the *BCCT* decision would govern the result. As discussed below, I base that conclusion on the parallels between the circumstances in *BCCT* and those posited here, the currency of the approach taken in *BCCT* to the balancing the *Charter* values of equality and religious freedom, and the likelihood of an absence of evidence of the type of harm that would justify upholding the decision. I conclude by considering a number of the arguments that have been put forward in support of the view that *BCCT* would not apply.

The Supreme Court decision in *BCCT**Factual background*

The *BCCT* case arose from an application by TWU to the College of Teachers for approval of its program of teacher education for the purpose of certifying its graduates as eligible to teach in the province's public schools. The *BCCT* was authorized by statute to carry out this approval

¹ 2001 SCC 31 ("*BCCT*" or "the *BCCT* case")

function. Its statutory objects included “to establish, having regard to the public interest, standards for the education, professional responsibility and competence of its members, persons who hold certificates of qualification and applicants for membership.” Its policies for approval of teacher education programs for certification purposes set three criteria for approval: context (including depth and breadth of personnel, research and other scholarly activity), selection (including an admission policy that recognized the importance of academic standing, interest in working with young people and suitability for entrance into the teaching profession) and content of the program.

Though there was no evidence that the TWU program would not meet these criteria, the BCCT **rejected the request for approval. It did so on the basis that TWU’s proposed program followed discriminatory practices, which were contrary to the public interest and public policy.** The focus of the BCCT’s concern was the requirement for students at TWU to sign a “Community Standards” document. This document included an agreement to “refrain from practices that are biblically condemned.” Among the practices specified were “sexual sins including premarital sex, adultery, homosexual behaviour, and viewing of pornography.” Faculty and staff were to sign a similar document. The requirement, in the view of the BCCT, had the effect of excluding persons from TWU on the basis of their sexual orientation.

TWU sought judicial review of the BCCT’s decision. It challenged the BCCT’s jurisdiction to consider the TWU practices that it regarded as discriminatory, and asserted that even if the BCCT had jurisdiction, there was no evidence of discriminatory consequences resulting from these practices.

Jurisdiction to consider alleged discriminatory practices

The Supreme Court first **held that it was within the jurisdiction of the BCCT to consider TWU’s discriminatory practices.** Since teachers were a medium for the transmission of values, it was important that future teachers understand the diversity of Canadian society. In determining suitability for entrance into the teaching profession, the BCCT was therefore entitled to take into account “all features of the education program at TWU,” and it would not be correct “to limit the scope of [the BCCT’s statutory objects] to a determination of skills and knowledge.” The BCCT’s public interest jurisdiction made it appropriate for it to consider concerns about equality. Though it was not directly applying either the *Charter* or human rights legislation, it was entitled to consider them in determining whether it would be in the public interest to allow public school teachers to be trained at TWU.²

The Court determined, based on the prevailing standard of review jurisprudence and **consideration of the nature of the BCCT’s expertise, that the BCCT’s decision should be reviewed on the standard of correctness.**³ It went on to consider two questions: first, whether the **requirement of adherence to the “Community Standards” document,** and the program and practices of TWU, showed that TWU was engaging in discriminatory practices; and second, whether, if so, these discriminatory practices established a risk of discrimination sufficient to conclude that TWU graduates should not be admitted to teach in the public schools.

² *Id.* at paras. 13, 26-27

³ *Id.* at paras. 15-19

Existence of discriminatory practices

In considering the first question, the Court found that a homosexual student would not be likely **to apply to TWU. It observed, however, that TWU was “not for everybody”** – rather, it was designed to address the needs of people who share certain religious convictions. Its admissions policy, the Court found, was not sufficient to establish discrimination within the meaning of the *Charter*. **It went on: “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** [of the *Charter*] would be inconsistent with freedom of conscience and religion, which co-exist [sic] with the right to equality.”⁴ While the BCCT was entitled to consider concerns about equality, it was also required to consider issues of religious freedom.

The Court noted in this connection that **British Columbia’s human rights legislation** accommodates religious freedom by providing that a religious institution does not breach the legislation when it prefers adherents of its religion, and that the B.C. legislature must not have considered that university education with a Christian philosophy was contrary to the public interest, since it had passed legislation in favour of TWU.⁵ It also referred to the contribution made by religious institutions to the diversity of Canadian society, and the tradition in Canada of religion-based institutions of higher learning.⁶ While homosexuals might be discouraged from attending TWU, that would not prevent them from becoming teachers. On the other hand, the Court stated, the freedom of religion of students at TWU would not be accommodated if they were denied that opportunity.⁷

Sufficient risk of discrimination

The central issue in the case, therefore, was how to reconcile the religious freedom of individuals wishing to attend TWU with the equality concerns of public school students, their parents, and society generally. The Court held that the potential conflict between the two sets of rights and values should be resolved through their proper delineation.⁸

The proper place to draw the line, the Court held, was between belief and conduct. It followed that **“[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.”⁹ There was no evidence that graduates of TWU would not treat homosexuals fairly and respectfully, and no evidence of discriminatory conduct by any graduate of the teaching program that TWU had been offering jointly with Simon Fraser University. Absent evidence that training teachers at TWU would “pose a real risk to the public educational system,” the BCCT had been wrong to refuse approval. “In considering the religious precepts of TWU instead of the actual impact of those beliefs on the school environment, the BCCT acted on the basis of **irrelevant considerations.”¹⁰ If there were evidence that particular teachers in the public school system actually engaged in discriminatory conduct, discipline proceedings before****

⁴ *Id.* at para. 25

⁵ *Id.* at paras. 28, 35

⁶ *Id.* at paras. 33-34

⁷ *Id.* at para. 35

⁸ *Id.* at para. 28

⁹ *Id.* at para. 36

¹⁰ *Id.* at paras. 35, 42-43

the BCCT could be taken.¹¹ But there was no basis in the evidence for concluding that graduates of TWU would engage in conduct of this kind.

Stage of the approval process at which *BCCT* could apply

It is not likely in my view that the *BCCT* decision would be applicable to a decision made by the Approval Committee within the scope of its current mandate. On my understanding of the current mandate of the Approval Committee, it is limited to considering the dimension of the public interest reflected in the national requirement. It may therefore consider the practices of **TWU that are alleged to be discriminatory only to the extent of considering whether TWU's** mission and perspective would constrain in any respect the teaching of the competencies set out in the national requirement. If the Approval Committee were to conclude that the teaching of the required competencies would be constrained so as to render the TWU School of Law unable to meet the national requirement, that decision would likely not engage the concerns about *Charter* values that underlay the decision in *BCCT*. It would be based not on generalized concerns about discriminatory practices grounded in religious beliefs, but on the conclusion that the TWU program would fail to teach a set of competencies that are required irrespective of religion.¹²

The *BCCT* decision could however come into play if the mandate of the Approval Committee were expanded to include other dimensions of the public interest, and it then decided to refuse approval of the TWU program based on concerns about discriminatory practices. It could also come into play if, despite the conclusion of the Approval Committee that the TWU program should be approved, one or more of the law societies decided, based on concerns about discriminatory practices and its view of the public interest, to refuse to accept completion of the TWU program as meeting the academic requirements for admission to the profession. Like the BCCT, law societies have been given a public interest mandate.

A variety of threshold issues could arise depending on precisely how and when in the approval process a challenge based on the *BCCT* decision was brought. These include issues of appropriate procedure and the manner in which *Charter* values may be invoked in relation to a decision of a committee of the Federation. I would be pleased to consider these matters further if you would like me to do so. In this discussion, I will focus on the substantive question whether, if a decision to refuse approval of **TWU's program were made based on the practices** that are alleged to be discriminatory, *BCCT* would govern the result.

Applicability of *BCCT*

In my view the answer to that question is that it would. I come to this view for three main reasons.

First, if **a decision to refuse approval of TWU's program were made based on the practices that** are alleged to be discriminatory, there would be a great many parallels between the circumstances that would then prevail and those in *BCCT*. These parallels would include the following.

¹¹ *Id.* at para. 37

¹² In making this point I do not intend to suggest that the Approval Committee would or should come to this conclusion.

- As in *BCCT*, the decision under review would be a decision whether completion of a program offered by TWU would meet the academic requirements for entry into a profession.
- As in *BCCT*, the decision would have been made by a body having a mandate to act in the public interest.
- As in *BCCT*, the concerns on which the decision was based would focus on the requirement that students at TWU sign a document in which they agree to abstain from, among other things, homosexual sexual activity while attending TWU. (The current document, entitled “**Community Covenant Agreement**,” is cast in somewhat less pointed terms than the document considered in *BCCT*. It no longer speaks of homosexual behavior as a “sexual sin” that is “biblically condemned.” Instead it calls on members of the TWU community, “[i]n keeping with biblical and TWU ideals,” to voluntarily abstain from, among other things, “sexual intimacy that violates the sacredness of marriage between a man and a woman.”)
- As in *BCCT*, TWU remains a private, faith-based university, founded by the Evangelical Free Churches of Canada and America, established as a university by British Columbia statute, and exempted, in part, from the B.C. *Human Rights Code*.

Second, the Supreme Court of Canada continues to apply the balancing approach that it took in *BCCT* where more than one set of *Charter* rights or values – in that case the values associated with equality and freedom of religion – are engaged.

The Supreme Court has consistently rejected a hierarchical approach to rights and values, which places some over others.¹³ It did so yet again in its very recent decision in *Saskatchewan (Human Rights Commission) v. Whatcott*.¹⁴ In that case the Court engaged in a balancing of the same two sets of values (along with freedom of expression) that it considered in *BCCT*, in a manner very analogous to that in *BCCT*. In so doing it reiterated the statement the Court first made in *Big M Drug Mart*, the seminal *Charter* freedom of religion case, that the right to manifest religious belief by teaching is part of “[t]he essence of the concept of freedom of religion.”¹⁵

In *Whatcott*, the Court addressed the constitutional validity of the prohibition of hate speech in Saskatchewan human rights legislation. It was alleged that certain flyers distributed by Whatcott infringed the prohibition by promoting hatred on the basis of sexual orientation; Whatcott maintained that the flyers constituted the exercise of his freedom of expression and freedom of religion. The Court saw the case as requiring it

to balance the fundamental values underlying freedom of expression (and, later, freedom of religion) in the context in which they are invoked, with competing *Charter* rights and other values essential to a free and democratic society, in this case, a commitment to equality and respect for group identity and the inherent dignity owed to all human beings.¹⁶

¹³ *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 877

¹⁴ 2013 SCC 11

¹⁵ *Id.* at para. 159

¹⁶ *Id.* at para. 66

In striking this balance, which resulted in its severing certain portions of the prohibition but upholding the remainder, and finding the conclusion that there was a contravention of the legislation unreasonable for two of the four flyers in issue and reasonable for the other two, the **Court stated that** “the protection provided under s. 2(a) [the freedom of religion guarantee] should extend broadly,” **and that** “[w]hen reconciling *Charter* rights and values, freedom of religion and the right to equality accorded all residents of Saskatchewan must co-exist.”¹⁷ It also **referred to the** “mistaken propensity to focus on the nature of the ideas expressed, rather than on the likely effects of the expression.”

Just as in *BCCT*, the Supreme Court in *Whatcott* found the proper balance point between equality and freedom of religion values to be the point at which conduct linked to the exercise of freedom of religion resulted in actual harm. Absent evidence of actual harm, it held in both cases, freedom of religion values must be given effect.

This leads to the third reason for concluding that *BCCT* would govern the result in the circumstances posited here: the likely absence of evidence of actual harm. I recognize of course that lawyers in Canada are subject to ethical duties to treat others with respect and avoid discrimination.¹⁸ But in *BCCT*, the Supreme Court was acutely sensitive to the role of teachers as **a “medium for the transmission of values.” The Court considered it “obvious that the pluralistic nature of society and the extent of diversity in Canada are important elements that must be understood by future teachers.”**¹⁹ The Court nonetheless had no difficulty concluding that **graduates of TWU would “treat homosexuals fairly and respectfully.”**²⁰

If the TWU teachers program could be relied upon to equip its graduates to be respectful of diversity, there appears to be no reason to conclude that its law program cannot do the same. It seems very unlikely that evidence could be mounted that lawyers educated at TWU would actually engage in harmful conduct. Just as the Court observed in *BCCT*, disciplinary processes would be available to deal with individual cases of discriminatory behaviour, whether by TWU or by graduates of other common law programs.

Arguments against the applicability of *BCCT*

Though I conclude for the three reasons just set out that the *BCCT* decision would be dispositive **of a challenge to a decision refusing to approve the TWU school of law program based on TWU’s alleged discriminatory practices**, I will nonetheless consider further the arguments that have been made to the contrary. A number of these arguments are set out in a paper by Professor Elaine Craig entitled **“The Case for the Federation of Law Societies Rejecting Trinity Western University’s Proposed Law Degree Program.”**²¹ In her paper Professor Craig argues that the legal

¹⁷ *Id.* at paras. 154, 161

¹⁸ See, for example, rule 5.04 (1) of the Law Society of Upper Canada *Rules of Professional Conduct*, which provides that

[a] lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences (as defined in the Ontario *Human Rights Code*), marital status, family status, or disability with respect to professional employment of other lawyers, articulated students, or any other person or in professional dealings with other licensees or any other person.

¹⁹ Note 1 above at para. 13

²⁰ *Id.* at para. 35

²¹ *Canadian Journal of Women and the Law*, Vol. 25, No. 1, 2013

context has changed in two respects since *BCCT* was decided, and that the basis for refusing approval to the TWU school of law would be different from the basis on which the BCCT sought to refuse approval of TWU's teaching program. **She argues that the courts' treatment of a decision to refuse approval of the TWU school of law proposal would therefore be different from that reflected in the Supreme Court's decision in *BCCT*.**²²

The first change in legal context, according to Professor Craig, is the change in the standard of review that the courts would apply to the approval (or non-approval) decision.²³ As indicated **above, the Supreme Court applied the correctness standard in considering whether the BCCT's decision was justified.**

It is possible that Professor Craig is right in asserting that a court reviewing today a decision like that made by the BCCT would apply the reasonableness standard. In its 2012 decision in *Doré v. Barreau du Québec*,²⁴ the Supreme Court held that in reviewing discretionary decisions of administrative decision-makers that are required to consider *Charter* values, it is appropriate to apply the approach to standard of review generally applied in judicial review proceedings, under which the standard of review is ordinarily reasonableness rather than correctness where the decision-maker has specialized expertise and discretionary power.²⁵ **The Court stated that “if, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.”**²⁶ Even before *Doré*, the Court had held in a series of decisions that an administrative body interpreting and applying its home statute (as a law society might be regarded as having done in this case if it decided against approval) should normally be accorded deference, through application of the reasonableness standard, on judicial review.²⁷ In its very recent decision in *Whatcott*,²⁸ discussed above, the Supreme Court applied the reasonableness standard in reviewing a decision of a human rights tribunal rendered in a context in which equality values, as well as those associated with freedom of expression and freedom of religion, were engaged.

Despite *Doré* and its antecedents, there also remains in my view a realistic possibility that a reviewing court would apply the **correctness standard. The Supreme Court's standard of review** case law contemplates that the correctness standard will apply to the determination of at least some constitutional issues, including those in which competing constitutional provisions must be accommodated.²⁹ In *Doré* itself, the Supreme Court implicitly recognized that the correctness standard may be appropriate in this context when it referred to its decision in *BCCT* as an **example of the application of “an administrative law/judicial review analysis in assessing whether the decision-maker took sufficient account of *Charter* values.”**³⁰ Unlike *Doré* and *Whatcott*, this is not merely a case in which *Charter* values would have to be balanced with

²² *Id.* at 22-26

²³ *Id.* at 22

²⁴ 2012 SCC 12

²⁵ *Id.* at paras. 23, 52-56

²⁶ *Id.* at para. 58

²⁷ *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 at para. 26; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 39

²⁸ Note 16 above at para. 168

²⁹ *Dunsmuir v. New Brunswick*, note 28 above at paras. 58, 61

³⁰ Note 25 above at para 32

statutory objectives, but one in which competing *Charter* values must themselves be balanced.³¹ The Supreme Court has laid down a legal rule as to how that balance is to be struck.

Even if a reasonableness standard applied, it does not follow that the decision would be upheld on judicial review. The key factor in the decision in *BCCT* was that there was no evidence of any harm to the public education system arising from the training of teachers at TWU. A finding based on no evidence is not just incorrect; it is unreasonable.³² In *Whatcott*, the Supreme Court **set aside two of the human rights tribunal's four determinations on the basis that, having regard to the evidence, the tribunal could not reasonably have reached the result it did by applying the proper legal test.**³³ Absent evidence of actual harm, a decision in this case not to approve based on concerns about discriminatory practices would likely be regarded as unreasonable.

The second change in legal context, according to Professor Craig, is that social values have **evolved, and that “[t]oday's decision-makers are expected to be much more protective of gay and lesbian equality than were the decision-makers of ten, fifteen or twenty years ago.”**³⁴

Assuming that this is the case, it is doubtful, in my view, that this evolution of social values would lead to a different outcome today from that in *BCCT*. As discussed above, *BCCT* was not simply an equality case. The core **of the Supreme Court's decision in *BCCT*** was the appropriate balancing of two sets of *Charter* values, those associated with equality and with freedom of religion.³⁵

The values associated with freedom of religion are at least as deeply embedded today as they were in 2001. **I have already discussed the Supreme Court's very** recent decision in *Whatcott*, in which the Court spoke of the right to manifest religious belief by teaching, and stated that the protection of freedom of religion “should extend broadly.” The **Supreme Court's approach to the** balancing of values in *Whatcott* in 2013 appears little different from that in *BCCT* in 2001. It is in my view not correct to conclude that changes in social values since the *BCCT* case was decided would lead to a different outcome today.

As already mentioned, Professor Craig also relies, in arguing that the outcome of a challenge to a **decision to refuse approval of TWU's law program would be different from that in *BCCT***, on the proposition that the basis for refusing approval to the TWU school of law would be different **from the basis on which the *BCCT* sought to refuse approval of TWU's teaching program.**³⁶ She asserts that a decision not to approve the school of law could, and presumably would, be **justified on two grounds. The first is that “it is reasonable to conclude that principles of equality, non-discrimination, and the duty not to discriminate ... cannot competently be taught in a learning environment with discriminatory policies.” The second is that “it is reasonable to conclude that the skill of critical thinking about ethical issues cannot adequately be taught by an institution that violates academic freedom and requires that all teaching be done from the**

³¹ *Whatcott* did entail a balancing of constitutional values, but at the first stage of determining the constitutionality of the provision of the human rights legislation was in issue, not at the subsequent stage of reviewing the decision of the human rights tribunal and applying the statute as the Supreme Court had interpreted it. It was only at the second stage that the Court applied the reasonableness standard of review. At the first stage, the standard applied was correctness.

³² *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 at para. 44

³³ Note 16 above at para. 201

³⁴ Note 23 above at 25

³⁵ *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 877

³⁶ Note 23 above at 26

– 9 –

perspective that the Bible is the sole, ultimate, and authoritative source of truth for all ethical **decision making.**”

In my view, both of these asserted grounds for refusing approval would be highly questionable. As for the first, as also already mentioned the Supreme Court concluded that graduates of TWU would **“treat homosexuals fairly and respectfully.”**³⁷ It was implicit in its decision that their **education at TWU did not detract from their ability to comply with** “principles of equality, non-discrimination, and the duty **not to discriminate.**” **Professor Craig provides no evidence to** support the contention that the position would somehow be otherwise for law students.

As for the second, it proceeds from a view of academic freedom that is by no means universally shared.³⁸ Following its logic would lead to the conclusion that no individual lawyer who adheres to a set of religious principles could engage in critical thinking about ethical issues. This conclusion cannot be tenable. The second argument, like the first one, also fails to give any recognition to the positive value of religious diversity that the Supreme Court embraced in *BCCT*.

* * * * *

I hope that this memorandum provides the advice that you require on this aspect of the matter. Please let me know if you have any questions arising from it.

JBL/as

³⁷ At para. 35

³⁸ The TWU policies on academic freedom (available online at <http://www.twu.ca/academics/calendar/2012-2013/academic-information/academic-policies/>) include these statements:

Trinity Western University is committed to academic freedom in teaching and investigation from a stated perspective, i.e., within parameters consistent with the confessional basis of the constituency to which the University is responsible, but practiced in an environment of free inquiry and discussion and of encouragement to integrity in research. Students also have freedom to inquire, right of access to the broad spectrum of representative information in each discipline, and assurance of a reasonable attempt at a fair and balanced presentation and evaluation of all material by their instructors. Truth does not fear honest investigation.

Tab 3.1.3

**SUBMISSIONS TO
THE FEDERATION OF LAW SOCIETIES OF CANADA**



Council of Canadian Law Deans
Conseil des doyens et
des doyennes des facultés
de droit du Canada

57 Louis Pasteur
Ottawa ON K1N 5N5
www.cclc-cdfdc.ca

November 20, 2012

Mr. John J.L. Hunter, Q.C. and Mr. Gérald R. Tremblay, C.M., O.Q., Q.C.,
President
Federation of Canadian Law Societies
World Exchange Plaza
1810 - 45, rue O'Connor Street
Ottawa, Ontario
K1P 1A4

Dear Mr. Hunter and Mr. Tremblay,

Re: Trinity Western University School of Law Proposal

On behalf of the Canadian Council of Law Deans, I would like to thank you and your colleagues from the Federation for taking the time to meet with us at our meeting in Kingston on November 9, 2012. It was an excellent opportunity to discuss a number of matters of mutual interest to the CCLD and the Federation, including the accreditation process for the Canadian common law degree programs.

At our meeting, the CCLD expressed its concern with respect to the application by Trinity Western University (TWU) to establish a law school. It is our understanding that the Federation is currently considering this application. We thought it would be helpful to follow up with a formal letter to you outlining our concerns.

As you know, all TWU students are required to sign a "community covenant agreement" which forms part of the application process for all students attending TWU:

<http://twu.ca/studenthandbook/university-policies/community-covenant-agreement.html>

Among other things, the covenant requires abstinence "from sexual intimacy that violates the sacredness of marriage between a man and a woman." There are also "formal accountability procedures to address actions by community members that represent a disregard for this covenant." The TWU Student Handbook provides that if "a student, in the opinion of the University, is unable, refuses or fails to live up to their commitment, the University reserves the right to discipline, dismiss, or refuse a student's re-admission to the University."

The covenant specifically contemplates that gay, lesbian or bisexual students may be subject to disciplinary measures including expulsion. This is a matter of great concern for all the members of the CCLD. Discrimination on the basis of sexual orientation is unlawful in Canada and fundamentally at odds with the core values of all Canadian law schools.

We would urge the Federation to investigate whether TWU's covenant is inconsistent with federal or provincial law. We would also urge the Federation to consider this covenant and its intentionally discriminatory impact on gay, lesbian and bi-sexual students when evaluating TWU's application to establish an approved common law program.

Yours truly,



Bill Flanagan
President of the Canadian Council of Law Deans
Dean of Law

cc: Jonathan S. Raymond, Ph.D., Trinity Western University

Education. Transformation. **IMPACT.**



November 29, 2012

Canadian Common Law Program Approval Committee
Federation of Law Societies of Canada
World Exchange Plaza
45 O'Connor Street, Suite 1810
Ottawa, Ontario K1P 1A4

Re: CCLD concerns regarding the Trinity Western University School of Law Proposal

Dear Committee Members:

Dean William Flanagan, president of the Canadian Council of Law Deans, copied me on a letter dated November 20, 2012 addressed to Mr. J.L. Hunter, Q.C., and Mr. Gérald R. Tremblay, C.M., O.C., Q.C., of the Federation of Law Societies, expressing "concerns" with respect to the Trinity Western University School of Law Proposal. Dean Flanagan raised only one issue, namely whether TWU's "community covenant agreement" creates the possibility of "discrimination on the basis of sexual orientation [that] is unlawful in Canada ." He urged "the Federation to investigate whether the TWU Community Covenant is inconsistent with federal or provincial law".

As you likely know, TWU was successful in a key case before the Supreme Court of Canada in 2001 (*Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772) that addressed TWU's community standards requirement. In that case, the British Columbia College of Teachers ("BCCT") argued that education at TWU would not be "offered in an environment that reflects human rights values and that those values can be used as a guide in the assessment of the impact of discriminatory practices on pedagogy" (para. 11). The Court concluded that the BCCT failed to delineate and consider the rights in issue (see paras. 29 and following) and, in an extraordinary move, confirmed an order of mandamus requiring it to accredit TWU's Teacher Education program.

In the 8 to 1 decision in favour of TWU, the Supreme Court of Canada made a number of statements supporting TWU's right to maintain a religiously-based community covenant in the context of a professional program, including the following:

It is important to note that this is a private institution that is exempted, in part, from the British Columbia human rights legislation and to which the Charter does not apply. 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. (para. 25)

The diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected. (para. 33)

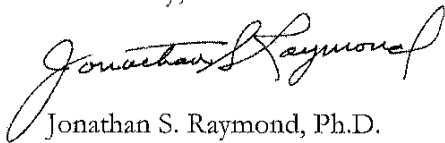
[A] religious institution is not considered to breach the [Human Rights Code] where it prefers adherents of its religious constituency. ... Students attending TWU are free to adopt personal rules of conduct based on their religious beliefs provided they do not interfere with the rights of others. Their freedom of religion is not accommodated if the consequence of its exercise is the denial of the right of full participation in society. (para. 35)

The Supreme Court of Canada has therefore already answered the question as to whether the Community Covenant “is inconsistent with federal or provincial law”. It is consistent with federal and provincial law.

I would note that since the date of that SCC decision, the response from the teaching and other employment sectors, such as nursing, has been overwhelmingly positive to TWU graduates who display both uncommon compassion and integrity in their values.

If this matter is of concern to you, please advise me. I and others at TWU would be pleased to meet with the Committee to discuss this or provide you with further information to the extent it may be required.

Yours truly,



Jonathan S. Raymond, Ph.D.

President and Professor | Acting Chancellor

www.egale.ca
185, rue Carlton Street
Toronto, ON
M5A 2K7
1-888-204-7777



January 25, 2013

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

Dear Mr. Tremblay:

I write on behalf of Egale Canada concerning the application of Trinity Western University ("Trinity Western") to the Federation of Law Societies of Canada ("Federation") for an assessment of whether its proposed law degree would meet the Federation's National Standards for Approving New Common Law Degree Programs. Egale Canada is a national lesbian, gay, bisexual, and trans (LGBT) human rights organization. For over twenty years, Egale Canada has intervened before numerous Canadian courts and tribunals—including the Supreme Court of Canada—to represent the issues of LGBT Canadians. Committed to respect for diversity in thoughts, opinions, and belief systems, Egale Canada continues to fight for substantive legal rights for Canada's LGBT community. I am sharing our perspective to assist your decision-making process.

In Egale Canada's view, it is a laudable state of affairs that rights and principles of equality which recognize the dignity and value of all individuals irrespective of their sexual orientation or gender identity are firmly grounded at all levels of Canadian law, including human-rights legislation in every jurisdiction and jurisprudence interpreting the *Canadian Charter of Rights and Freedoms*. This state of affairs is the result of hard-fought legal and social struggles. Those rights and principles, in concert with others such as freedom of expression and freedom of religion, now form part of the fabric of professional ethics and the rule of law which all members of the legal profession are required to advance. Trinity Western's application reaches you against this backdrop.

Egale Canada does not purport to have expertise in interpreting the Federation's jurisdiction or in the fine-grained assessment of a proposed law degree. Assuming, however, that you have jurisdiction to assess Trinity Western's proposed degree, we would urge you carefully to examine its admission criteria and practices, curriculum, hiring, and "Community Covenant Agreement" with a view to assuring yourself that they are compatible with the ethical and legal training appropriately required of those seeking entry to the legal profession. We recognize religious organizations' exemption from human-rights legislation for their private activities. In the light of the legal profession's public character and trust, as well as the practical and symbolic weight of the Federation's imprimatur, you should be alert to the possibility that internal practices ordinarily shielded from human-rights scrutiny may pose

Egale Canada is Canada's LGBT human rights organization: advancing equality, diversity, education, and justice.

Égale Canada est l'organisme national du Canada de défense des droits des personnes LGBT, voué à la promotion de l'égalité, de la diversité, de l'éducation et de la justice.

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difficulties for a publicly oriented accreditation bid. We would urge you to ensure that the original materials submitted by Trinity Western or supplemental ones demonstrate satisfactory responses to the concerns that you have received about its application.

Yours truly,

Helen Kennedy
Executive Director

Egale Canada is Canada's LGBT human rights organization: advancing equality, diversity, education, and justice.

Égale Canada est l'organisme national du Canada de défense des droits des personnes LGBT, voué à la promotion de l'égalité, de la diversité, de l'éducation et de la justice.

Page 2 of 2



BY EMAIL to jherman@flsc.ca and dwolfe@flsc.ca
Jonathan Herman, Chief Executive Officer
Deborah Wolfe, Director, Law School Programs
Federation of Law Societies of Canada
World Exchange Plaza
45 O'Connor Street Suite 1810
Ottawa ON K1P 1A4

Dear Mr. Herman and Ms. Wolfe:

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Re: Statement by the Canadian Council of Law Deans (the "CCLD") on the Application by Trinity Western University ("TWU") for Accreditation for a Proposed Law School

We read with concern statements reported in the media and attributed to the CCLD, apparently found in a letter dated November 24, 2012 addressed to you concerning the application by TWU for Accreditation for a Proposed Law School. We are concerned as well to have heard that certain law deans have made presentations to other legal professional groups, apparently in a concerted effort to have the TWU application denied without notice to or an invitation to TWU to respond.

Our concerns are fourfold. First, we entirely reject the notion that existing law schools ought to monopolize legal education in Canada so as to exclude religious or conscience-based universities. Second, we reject the premise of the CCLD's submission that persons who adhere to religious principles ought to be excluded from legal education. Third, we reject the suggestion by the CCLD that the Association of University and College Teachers' concerns over academic freedom in religious or conscience-based universities disqualify such universities from providing an accredited legal education. Fourth, we are concerned that the process of evaluation of TWU's application may be tainted were any of the CCLD or their nominees to participate in the process or decision.

The BCCLA is a non-profit society that was formed 50 years ago to educate people about and promote civil liberties, human rights and freedoms. We have long stood for the protection of freedom of expression, freedom of association, and freedom of religion and conscience. We have long stood for the protection of all persons from unlawful discrimination. We are pleased that those protections are enshrined in our Canadian Charter of Rights and Freedoms and human rights legislation.

British Columbia Civil Liberties Association
900 Helmcken Street 2nd floor
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Toll-free 866.731.7507



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Our work has involved us in many court proceedings. Those have included acting as co-plaintiff in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, to protect the rights of the GLBT community from discrimination by Canada Customs agents who sought to filter what materials could be imported to Canada. We intervened in *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, to support the principle of the public school system remaining secular and to ensure that respectful education of students concerning same-sex relationships was achieved. We intervened as well in *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, where the issue was whether TWU as a private, religious-based university, should be denied accreditation for its educational degree program. In each of these and the many other cases we have been involved with or spoken out about, we have maintained a consistent theme of protecting the rights and freedoms of Canadians and the pluralistic and diverse nature of Canada.

With regard to our first concern, we note that Canada is a country founded upon diversity and tolerance. It is thus startling for deans of publicly-funded university law schools to use their position to attempt to thwart the entry of another voice into academe, particularly where that voice is a religious one. We note that the Human Rights Code of British Columbia expressly provides for religious-based groups, among others, to be exempt from certain of its provisions when they grant preferences to members of those groups. Obviously, in order for such groups to survive they must be able to prescribe the conditions of membership of their group and set out their fundamental beliefs.

The CCLD appear to miss that point. That is surprising given that a decade ago the issue was explicitly and emphatically dealt with by the Supreme Court of Canada in *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31. The court there rejected the attempt to deny accreditation of TWU's educational training program based upon assumptions made about whether religiously-based beliefs that it promoted would result in discrimination if its graduates were hired as teachers in the public school system. The court's majority wrote this:

TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions. That said, the admissions policy of TWU alone is not in itself sufficient to establish discrimination as it is understood in our s. 15 jurisprudence. It is important to note that this is a private institution that is exempted, in part, from the British Columbia human rights legislation and to which the Charter does not apply. 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.

The court decided that the BC College of Teachers had inappropriately narrowed its consideration of matters. Instead of considering all rights, it focused just on discrimination. Instead of considering whether there was real evidence of misconduct, it focused on whether it regarded the beliefs of a particular religious group as acceptable. The court found that the BC College of Teachers was improperly forcing TWU to elect to abandon its beliefs in order to obtain accreditation:

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There is no denying that the decision of the BCCT 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. If TWU does not abandon its Community Standards, it renounces certification and full control of a teacher education program permitting access to the public school system. Students are likewise affected because the affirmation of their religious beliefs and attendance at TWU will not lead to certification as public school teachers unless they attend a public university for at least one year. These are important considerations. What the BCCT was required to do was to determine whether the rights were in conflict in reality.

Finally, the court concluded that the BC College of Teachers should have left accreditation of TWU's program in place, and deal with any discriminatory misconduct by a TWU-educated teacher (or any other teacher, for that matter) through its usual disciplinary processes:

Instead, the proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them. Absent 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. The BCCT, rightfully, does not require public universities with teacher education programs to screen out applicants who hold sexist, racist or homophobic beliefs. For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society.

The CCLD apparently were aware of that court decision, but reject its application here, calling their view a "principled" approach. With respect, their implicit derogation of the Supreme Court's decision as being



unprincipled is inappropriate. CCLD posits that “Discrimination on the basis of sexual orientation is unlawful in Canada and fundamentally at odds with the core values of all Canadian law schools.” If the topic were just about public law schools, we would agree. But the topic here is whether private educational institutions formed by religious or conscience-based groups are to have their constitutional rights recognized and protected. Leaving that out of the equation is unprincipled. The CCLD approach is as burdensome to fundamental freedoms and as contrary to the Charter as the BC College of Teachers’ approach was.

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The second concern noted above was the CCLD’s premise that those who are religiously-minded should be excluded from legal education. That would, by extension from their argument, include all professors, students and, eventually, lawyers and judges who held the religious views that the CCLD say are repugnant. Yet the same law schools that the CCLD preside over have admitted TWU undergraduates into their law school programs. There are religious adherents among the student population in existing law schools in Canada. And although no current legal scholar writing from a religious viewpoint readily comes to mind among the academics at existing public law schools, no doubt there are at least some professors who are members of religions.

Also, we note that Law Societies across Canada have not made a question about the religious beliefs of applicants part of their questionnaire for articling student program admissions. In British Columbia, we still have the stain of the *Martin v. Law Society of British Columbia*, [1950] 3 D.L.R. 173, decision of our Law Society and Court of Appeal on the books. There, the Law Society denied admission to the bar on grounds the applicant was a communist. The court upheld that. Such McCarthy-like tests as a condition of entering a profession are something that we would hope had long since disappeared.

The third concern was over the use by the CCLD of the CAUT criticism of TWU and other religiously-based educational institutions as somehow not being places of academic freedom. Given the absence among publicly-funded universities of encouragement for religiously-based academics to voice their perspective, one could be forgiven for questioning why CAUT would find fault elsewhere when diversity is not uniformly practiced in public universities, at least as CAUT preaches it.

The argument of CAUT adopted by CCLD reduces itself to the absurd. Secular universities preclude teaching from a religious perspective in order to maintain their secular and non-sectarian status; religious institutions require



professors to be adherents and provide instruction from the perspective of their group. Positing that academic freedom does not exist in religious educational institutions becomes a front for asserting that the religious perspective simply cannot be taught anywhere. The argument about a lack of freedom in religious educational institutions circles back as a supposed justification for suppression of religious viewpoints. That simply cannot be right.

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Fourth, we note that the Federation of Law Societies of Canada delegates functions to deans of law schools in Canada, including seeking their advice on the examination of credentials of foreign-educated students and also, more recently in the case of Thompson River University and Lakehead University, on the ad hoc committee formed to report on whether to approve accreditation of law schools there. The CCLD has, by putting forward a marker on behalf of all deans of existing accredited law schools in Canada, created a reasonable apprehension of bias were any of their number to be included in the process of evaluating and deciding upon the TWU application for accreditation.

The BCCLA encourages the Federation of Law Societies of Canada to give proper consideration to the application of TWU and to reject the anti-freedom-of-religion precepts of the CCLD's letter and public statements.

Sincerely,

Lindsay M. Lyster
President

cc: The Council of Canadian Law Deans

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 - Fax: (613) 533-6509



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- Minister of Justice and Attorney General for B.C.,
The Honourable Shirley Bond
 - shirley.bond.mla@leg.bc.ca
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 - Fax: (250) 952-7263
- Jonathan Raymond, President, Trinity Western University
 - president@twu.ca

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File No.: 4149

January 30, 2013

Federation of Canadian Law Societies

World Exchange Plaza
1810 – 45, rue O'Connor Street
Ottawa, Ontario K1P 1A4

Attention: John J. L. Hunter, Q.C. and Gerald R. Tremblay, C.M., O.Q., Q.C.

Dear Mr. Hunter, Q. C. and Mr. Tremblay, C.M., O.Q., Q.C.,

RE: Trinity Western University School of Law Proposal

I have reviewed the November 20, 2012 letter from Dean Bill Flanagan on behalf of the Council of Canadian Law Deans.

I am not an alumnus of Trinity Western University ("TWU") and have never been on their campus, so I have no axe to grind. Regardless, I respectfully submit that Dean Flanagan's letter is misguided.

I have reviewed the TWU "Community Covenant Agreement" (the "Agreement"), a copy of which is enclosed, and pursuant to its terms, the community appears to be a voluntary community of Christian scholars seeking to become people of "high competence and exemplary character". This is hardly an insidious goal.

No one is forced to join the community. Only those wishing to join the community are required to abide by the Agreement, which prohibits actions that have been considered immoral for millennia, such as:

- adultery,
- extra marital affairs,
- heterosexual sex before marriage,

- drunkenness,
- illegal drugs, and
- abuse of legal drugs.

The Agreement imposes a high moral standard on those who voluntarily choose to join the TSU community, and also imposes an obligation to treat all persons with respect and dignity (paragraph 3).

Dean Flanagan has urged the Federation to investigate whether the Agreement is inconsistent with federal and provincial law. In order to assist in the task, I enclose a copy of the Federal Civil Marriage Act, and draw the Federation's attention to the preamble and to Section 3.1.

The Federation has welcomed and indeed celebrated the law school at Lakehead University, which focuses on aboriginal law and an understanding of aboriginal issues (I refer to <http://law.lakeheadu.ca/deans-message/> - copy enclosed). I urge the Federation to likewise support the Trinity Western University Law School proposal, which in an analogous fashion would focus on a Christian perspective of law and society.

Yours truly,

KUBITZ & COMPANY

A handwritten signature in blue ink, appearing to read 'Walter W. Kubitz', is written over the printed name. The signature is fluid and cursive, with a large loop at the beginning.

WALTER W. KUBITZ, Q.C.

Enclosure

S:\Client Files\4149 Kubitz Personal\2013 01 23 WWK ltr to Hunter and Tremblay re Trinity Western University School of Law Proposal.docx



- Living in Community
- Living in Residence
- University Policies
- For Your Information

1. The TWU Community Covenant
2. Christian Community
3. Community Life at TWU
4. Areas for Careful Discernment and Sensitivity
5. Commitment and Accountability

Community In Covenant

Our Pledge to One Another

Trinity Western University (TWU) is a Christian university of the liberal arts, sciences and professional studies with a vision for developing people of high competence and exemplary character who distinguish themselves as leaders in the marketplaces of life.

1. The TWU Community Covenant

The University's mission, core values, curriculum and community life are formed by a firm commitment to the person and work of Jesus Christ as declared in the Bible. This identity and allegiance shapes 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.

The University is an interrelated academic community rooted in the evangelical Protestant tradition; it is made up of Christian administrators, faculty and staff who, along with students choosing to study at TWU, covenant together to form a community that strives to live according to biblical precepts, believing that this will optimize the University's capacity to fulfil its mission and achieve its aspirations.

The community covenant is a solemn pledge in which members place themselves under obligations on the part of the institution to its members, the members to the institution, and the members to one another. In making this pledge, members enter into a contractual agreement and a relational bond. By doing so, members accept reciprocal benefits and mutual responsibilities, and strive to achieve respectful and purposeful unity that aims for the advancement of all, recognizing the diversity of viewpoints, life journeys, stages of maturity, and roles within the TWU community. It is vital that each person who accepts the invitation to become a member of the TWU community carefully considers and sincerely embraces this community covenant.

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2. Christian Community

The University's acceptance of the Bible as the divinely inspired, authoritative guide for personal and community life is foundational to its affirmation that people flourish and most fully reach their potential when they delight in seeking God's purposes, and when they renounce and resist the things that stand in the way of those purposes being fulfilled. This ongoing God-enabled pursuit of a holy life is an inner transformation that actualizes a life of purpose and eternal significance. Such a

distinctly Christian way of living finds its fullest expression in Christian love, which was exemplified fully by Jesus Christ, and is characterized by humility, self-sacrifice, mercy and justice, and mutual submission for the good of others.

This biblical foundation inspires TWU to be a distinctly Christian university in which members and others observe and experience truth, compassion, reconciliation, and hope. TWU envisions itself to be a community where members demonstrate concern for the well-being of others, where rigorous intellectual learning occurs in the context of whole person development, where members give priority to spiritual formation, and where service-oriented citizenship is modeled.

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3. Community Life at TWU

The TWU community covenant involves a commitment on the part of all members to embody attitudes and to practise actions identified in the Bible as virtues, and to avoid those portrayed as destructive. Members of the TWU community, therefore, commit themselves to:

- cultivate Christian virtues, such as love, joy, peace, patience, kindness, goodness, faithfulness, gentleness, self-control, compassion, humility, forgiveness, peacemaking, mercy and justice
- live exemplary lives characterized by honesty, civility, truthfulness, generosity and integrity
- communicate in ways that build others up, according to their needs, for the benefit of all
- treat all persons with respect and dignity, and uphold their God-given worth from conception to death
- be responsible citizens both locally and globally who respect authorities, submit to the laws of this country, and contribute to the welfare of creation and society
- observe modesty, purity and appropriate intimacy in all relationships, reserve sexual expressions of intimacy for marriage, and within marriage take every reasonable step to resolve conflict and avoid divorce
- exercise careful judgment in all lifestyle choices, and take responsibility for personal choices and their impact on others
- encourage and support other members of the community in their pursuit of these values and ideals, while extending forgiveness, accountability, restoration, and healing to one another.

In keeping with biblical and TWU ideals, community members voluntarily abstain from the following actions:

- communication that is destructive to TWU community life and inter-personal relationships, including gossip, slander, vulgar/obscene language, and prejudice
- harassment or any form of verbal or physical intimidation, including hazing
- lying, cheating, or other forms of dishonesty including plagiarism
- stealing, misusing or destroying property belonging to others
- sexual intimacy that violates the sacredness of marriage between a man and a woman
- the use of materials that are degrading, dehumanizing, exploitive, hateful, or gratuitously violent, including, but not limited to pornography
- drunkenness, under-age consumption of alcohol, the use or possession of illegal drugs, and the misuse or abuse of substances including prescribed drugs
- the use or possession of alcohol on campus, or at any TWU sponsored event, and the use of tobacco on campus or at any TWU sponsored event.

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4. Areas for Careful Discernment and Sensitivity

A heightened level of discernment and sensitivity is appropriate within a Christian educational community such as TWU. In order to foster the kind of campus atmosphere most conducive to university ends, this covenant both identifies particular Christian standards and recognizes degrees of latitude for individual freedom. True freedom is not the freedom to do as one pleases, but rather empowerment to do what is best. TWU rejects legalisms that mistakenly identify certain cultural practices as biblical imperatives, or that emphasize outward conduct as the measure of genuine Christian maturity apart from inward thoughts and motivations. In all respects, the TWU community expects its members to exercise wise decision-making

according to biblical principles, carefully accounting for each individual's capabilities, vulnerabilities, and values, and considering the consequences of those choices to health and character, social relationships, and God's purposes in the world.

TWU is committed to assisting members who desire to face difficulties or overcome the consequences of poor personal choices by providing reasonable care, resources, and environments for safe and meaningful dialogue. TWU reserves the right to question, challenge or discipline any member in response to actions that impact personal or social welfare.

Wise and Sustainable Self-Care

The University is committed to promoting and supporting habits of healthy self-care in all its members, recognizing that each individual's actions can have a cumulative impact on the entire community. TWU encourages its members to pursue and promote: sustainable patterns of sleep, eating, exercise, and preventative health; as well as sustainable rhythms of solitude and community, personal spiritual disciplines, chapel and local church participation, work, study and recreation, service and rest.

Healthy Sexuality

People face significant challenges in practicing biblical sexual health within a highly sexualized culture. A biblical view of sexuality holds that a person's decisions regarding his or her body are physically, spiritually and emotionally inseparable. Such decisions affect a person's ability to live out God's intention for wholeness in relationship to God, to one's (future) spouse, to others in the community, and to oneself. Further, according to the Bible, sexual intimacy is reserved for marriage between one man and one woman, and within that marriage bond it is God's intention that it be enjoyed as a means for marital intimacy and procreation. Honouring and upholding these principles, members of the TWU community strive for purity of thought and relationship, respectful modesty, personal responsibility for actions taken, and avoidance of contexts where temptation to compromise would be particularly strong.

Drugs, Alcohol and Tobacco

The use of illegal drugs is by definition illicit. The abuse of legal drugs has been shown to be physically and socially destructive, especially in its potential for forming life-destroying addictions. For these reasons, TWU members voluntarily abstain from the use of illegal drugs and the abuse of legal drugs at all times.

The decision whether or not to consume alcohol or use tobacco is more complex. The Bible allows for the enjoyment of alcohol in moderation, but it also strongly warns against drunkenness and addiction, which overpowers wise and reasonable behaviour and hinders personal development. The Bible commends leaders who abstained from, or were not addicted to, alcohol. Alcohol abuse has many long-lasting negative physical, social and academic consequences. The Bible has no direct instructions regarding the use of tobacco, though many biblical principles regarding stewardship of the body offer guidance. Tobacco is clearly hazardous to the health of both users and bystanders. Many people avoid alcohol and/or tobacco as a matter of conscience, personal health, or in response to an addiction. With these concerns in mind, TWU members will exercise careful discretion, sensitivity to others' conscience/principles, moderation, compassion, and mutual responsibility. In addition, TWU strongly discourages participation in events where the primary purpose is the excessive consumption of alcohol.

Entertainment

When considering the myriad of entertainment options available, including print media, television, film, music, video games, the internet, theatre, concerts, social dancing, clubs, sports, recreation, and gambling, TWU expects its members to make personal choices according to biblical priorities, and with careful consideration for the immediate and long-term impact on one's own well-being, the well-being of others, and the well-being of the University. Entertainment choices should be guided by the pursuit of activities that are edifying, beneficial and constructive, and by a preference for those things that are "true, noble, right, pure, lovely, admirable, excellent, and praiseworthy," recognizing that truth and beauty appear in many differing forms, may be disguised, and may be seen in different ways by different people.

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5. Commitment and Accountability

This covenant applies to all members of the TWU community, that is, administrators, faculty and staff employed by TWU and its affiliates, and students enrolled at TWU or any affiliate program. Unless specifically stated otherwise, expectations of this covenant apply to both on and off TWU's campus and extension sites. Sincerely embracing every part of this covenant is a requirement for employment. Employees who sign this covenant also commit themselves to abide by TWU Employment Policies. TWU welcomes all students who qualify for admission, recognizing that not all affirm the theological views that are vital to the University's Christian identity. Students sign this covenant with the commitment to abide by the expectations contained within the Community Covenant, and by campus policies published in the Academic Calendar and Student Handbook.

Ensuring that the integrity of the TWU community is upheld may at times involve taking steps to hold one another accountable to the mutual commitments outlined in this covenant. As a covenant community, all members share this responsibility. The University also provides formal accountability procedures to address actions by community members that represent a disregard for this covenant. These procedures and processes are outlined in TWU's Student Handbook and Employment Policies and will be enacted by designated representatives of the University as deemed necessary.

By my agreement below I affirm that:

- I have accepted the invitation to be a member of the TWU community with all the mutual benefits and responsibilities that are involved;
- I understand that by becoming a member of the TWU community I have also become an ambassador of this community and the ideals it represents;
- I have carefully read and considered TWU's Community Covenant and will join in fulfilling its responsibilities while I am a member of the TWU community.

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Civil Marriage Act, SC 2005, c 33


Current version: in force since Jul 20, 2005

Link to the latest version: <http://canlii.ca/t/7w02>

Stable link to this version: <http://canlii.ca/t/j14t>

Citation to this version: Civil Marriage Act, SC 2005, c 33, <<http://canlii.ca/t/j14t>> retrieved on 2013-01-22

Currency: Last updated from the Justice Laws Web Site on 2013-01-16

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Civil Marriage Act

S.C. 2005, c. 33

Assented to 2005-07-20

An Act respecting certain aspects of legal capacity for marriage for civil purposes

Preamble

WHEREAS the Parliament of Canada is committed to upholding the Constitution of Canada, and section 15 of the *Canadian Charter of Rights and Freedoms* guarantees that every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination;

WHEREAS the courts in a majority of the provinces and in one territory have recognized that the right to equality without discrimination requires that couples of the same sex and couples of the opposite sex have equal access to marriage for civil purposes;

WHEREAS the Supreme Court of Canada has recognized that many Canadian couples of the same sex have married in reliance on those court decisions;

WHEREAS only equal access to marriage for civil purposes would respect the right of couples of the same sex to equality without discrimination, and civil union, as an institution other than marriage, would not offer them that equal access and would violate their human dignity, in breach of the *Canadian Charter of Rights and Freedoms*;

WHEREAS the Supreme Court of Canada has determined that the Parliament of Canada has legislative jurisdiction over marriage but does not have the jurisdiction to establish an institution other than marriage for couples of the same sex;

WHEREAS everyone has the freedom of conscience and religion under section 2 of the *Canadian Charter of Rights and Freedoms*;

WHEREAS nothing in this Act affects the guarantee of freedom of conscience and religion and, in particular, the freedom of members of religious groups to hold and declare their religious beliefs and the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs;

WHEREAS it is not against the public interest to hold and publicly express diverse views on marriage;

WHEREAS, in light of those considerations, the Parliament of Canada's commitment to uphold the right to equality without discrimination precludes the use of section 33 of the *Canadian Charter of Rights and Freedoms* to deny the right of couples of the same sex to equal access to marriage for civil purposes;

WHEREAS marriage is a fundamental institution in Canadian society and the Parliament of Canada has a responsibility to support that institution because it strengthens commitment in relationships and represents the foundation of family life for many Canadians;

AND WHEREAS, in order to reflect values of tolerance, respect and equality consistent with the *Canadian Charter of Rights and Freedoms*, access to marriage for civil purposes should be extended by legislation to couples of the same sex;

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short title

1. This Act may be cited as the *Civil Marriage Act*.

Marriage — certain aspects of capacity

2. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.

Religious officials

3. It is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs.

Freedom of conscience and religion and expression of beliefs

- 3.1 For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms* or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom.

Marriage not void or voidable

4. For greater certainty, a marriage is not void or voidable by reason only that the spouses are of the same sex.

CONSEQUENTIAL AMENDMENTS

CANADA BUSINESS CORPORATIONS ACT

5. [Amendments]

CANADA COOPERATIVES ACT

6. [Amendments]

CIVILIAN WAR-RELATED BENEFITS ACT

7. [Amendment]

DIVORCE ACT

8. [Amendments]

FEDERAL LAW AND CIVIL LAW OF THE PROVINCE OF QUEBEC ACT

9. [Amendment]

INCOME TAX ACT

10. [Amendments]

11. [Amendment]

- 11.1 [Amendment]

12. [Amendments]

MARRIAGE (PROHIBITED DEGREES) ACT

13. [Amendment]

14. [Amendment]

MODERNIZATION OF BENEFITS AND OBLIGATIONS ACT

15. [Amendment]

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by **LEXUM**  for the  Federation of Law Societies of Canada

Faculty of Law

Dean's Message

"Welcome to the Faculty of Law!"



Welcome.

In September, 2013 the Faculty of Law at Lakehead University will open its doors. We will be the first new law school in Ontario in over 40 years.

The law school is in the North for the North. Its focus is on preparing students for the practice of law in rural and smaller centres -- what I will call "Main Street" Canada -- where there is a pressing need for new lawyers.

The law program reflects the realities of "Main Street" practice. Our focus is threefold. First, there is emphasis on aboriginal law and understanding of aboriginal issues. We will provide stand alone courses on aboriginal law, as well as integrating aboriginal perspectives into our other subject areas where appropriate. Second, we focus on the needs of small practitioners, which include a course concerned with the business of law. Third, there is concentration on natural resources law from mining rights to employment standards.

What kind of law school can students expect? We are small and we will take full advantage of our small size. Students will receive a personal education. Classes will be small, learning will be hands on, and our professors will know their students. We will be able to offer opportunities for students to hone their legal skills in ways that larger law schools can only dream of. Our aim is to make Lakehead law graduates lawyer ready.

We will provide the highest standard legal education, where knowledge of the law is fused with the necessary skills to apply that law effectively. That is our goal and if we achieve that goal our graduates will be well served wherever their future endeavours may take them.

There is much to do before we open our doors. It is an exciting time for Lakehead University, for Thunder Bay and for Northern Ontario. I invite you to join me in this adventure.

Lee Stuesser

Founding Dean of Law

Lakehead University, 955 Oliver Road, Thunder Bay, ON
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Lakehead University Questions & comments? [Email Us](#)

March 14, 2013

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Dear Sirs and Mesdames,

Re: Trinity Western University School of Law Proposal

We represent a broad coalition of law students and alumni from the University of British Columbia Faculty of Law united in support of Dean Flanagan and the Canadian Council of Law Deans (“CCLD”). We agree with the CCLD position that Trinity Western University’s (“TWU’s”) Community Covenant, which bars its students from “sexual intimacy that violates the sacredness of marriage between a man and a woman,” amounts to discrimination on the basis of sexual orientation, which is unlawful in Canada and fundamentally at odds with the core values of all Canadian law schools.

Most of the criticism to date has focused on the legality of TWU’s Community Covenant. We support that criticism, yet feel we have an additional perspective to add to the discussion. Little has been said about the effect strict adherence to the Covenant would have on the law school experience. This is the focus of our critique.

We are particularly concerned about two damaging effects the Covenant could have: (1) It would exclude sexual minorities, which would diminish diversity of opinion in the legal profession and

impair the development of critical thought and legal analytical skill; (2) It would provide opportunities to access legal education in a discriminatory manner. Such an education confers significant social privileges and queer students should have no less access to it than any other.

The law does not exist in isolation. Learning the law requires some analysis of its social context. As part of our legal education, we are regularly encouraged to bring our own perspectives into our legal analyses, whether based on religion, gender, sexual orientation, or other beliefs, identities, and experiences. This diversity encourages us to challenge, debate, and discuss the law in its broader context. This discourse deepens our understanding of both the law and our role as future members of the legal profession.

It is our concern that the Covenant exemplifies a limited tolerance of diversity. While we are respectful of Christian values, a law school should promote an inclusive environment that is fertile ground for debate. All law schools, and the legal profession as a whole, should strive to promote such an environment.

There is tremendous competition for law school admission. Any additional opportunities to a legal education should not be denied to persons based on their sexual orientation. Sexual minorities still face significant social discrimination. Approving a law school that binds students to the TWU Covenant does nothing to alleviate this disadvantage; indeed it has the potential to exacerbate it.

While TWU is a private university, it is not absolved from its public obligations. Legal education is a public good. The practice of the law is publicly regulated and lawyers are officers of the court - they are compelled to act in the public interest. Law schools are safeguarded by provincial law societies because lawyers have duties to the court and their communities, regardless of where they are trained.

Religious freedom is an important right that will continue to be protected in Canada. However, our concern is that TWU's Community Covenant veils homophobia in Christian values. TWU's policy does not allow for balance between religious freedom and the rights of others to their sexual identity.

We hope TWU reconsiders its position regarding the Community Covenant. It is also our desire to see the province of British Columbia, the Law Society of British Columbia, and the Federation of Law Societies of Canada consider the concerns articulated in our letter throughout all approval processes.

Sincerely,

UBC OUTlaws

UBC Social Justice Action Network

1. Dustin Klaudt - JD Candidate (UBC 2013)
2. Rebecca Coad - JD Candidate (UBC 2013)
3. Kate Parisotto - JD Candidate (UBC 2013)
4. Rachel Barsky - JD (UBC 2012)
5. Karen Segal - JD Candidate (UBC 2014)
6. Laura Hawes - JD (UBC 2012)
7. Noah Stewart - Member of the LSS Executive, JD Candidate (UBC 2014)
8. Flora Vineberg - JD Candidate (UBC 2015)
9. Martina Zanetti - JD Candidate (UBC 2013)

10. Lisa Jørgensen - JD Candidate (UBC 2013)
11. Andrea Ritchie - JD (UBC 2012)
12. Kaylon Quinn - JD Candidate (UBC 2014)
13. Catrina Webster - JD Candidate (UBC 2014)
14. Iva Erceg - JD Candidate (UBC 2013)
15. Megan Dyer - JD Candidate (UBC 2013)
16. Brian Koh - JD (UBC 2012)
17. Matthew Fingas - JD Candidate (UBC 2014)
18. Jeanette O'Sullivan - JD (UBC 2012)
19. Amelia Boulton - JD Candidate (UBC 2014)
20. Michelle Reinhart - JD Candidate (UBC 2014)
21. Rachel Schechter - JD Candidate (UBC 2013)
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30. Ian Wiebe - JD (UBC 2011)
31. James Boxall - JD Candidate (UBC 2013)
32. Molly Shames - JD Candidate (UBC 2013)
33. Paul Kressock - JD Candidate (UBC 2014)
34. Paul Mereau - JD Candidate (UBC 2013)
35. Tyson Gratton - JD Candidate (UBC 2013)
36. Brittany Weikum - JD (UBC 2012)
37. Karoline Clarke - JD Candidate (UBC 2014)
38. Anthony Pugh - JD Candidate (UBC 2014)
39. Elizabeth Pan - JD Candidate (UBC 2014)
40. Meera Jain - JD (UBC 2012)
41. Michelle Beda - JD Candidate (UBC 2015)
42. Jessie Caryl - JD Candidate (UBC 2014)
43. Alexander Mackoff - JD Candidate (UBC 2013)
44. Juliana Dalley - JD Candidate (UBC 2013)
45. David Penner - JD Candidate (UBC 2013)
46. Ravi Bindra - JD Candidate (UBC 2013)
47. Alex Norris - JD Candidate (UBC 2013)
48. David Kemp - Member of the LSS Executive - JD Candidate (UBC 2015)
49. Aicha Kouyate - JD Candidate (UBC 2014)
50. Lauren Read - Member of the LSS Executive, JD Candidate (UBC 2015)
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53. Julie Brown - JD (UBC 2012)
54. Sara Gray - JD Candidate (UBC 2015)
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57. Kenneth Deane Craig - LLMCL Candidate (UBC 2013)
58. Ben Chiou - JD Candidate (UBC 2015)
59. Valerie Haaf, EIT - Bachelor of Applied Science (UBC 2012)
60. William House - JD Candidate (UBC 2013)

61. Erin Kizell - JD Candidate (UBC 2013)
62. Michela Fiorido - JD Candidate (UBC 2014)
63. Rita Davie - JD Candidate (UBC 2014)
64. Rachel Heinrichs - JD Candidate (UBC 2013)
65. William Skinner - JD Candidate (UBC 2015)
66. Maxime Walker - JD Candidate (UBC 2015)
67. Robin Phillips - JD Candidate (UBC 2014)
68. Brian Stephenson - JD Candidate (UBC 2015)
69. Will Shaw - JD Candidate (UBC 2013)
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71. Daniel Kent - JD Candidate (UBC 2013)
72. Janis Ko - JD (UBC 2012)
73. Patrick Beechinor - JD Candidate (UBC 2014)
74. Emsie Hung - JD Candidate (UBC 2015)
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76. Sam Arden - JD Candidate (UBC 2013)
77. Jonathan Braun - Member of the LSS, JD Candidate (UBC 2015)
78. Todd Shikaze - JD Candidate (UBC 2013)
79. Shannon Fenrich - JD Candidate (UBC 2013)
80. Victoria Petrenko - JD Candidate (UBC 2015)
81. Dionne Lau - JD Candidate (UBC 2015)
82. Zoe Si - JD Candidate (UBC 2013)
83. Chantelle Yan - JD Candidate (UBC 2015)
84. Michael Burokas - JD Candidate (UBC 2014)
85. Ainslie Hurd - JD Candidate (UBC 2015)
86. Anna Kontsedalova - JD Candidate (UBC 2013)
87. Kaitlin Green - JD Candidate (UBC 2015)
88. Savitri Gordian - JD (UBC 2012)
89. Chris Thompson - JD Candidate (UBC 2013)
90. Jessica Magalios - JD Candidate (2013)
91. Georgia Clark - JD Candidate (UBC 2015)
92. Farah Malik - JD Candidate (UBC 2013)
93. Gregory Rabin - JD Candidate (UBC 2015)
94. Roni Jones - JD Candidate (UBC 2013)
95. Emily Gray - JD Candidate (UBC 2015)
96. Grant Sikkes - JD Candidate (UBC 2014)
97. Genevieve Hillsburg - JD Candidate (UBC 2015)
98. Elise Hahn - M.A. Candidate (UBC 2014)
99. Spencer Landsiedel - JD/M.B.A. Candidate (UBC 2015)
100. Nivedhya Ramaswamy - JD Candidate (UBC 2014)
101. Natasha Rana - JD Candidate (UBC 2014)
102. Cassie Preston - JD Candidate (UBC 2014)
103. Audrey Bouffard-Nesbitt - JD Candidate (UBC 2013)
104. Megan Coyle - JD Candidate (UBC 2015)
105. Laura Morrison - JD Candidate (UBC 2013)
106. Sherry Shir - JD Candidate (UBC 2014)
107. Trevor Simpson - JD Candidate (UBC 2015)
108. Andrea Fraser - JD Candidate (UBC 2015)
109. Dustin Paul - JD Candidate (UBC 2013)
110. Tahsin Najam - JD Candidate (UBC 2015)
111. Brendan Dawes - JD Candidate (UBC 2015)

112. Joshua Spruyt - JD Candidate (UBC 2013)
113. Servane Phillips - JD (UBC 2012)
114. Alexander Smith - JD Candidate (UBC 2013)
115. Graham Mack - JD Candidate (UBC 2015)
116. Hamish Stewart - JD Candidate (UBC 2014)
117. Heather Adlam - JD Candidate (UBC 2014)
118. Catherine Repel - JD Candidate (UBC 2015)
119. Nigel Blondeau - JD Candidate (UBC 2014)
120. Emily McClintock - JD Candidate (UBC 2015)
121. David Ferguson - JD Candidate (UBC 2015)
122. Marie Diane Irvine - JD Candidate (UBC 2013)
123. Jessica Johnson - JD Candidate (UBC 2013)
124. Torrey Sirdevan-Bachelor of Applied Science (UBC 2015)
125. Alexander Currie - JD Candidate (UBC 2015)
126. Mark McPhee - JD Candidate (UBC 2013)
127. Jessica Sheehan - JD Candidate (UBC 2015)
128. Kyle Thompson - JD Candidate (UBC 2015)
129. Claire Hildebrand - J.D Candidate (UBC 2015)
130. Jennifer Flood - JD Candidate (UBC 2013)
132. Laura Kasian - JD Candidate (UBC 2013)
133. Negar Jalali - JD Candidate (UBC 2015)
134. Grace Andrea Jackson - JD (UBC 2012)
135. Clayton Gallant - JD Candidate (UBC 2015)
136. Victor Ryans - JD Candidate (UBC 2015)
137. Martin Ferreira Pinho - JD Candidate (UBC 2013)
138. Danielle Lewchuk - JD Candidate (UBC 2013)
139. Ryan LaPlante - JD Candidate (UBC 2015)
140. Kit McGuinness - JD (UBC 2012)
141. Laura Smith - JD (UBC 2012)
142. Tessa Seager - JD Candidate (UBC 2015)
143. Jessie Lee Cameron - JD Candidate (UBC 2013)
144. Daniel Kozera - JD Candidate (UBC 2015)
145. Iain Bailey- JD Candidate (UBC 2015)
146. Darcy McKittrick - JD Candidate (UBC 2015)
147. Kendra Shupe - JD Candidate (UBC 2014)
148. Lindsay Wright - JD Candidate (UBC 2013)
149. Alex Choi - JD Candidate (Queen's 2013)
150. Samuel Turcott - JD Candidate (UBC 2014)
151. Maureen Gillis - JD Candidate (UBC 2013)
152. Christopher Munroe - JD (UBC 2012)
153. Zohar Amouyal - JD Candidate (UBC 2013)
154. Alain Saint-Onge - JD Candidate (UBC 2014)
155. Dan H Griffith - JD Candidate (UBC 2014)
156. Parveen K. Shergill - JD Candidate (UBC 2013)
157. Delaine Friedrich - JD Candidate (UBC 2015)
158. Stuart Wright - JD Candidate (UBC 2015)
159. Jessie Gill - JD Candidate (UBC 2014)
160. Malcolm Funt - JD Candidate (UBC 2014)
161. Dylan Mazur - JD Candidate (UBC 2015)
162. Laura Wilson - JD Candidate (UBC 2015)
163. Emily Snow - Member of the UBC ILSA Executive, JD Candidate (UBC 2014)

164. Margaret MacDonald - JD Candidate (UBC 2014)
165. Amber Timothy - JD Candidate (UBC 2013)
166. Kelsey Rose - JD Candidate (UBC 2014)
167. Sasa Pudar - JD Candidate (UBC 2014)
168. Andrea Lejay - JD Candidate (UBC 2014)
169. Benjamin Schach - JD Candidate (UBC 2015)
170. Nicole Schnurr - JD Candidate (UBC 2014)
171. David Wu - JD Candidate (UBC 2015)
172. Brittany Durrant - JD Candidate (UBC 2014)
173. Alex Evans - JD Candidate (UBC 2014)
174. Glenn Grande - JD Candidate (UBC 2014)
175. Mikhael Magaril - JD Candidate (UBC 2014)
176. Adam Freud - JD Candidate (UBC 2013)
177. Trevor Bant - JD Candidate (UBC 2014)
178. Hennadiy Kutsenko - JD Candidate (UBC 2014)
179. Kelsey Mack- JD (UBC 2012)
180. Lisa Frey - JD (UBC 2012)
181. Vanessa Johnson - JD Candidate (UBC 2014)
182. Jessica Todd - JD Candidate (UBC 2014)
183. Christina Gray - JD Candidate (UBC 2013)
184. Caitlin Ohama-Darcus - JD Candidate (UBC 2015)
185. Michael Fitzmaurice - JD Candidate (UBC 2014)
186. Kayla Baldwin - JD Candidate (UBC 2014)
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192. Kevin Chiarot - JD (UBC 2012)
193. Heather Doi - JD Candidate (UBC 2015)
194. Kate Phillips - JD Candidate (UBC 2014)
195. Blair McRadu - JD Candidate (UBC 2015)
196. Sarah McCalla - JD Candidate (UBC 2014)
197. Jessica Lewis - JD Candidate (UBC 2015)
198. Angela Lee - JD Candidate (UBC 2015)
199. Bryan Badali - JD Candidate (UBC 2013)
200. Joanne Tsang - JD Candidate (UBC 2013)
201. Robin McMurachy - JD Candidate (UBC 2015)
202. Alexandra Russell - JD Candidate (UBC 2015)
203. Harshada Deshpande - JD Candidate (UBC 2014)
204. Aletha Utley - JD Candidate (UBC 2014)
205. Riley O'Brien - JD Candidate (UBC 2015)
206. Katie Blundy - JD Candidate (UBC 2015)
207. Ruben Lindy - JD Candidate (UBC 2015)
208. Jamie Hansen- JD Candidate (UBC 2014)
209. Lucas McFadden - JD Candidate (UBC 2015)
210. Jonjit Singh - JD Candidate (UBC 2014)
211. Jason Scott - JD Candidate (UBC 2015)
212. Leanne Moses - JD Candidate (UBC 2015)
213. Krisha Dhaliwal - JD Candidate (UBC 2015)
214. Stephen Hedley - JD Candidate (UBC 2014)

- 215. Wesley Chenne - JD Candidate (UBC 2015)
- 216. Stefan Kruse - JD Candidate (UBC 2015)
- 217. Michael Davis - Member of the LSS, ILSA Executive, JD Candidate (UBC 2014)
- 218. Aaron Samuel - JD Candidate (UBC 2015)
- 219. Joty Sandhu - JD Candidate (UBC 2015)
- 220. Jason Hughes - JD Candidate (UBC 2014)

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Jonathan Raymond, President, Trinity Western University
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MAR-18-2013 MON 11:53 AM EVANS & EVANS

FAX NO. 905 775 8835

P. 01

EVANS & EVANS
BARRISTERS, SOLICITORS, NOTARIES

ROBERT F. EVANS, Q.C.

THOMAS M. PEACOCK

T.W.W. EVANS, Q.C. (1894-1955)
CHARLES T.S. EVANS, Q.C. (1926 - 1986)
BROCK M. EVANS, Q.C. (1935 - 1987)
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March 18, 2013

The Federation of Law Societies of Canada
World Exchange Plaza
45 O'Connor Street, Suite 1810
Ottawa, Canada
K1P 1A4

Fax: (613) 236-7233

Attention: Bâtonnier Gérard R. Tremblay, President

Re: Proposal for a law school at Trinity Western University

Greetings

Our eldest daughter is extraordinarily successful in her life. My wife and I give some of the credit for her success to her four years at Trinity Western University, where she received an excellent education and a great life experience.

Many Canadian Universities have been founded on Christian principles, including Victoria College, Trinity College and St. Michael's College at the University of Toronto. It would be most unfortunate, indeed tragic, if our Christian based universities were barred from establishing law faculties and other faculties of higher learning.

I refer to the article on page A18 of the Toronto Star of March 2, 2013 under the heading "Lawyers oppose Christian law school." While I fully agree with Clayton Ruby in opposing discrimination on the basis of the grounds detailed in the Canadian Charter of Rights and Freedoms, I support the establishment of a law school at Trinity Western.

MAR-18-2013 MON 11:54 AM EVANS & EVANS

FAX NO. 905 775 8835

P. 02

It is my hope that discrimination will continue to diminish in Canada, with the world wide lessons derived from the horror of the holocaust of World War II, and peacefully through our Charter of Rights and Freedoms which is becoming more and more a reality in the every day lives of Canadians.

I believe that there is room for improvement for all of us as individuals and for all institutions.

It is my hope and my request that the Federation of Law Societies of Canada and that the lawyers of Canada will support Trinity Western University in its proposal to establish a law school. My expectation, through our daughter's experiences as a student, is that Trinity Western will establish a fine faculty of law in which we can all take pride.

Yours truly



Robert F. Evans

Regional Bencher, Central East
Law Society of Upper Canada

c.c. Tom Conway, Treasurer, LSUC, fax (416) 947-7609
c.c. Clayton Ruby, fax (416) 964-9193

On March 5th, 2013, a Town Hall was held at the **Schulich School of Law** to discuss Trinity Western University's proposal to create Canada's next law school. At issue during the meeting were TWU's discriminatory admissions and hiring policies, which include that no community member shall engage in sexual behaviour that violates the sacred bond of marriage between a man and a woman. The primary discussion point was whether an institution with such policies should educate students for the practice of law.

Those present at the meeting included gays and lesbians, who voiced concern not only about TWU's policies, but also about the fact that another protected right – freedom of religion – could potentially be stifled by any action we might take. One Christian in the room shared with us his own faith-based educational background, and reminded us of the personal and voluntary choice an individual makes when agreeing to TWU's community covenant, a choice that arguably should not be impeded. A number of straight people in attendance felt strongly that religion has no place in the teaching of law, and that TWU's proposal should be opposed. Some felt that it would be best to live and let live.

In short, there was no obvious consensus at the Town Hall about whether or not we, as law students and future members of the legal profession, should take a stance on TWU's proposed law school. What is obvious, though, is that the diversity of thought and opinion within the halls of the Schulich School of Law is great. What is also obvious, is that the respect we have for each other's thoughts and opinions here, no matter how divergent, is also great.

But perhaps the most obvious (and most important) thing is this: a Town Hall like the one held on March 5th would never happen at a TWU law school. Gays and lesbians would never sit in a classroom with Christians and Jews and atheists, challenging each other to take on new perspectives while encouraging respect and tolerance for everyone else's, at a TWU law school.

Whether or not those at TWU would *want* such a meeting to take place is irrelevant. Whether or not they themselves discriminate in their daily lives is also irrelevant. The fact of the matter is that TWU's *policies* simply would not allow for free, open, challenging, critical, respectful dialogue. What is the practice of law, if not all of those things? Does the rule of law not require that it be available freely and openly to all? Does the complexity of law not challenge us to be innovative and resourceful for our clients? Does the study of law not require us to think critically about difficult issues? Does our very own Constitution not require us to respect all of our brothers and sisters, regardless of race, sex, religion, age, sexual orientation, or otherwise?

If TWU is to be granted the privilege of opening Canada's next law school, it should first ask itself if it is up to the challenge of having an open, honest, meaningful discussion about its policies and practices. If it finds itself unable to do so, then, in the words of its own student handbook, it "should seek a living-learning situation more acceptable to them".

We, the Undersigned, support this statement:

Dal OUTlaw

- Annie McFarlane - Dal Law 2013,
- Chelsey Roy - Dal Law 2013
- Cordelle Ellison - Dal Law 2013
- Greg Englehutt - Dal Law 2013

Dal Social Activist Law Student Association

- Georgia Lloyd-Smith - Dal Law 2014
- Yasemin Diamente - Dal Law 2014
- Emily Coyle - Dal Law 2014
- Bruce Muir - Dal Law 2015
- Lara Green - Dal Law 2014
- Zoe Marler - Dal Law 2014
- Aaron Dewitt - Dal Law 2014
- Conor Mullin - Dal Law 2013
- Mary Elizabeth - Dal Law 2015
- Martin Sanderson - Dal Law 2014
- Shawnee Gregory - Dal Law 2015

Stefan Currie-Roberts - Dal Law 2013

Emma Baasch - Dal Law 2014

Ora Morison - Dal Law 2015

Cheri Caplan - Dal Law 2013

Jennifer Asquin - Dal Law 2013

Katherine Ruta - Dal Law 2014

Michelle Yung - Dal Law 2013

Angela MacKenzie - Dal Law 2014

Maria Constantine - Dal Law 2013

Shannon Paine - Dal Law 2013

Chris Gleddie - Dal Law 2013

Allison Reed - Dal Law 2013

Mick Levin - Dal Law 2015

Amy Sakalauskas - Practicing Member of the NSBS

Laura Dunnigan - Dal Law 2013

Dave Dhillon - Dal Law 2014

Kelsey Nearing - Dal Law 2014

Kristy MacKinnon - Dal Law 2015

Aaron Lemkow - Dal Law 2015

Christy Meredith - Dal Law 2014

Ashley Wilson - Dal Law 2014

David Gruber - Dal Law 2015

Barbara Grochalova - Dal Law 2014

David Abrams - Dal Law 2015

Christa Korens - Dal Law 2014
Steven Evans - Dal Law 2014
Caitlin Regan-Cottreau - Dal Law 2014
Celeste Woods - Dal MSc, SLP 2013
Cameron Foster - Dal Law 2013
Will Horne - Dal Law 2014
Aileen Fury - Dal Law 2015
Deanna Bru - Dal Law 2015
Andrea Van der Heyden - Dal Law 2014
Michael Oland - Dal Law 2014
Alandra Harlington - Dal Law 2013
Ashley Schuitema - Dal Law 2014
Kate Fairbrother - Dal Law 2013
Amanda Whitehead - Dal Law 2014
Alec Young - Dal Law 2013
Nigel Jenkins - Dal Law 2013
Simon Turner - Dal Law 2013
Dan Manchee - Dal Law 2013
Kylan Kidd - Dal Law 2015
Gregory Johansson - Dal Law 2015
Natasha Meier - Dal Law 2014
Jenna Clark - Dal Law 2015
Margarete Daugela - Dal Law 2015
Lindsay Thomson - Dal Law 2013
Amanda Fricker - Dal Law 2013
Jim Kehoe - Dal Law 2013
Nick Lenehan - Dal Law 2013
Mathieu Poirier - Dal Law 2014
Katie Sammon - Dal Law 2013
James P Barry - Dal Law 2013
Daniel Pink - Dal Law 2011
Sarah Turgeon - Dal Law 2013
Lénie Tessier-Beaulieu - Dal Law 2012
Nick Cosulich - Dal Law 2014
Allison Smith - Dal Law 2014
Tricia Parker - Dal Law 2015
Samantha Jenkins - Dal Law 2014
Sara D. Gardezi - Dal Law 2012
Leah Burt - Dal Law 2014
Cathy Rasmussen - Dal Law 2014
Christena McIsaac - Dal Law 2014
Tim Hansen - Dal Law 2014
Jared Leon - Dal Law 2014
Leonard Loewith - Dal Law 2013
Nathan Coles - Dal Law 2013
Stephen Hurley - Dal Law 2014

James Violande - Dal Law 2013
Lorne J. Graburn - Dal Law 2012
Max Ma - Queen's Law 2015, BA (Hons) (Dal)
Ken Cadigan - Dal Law 2013
James Foy - Dal Law 2014
Kelsey Evaniew - Dal Law 2014

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Federation of Canadian Law Societies
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Dear Mr. Tremblay, Mr. Herman, Ms. Wolfe, and Ms. Pawlitza:

Re: Trinity Western University School of Law Proposal

We are current students of the University of Alberta Faculty of Law and we are writing today to express our concern over the proposed establishment of a law school at Trinity Western University. Our concern centers on the fact that students are required to sign and abide by the community covenant agreement that requires the student to abstain from “sexual intimacy that violates the sacredness of marriage between a man and a woman.” Failure to abide by the covenant gives the University the right to discipline, dismiss, or refuse to readmit the student.

This covenant actively discriminates against persons on the basis of sexual orientation. Where married heterosexual couples are free to engage in sexual intimacy without fear of discipline or expulsion from the University, same-sex married couples are not afforded this same security, despite having legally recognized marriages. This exclusion of same-sex marriage from the covenant is contrary to the *Canadian Charter of Rights and Freedoms* and Canadian Human Rights legislation.

We recognize the fact that the *Charter* does not apply to private schools such as TWU. All law schools, however, should strive to provide a legal education that is balanced and equality focused. Students should be taught to uphold the values of the Canadian legal system, including those found in the *Charter*. We are concerned that students would be unable to learn such values in an environment where such discrimination occurs against individuals in the LGBTQ community, an already marginalized community. Even though TWU is a private institution, the

students graduating from the program would still need to be recognized by provincial Law Societies, which are public bodies who have a duty to promote justice equality and respect for the law, including *Charter* values.

Furthermore, the effect of the covenant on all non-heterosexual students is unacceptable. It sends a message that LGBTQ students are not welcome within the TWU community. As explained by Justice L'Heureux-Dube in 2001, you cannot "separate condemnation of the 'sexual sin' of 'homosexual behaviour' from intolerance of those with homosexual or bisexual orientations... [In] the words of the intervener EGALE, '[r]equiring someone not to act in accordance with their identity is harmful and cruel. It destroys the human spirit. Pressure to change their behaviour and deny their sexual identity has proved tremendously damaging to young persons seeking to come to terms with their sexual orientation' (factum, at para. 34)."¹ TWU's claims that the covenant does not prevent non-heterosexual students from attending the University wrongly suggest that it is "possible to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood."²

We, as future lawyers and officers of the court, are committed to equality and promoting the values of the *Charter* within our own practices. We believe that our colleagues should be exposed to a learning environment that fosters the same.

Yours sincerely,

Christopher Ghesquiere, JD Candidate (U of A 2013)

Ruoxi Wang, JD Candidate (U of A 2014)

Carmen Lee, JD Candidate (U of A 2014)

Mark Zamrij, JD Candidate (U of A 2014)

Soheel Hussein, JD Candidate (U of A 2014)

Brandi Davies, JD Candidate (U of A 2013)

Kent West, JD Candidate (U of A 2013)

Tatum Woywitka, JD Candidate (U of A 2013)

Angie Riano, JD Candidate (U of A 2013)

Jacob Marchel, JD Candidate (U of A 2015)

Cristina Baer, JD Candidate (U of A 2014)

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Hyok Kim, JD Candidate (U of A 2014)

Stacey Purser, JD Candidate (U of A 2015)

¹ *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772, 2001 S.C.C. 31 at para 6.

² *Ibid.*

Michelle Paul, JD Candidate (U of A 2013)
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Monday, March 18th 2013
Ottawa, Ontario

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Dear Sirs and Mesdames,

Re: Trinity Western University School of Law Proposal

Recently, several articles have been published in The National Post debating the appropriateness of creating a law school at the private Christian university, Trinity Western. The Canadian Council of Law Deans (CCLD), many law professors, legal practitioners, and student organizations have already spoken out against establishing such a law school. There has also been a great deal of support for Trinity-Western's proposal. A decision on the issue will be made soon.

As members of uOttawa OUTLaw, the LGBTQ student society at the University of Ottawa Faculty of Law, we would like to offer our thoughts on this contentious issue.

There are many things to commend about Trinity Western University. While much of the debate has focused on negative aspects of their Community Covenant Agreement, it is worth noting that this Covenant promotes positive values as well, and specifically asks that its signatories refrain from any form of harassment or discrimination. This Covenant has evolved over the years since Trinity Western was founded, to better reflect the changing norms and attitudes of Canadian society. Ultimately, the Covenant still retains several provisions that inherently discriminate against LGBTQ students, faculty, and staff.

As law students, and particularly as LGBTQ law students, many of us feel that we would not be welcomed in an environment such as the one fostered at TWU through this Covenant. Law school is



already an intensely competitive, stressful experience, and no student needs the added stress of being explicitly discriminated against by the codes of their institution. At the University of Ottawa, we have felt nothing but support and acceptance from our faculty and staff. We believe that this has had a direct impact on our success at law school. Our colleagues across the country should be afforded the same opportunity. We are concerned that this would not be the case at TWU, where all faculty and staff are required to sign the Covenant.

While the Supreme Court clarified in *Trinity Western University v British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31 that a discriminatory environment will not necessarily produce discriminatory teachers, we are still concerned that the Covenant institutionalizes discrimination against the LGBTQ community, and that a discriminatory university environment would be detrimental to LGBTQ law students, the general student population, and the public at large.

We recognize that the Covenant as a whole promotes many positive values. There remain several problematic provisions. Section 3, “Community Life at TWU” requires students to abstain from “sexual intimacy that violates the sacredness of marriage between a man and a woman.”¹ Section 4, “Areas for Careful Discernment and Sensitivity” states that “sexual intimacy is reserved for marriage between one man and one woman, and within that marriage bond it is God’s intention that it be enjoyed as a means for marital intimacy and procreation.”² The references to the marital union of one man and one woman exclude trans* identified people, polyamorous relationships, other forms of nonmonogamy, unmarried same-sex couples, married same-sex couples, any other form of sexual expression—effectively rendering LGBTQ families and marginalized sexualities invisible.

In the twelve years since *TWU v BCCT* (2001), much has changed in the law surrounding same-sex relationships. Same-sex marriage has been legalized in Canada. Same-sex couples are able to adopt children in many parts of the country, and three-parent families have been recognized in certain court decisions. We believe that a law school cannot provide a complete legal education of these concepts while simultaneously requiring its students, faculty and staff to sign an agreement that denigrates them.

Regardless of whether it is enforced, the Covenant is a significant symbolic document for the university. The Covenant makes it known to everyone who wishes to enter the TWU community that LGBTQ students and families will not be deemed equals. The Covenant not only effectively permits institutionalized discrimination against those members of the TWU community, it promotes such discrimination.

Our principle concern is that a law school at TWU would create a discriminatory academic environment for potential LGBTQ students, and send a negative message about the legal status of the LGBTQ community more broadly. As currently written, the Covenant creates a distinction between LGBTQ students, faculty and staff, and their straight counterparts. We believe that an environment free from such discrimination and inequality is fundamental to the well-being of an academic community, and the legal profession.

Sincerely,

University of Ottawa OUTLAW Executive

¹ Trinity Western University Community Covenant Agreement at page 3, available online: <<http://twu.ca/studenthandbook/twu-community-covenant-agreement.pdf>>

² *Ibid* at page 4



Le lundi 18 mars 2013
Ottawa, Ontario

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Sujet: Demande quant à la mise en œuvre d'une faculté de droit à l'Université *Trinity Western*

Chères Mesdames,
Chers Messieurs,

Plusieurs articles ont récemment été publiés dans le *National Post* qui portent sur débat quant à la pertinence de la mise en œuvre d'une nouvelle faculté de droit à l'université privée chrétienne, *Trinity Western*. Le Conseil canadien des doyens en droit, de nombreux professeurs et professeurs de droit, des juristes et des organisations étudiantes se sont déjà prononcés contre l'établissement d'une telle école de droit. En revanche, il y a également un certain soutien important appuyant la proposition de *Trinity Western*. Cela étant, une décision sur la question sera bientôt faite.

En tant que membres de *OUTlaw* de l'Université d'Ottawa, l'association des étudiantes et étudiants LGBT de la Faculté de droit de l'Université d'Ottawa, nous tenons à partager nos réflexions sur cette question controversée.

Il ne fait pas doute qu'il y a certaines qualités très remarquables et appréciables à l'Université *Trinity Western*. Bien qu'une partie importante du débat porte sur les aspects néfastes de l'entente sur la convention collective communautaire, il convient à noter que la présente convention promeut également des valeurs admirables, et sollicite expressément que les signataires s'abstiennent de toute forme



d'harcèlement ou de discrimination. Cette convention a évolué au fil des ans depuis la fondation de Trinity Western afin de mieux refléter le progrès des normes et des attitudes de la société canadienne. Cependant, il reste que la convention dispose toujours de certaines dispositions intrinsèquement discriminatoires à l'égard des étudiantes et étudiants, des professeures et professeurs, ainsi que et des membres du personnel appartenant à la communauté LGBT.

En tant qu'étudiantes et étudiants en droit s'identifiant à la communauté LGBT, une grande part d'entre nous opine que nous ne serions pas accueillis dans un environnement tel que celui à UTW de par la convention qui lui est rattachée. Les études en droit engendrent déjà plusieurs stressés, et aucun étudiante ou étudiant ne devrait être assujéti à un stress supplémentaire occasionné par des règlements scolaires qui promeuvent de la discrimination au sein de son institution académique. À l'Université d'Ottawa, l'esprit d'ouverture, d'inclusion et d'acceptation du corps professoral et du personnel de soutien fait en sorte que nous nous sentions bienvenus et appréciés à la Faculté de droit. Nous estimons avec raison que cela a indéniablement un impact profond sur notre succès à la Faculté de droit. De par ce fait, nous croyons que tous nos collègues au Canada devraient jouir de cette même occasion, soit de connaître des véritables succès dans un environnement respectueux, propice à l'épanouissement de toutes et de tous. Malheureusement, nous craignons que ce ne serait pas le cas à UTW, où tous les professeures et professeurs, ainsi que personnel de soutien sont tenus à signer la convention.

Bien que la Cour suprême du Canada a précisé dans *Université Trinity Western c British Columbia College of Teachers*, [2001] 1 RCS 772, 2001 CSC 31, qu'un environnement discriminatoire ne formerait pas forcément des enseignants discriminatoires, nous sommes néanmoins préoccupés par le fait que la convention sert à institutionnaliser la discrimination contre de la communauté LGBT, et qu'un tel milieu universitaire serait préjudiciable aux étudiantes et étudiants LGBT en droit, à la population étudiante en général et au grand public.

Nous reconnaissons que la convention dans son ensemble favorise de nombreuses valeurs admirables. Toutefois, certaines dispositions problématiques s'y trouvent toujours. Selon la section 3: «La vie communautaire à l'UTW», les étudiantes et étudiants doivent s'abstenir de «l'intimité sexuelle qui viole le caractère sacré du mariage entre un homme et une femme.»³ La section 4, «Domaines de discernement attentif et de sensibilité» stipule que «l'intimité sexuelle est réservée pour le mariage entre un homme et une femme, et que dans le cadre de cette relation se trouve l'intention de Dieu que le mariage soit apprécié en tant que moyen propice à l'intimité conjugale et à la procréation.»⁴ On ne peut faire fi que ces définitions portées à l'union conjugale entre un homme et une femme excluent à la fois les personnes qui s'identifient en tant que trans*, les relations polyamoureuses, d'autres formes de non monogamie, des couples homosexuels non mariés, des couples homosexuels mariés, ainsi toute autre forme d'expression sexuelle, chose qui rend invisibles les couples LGBT et autres minorités sexuelles marginalisées.

Au cours des douze années écoulées depuis *Université Trinity Western c British Columbia College of Teachers* (2001), plusieurs changements importants quant aux relations homosexuelles ont été adoptés par le droit canadien. D'abord, le mariage homosexuel a été légalisé au Canada. Ensuite, les couples homosexuels peuvent maintenant adopter des enfants dans de nombreuses régions au pays, et des familles «triparentales» ont été reconnues par certaines juridictions. Certes, nous croyons qu'une institution académique de droit ne serait pas en mesure d'offrir à la fois une véritable éducation juridique

³ [TRADUCTION] L'entente sur la convention collective communautaire de l'Université *Trinity Western* à la page 3, disponible en ligne: <<http://twu.ca/studenthandbook/twu-community-covenant-agreement.pdf>>.

⁴ [TRADUCTION] *Ibid* à la page 4.



complète quant à ces derniers concepts, tout en exigeant que ses étudiantes et étudiants, professeures et professeurs, et employées et employés signent une convention qui dénigre ceux-là.

Peu importe si elle est appliquée en pratique, la convention est un document important, voire de valeur symbolique, pour l'Université. Elle fait valoir l'idée que les étudiantes et étudiants et les familles LGBT qui souhaitent fréquenter l'Université *Trinity Western* ne sont pas sur le même pied d'égalité par rapport aux autres. Qui plus est, la convention permet non seulement la discrimination institutionnalisée contre les membres de la communauté LGBT de l'UTW, elle favorise une telle discrimination.

Notre principale préoccupation est qu'une faculté de droit à l'UTW créerait un environnement académique discriminatoire pour les étudiantes et étudiants potentiels appartenant à la communauté LGBT, et enverrait un message néfaste au sujet du statut légal et juridique de la communauté LGBT en général. Comme il est actuellement stipulé, la convention distingue expressément entre les étudiantes et étudiants, professeures et professeurs, employées et employés LGBT, et leurs homologues hétérosexuels. C'est pourquoi nous tenons à souligner fermement notre position qu'un esprit qui vise un environnement sans discrimination et sans inégalités est fondamental au bien-être d'une communauté universitaire et à l'exercice de la profession juridique.

Veuillez recevoir, Mesdames, Messieurs, l'expression de nos sentiments les plus sincères.

Le comité exécutif de OUTLAW de l'Université d'Ottawa

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Dear Mr. Tremblay, Mr. Herman, Ms. Wolfe, and Ms. Pawlitza:

Re: Trinity Western University School of Law Proposal

We are writing as current students and alumni from Osgoode Hall Law School at York University. We wish to express our concerns regarding the application of Trinity Western University ("TWU") to establish a law school. We understand that the Federation of Canadian Law Societies is currently considering TWU's proposal.

We are particularly concerned by TWU's requirement that its students sign a community covenant agreement. The covenant requires that students abstain from "sexual intimacy that violates the sacredness of marriage between a man and a woman".¹ There are "formal accountability procedures to address actions by community members that represent a disregard for this covenant."² The TWU Student Handbook provides that "[i]f a student, in the opinion of the University, is unable, refuses or fails to live up to their commitment, the University reserves the right to discipline, dismiss, or refuse a student's readmission to the University."³

The covenant at TWU discriminates on the basis of sexual orientation, contrary to the *Canadian Charter of Rights and Freedoms* and provincial human rights legislation. While heterosexual students are permitted to practice sexual intimacy within marriage, the definition of marriage in the covenant excludes same-sex marriage. Non-heterosexual married couples are singled out by the covenant and barred from sexual intimacy, at the risk of expulsion. TWU's definition of marriage deprives LGBTQ students of rights that others enjoy, and is therefore discriminatory.

¹ Trinity Western University Community Covenant Agreement at page 3, available online:
<<http://twu.ca/studenthandbook/twu-community-covenant-agreement.pdf>>

² *Ibid.* at page 5.

³ Trinity Western University Student Handbook, Student Accountability Process, available online:
<<http://twu.ca/studenthandbook/university-policies/student-accountability-process.html>>

In addition, we are concerned about the suitability of TWU as a forum for legal education. Law schools are to propagate the values of the Canadian legal system, including those set out in the *Charter of Rights and Freedoms*. While the *Charter* may not apply to private schools such as TWU, all law schools should seek to uphold it. TWU maintains a covenant that marginalizes individuals on the basis of sexual orientation, contrary to the *Charter* and provincial human rights legislation. It is evident that policies at TWU contradict the values of the Canadian legal system. We conclude that the school would fail to provide a balanced legal education.

The effect of the covenant on all non-heterosexual students is unacceptable. It sends a message that LGBTQ students are not welcome within the TWU community. As explained by Justice L'Heureux-Dube in 2001, you cannot "separate condemnation of the 'sexual sin' of 'homosexual behaviour' from intolerance of those with homosexual or bisexual orientations... [In] the words of the intervener EGALE, '[r]equiring someone not to act in accordance with their identity is harmful and cruel. It destroys the human spirit. Pressure to change their behaviour and deny their sexual identity has proved tremendously damaging to young persons seeking to come to terms with their sexual orientation' (factum, at para. 34)."⁴ TWU's claims that the covenant does not prevent non-heterosexual students from attending the University wrongly suggest that it is "possible to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood."⁵

As current and future officers of the court, we are committed to promoting the values of the *Charter* within our own practices. We believe that our colleagues should be exposed to a learning environment that fosters the same dedication to equality. We ask that these concerns be weighted heavily in considering TWU's proposed law school.

Sincerely,

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⁴ *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772, 2001 S.C.C. 31 at para 69.

⁵ *Ibid.*

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Waleed Malik, JD Candidate (2014)

Margarita Malkina, JD Candidate (2015)

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Simon Marmur, JD Candidate (2013)

Louise Marriott, JD Candidate (2013)

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Stacy McFarlane, JD Candidate (2013),
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James Mencil, JD Candidate (2015)

Jeffrey Mitchell, JD Candidate (2014)

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Jaime Mor, JD Candidate (2015)

Jessica Morris, JD Candidate (2013)

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Trevor Moum, JD Candidate (2015)

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Saneliso Moyo, JD Candidate (2014),
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David Newton, JD Candidate (2015)

Thomas Ng, JD/MBA Candidate (2016)

David Nisker, JD Candidate (2015)

Robin Nobleman, JD Candidate (2015),
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Tim Osborne, JD Candidate (2015)

Lisa Ostrom, JD Candidate (2014)

Oscar Palma, JD Candidate (2014)

Courtney Palmer, JD Candidate (2013),
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Lee Parkin, JD Candidate (2014)

Alyssa Peeler, JD Candidate (2015)

Nicole Petersen, JD Candidate (2013)

Willow Pivarnyik, JD Candidate (2013)

Jacob Polowin, JD Candidate (2015),
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Karina Pylypczuk, JD Candidate (2015)

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Susanna Quail, JD Candidate (2014)

Deborah Rachlis, JD Candidate (2014)

Jeremy Rankin, JD Candidate (2015)

Nikita Rathwell, JD Candidate (2014)

Luke Reid, JD Candidate (2014)

Sherazadi Remtulla, JD Candidate (2014)

Mariko Rivers, JD Candidate (2015)

Evguenia Rokhline, JD Candidate (2014)

Brandon Rooney, JD Candidate (2013)

Ebony Rose, JD Candidate (2015)

Erin Rosenzweig, JD Candidate (2013)

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Jonathan Samosh, JD Candidate (2013),
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Brett Saulnier, JD Candidate (2014)

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College of Law Gay/Straight Alliance
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March 18, 2013

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Dear Sirs and Mesdames,

Re: Trinity Western University School of Law Proposal

We are current students and alumni from the University of Saskatchewan, College of Law. We write to express our concern respecting the application by Trinity Western University ("TWU") to establish a law school. We are particularly concerned by the school's requirement that students at TWU sign a "community covenant agreement". Our concern is that the covenant requires abstinence from "sexual intimacy that violates the sacredness of marriage between a man and a woman".¹ As you are aware, the covenant further provides that "[if] a student, in the opinion of the University, is unable, refuses or fails to live up to their commitment, the University reserves the right to discipline, dismiss, or refuse a student's readmission to the University."²

The covenant at TWU discriminates on the basis of sexual orientation, contrary to *Canadian Charter of Rights and Freedoms* and provincial human rights legislation. While heterosexual students are permitted to practice sexual intimacy within marriage, the definition of marriage in the covenant excludes same-sex marriage. Non-heterosexual couples are singled out by the covenant, and are barred from sexual intimacy while attending TWU at the risk of expulsion.

¹Trinity Western University Community Covenant Agreement at page 3, available online:
<<http://twu.ca/studenthandbook/twu-community-covenant-agreement.pdf>>

²Trinity Western University Student Handbook, Student Accountability Process, online:
<<http://twu.ca/studenthandbook/university-policies/student-accountability-process.html>>

TWU's definition of marriage deprives LGBT students of rights that others enjoy, and is therefore discriminatory.

We are concerned about the suitability of TWU as forum for legal education. Law schools are to propagate the values of the Canadian legal system, including the values set out in the *Canadian Charter of Rights and Freedoms*. While the *Charter* may not apply to private schools such as TWU, all law schools should seek to uphold it. TWU maintains a discriminatory covenant that marginalizes individuals on the basis of sexual orientation, contrary to the *Charter* and provincial human rights legislation. It is evident that policies at TWU contradict the values of the Canadian legal system. We conclude that the school would fail to provide a balanced legal education.

Furthermore, the effect of the covenant on all non-heterosexual students is unacceptable. It sends a message that LGBT students are not welcome within the TWU community. As explained by Justice L'Heureux-Dube in 2001, you cannot "separate condemnation of the 'sexual sin' of 'homosexual behaviour' from intolerance of those with homosexual or bisexual orientations... [In] the words of the intervener EGALE, '[r]equiring someone not to act in accordance with their identity is harmful and cruel. It destroys the human spirit. Pressure to change their behaviour and deny their sexual identity has proved tremendously damaging to young persons seeking to come to terms with their sexual orientation' (factum, at para. 34)."³ TWU's claims that the covenant does not prevent non-heterosexual students from attending the University wrongly suggest that it is "possible to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood."⁴

We, as current and future lawyers and officers of the court, are committed promoting the values of the *Charter* within our own practices. We believe that our colleagues should be exposed to a learning environment that fosters the same dedication to equality

Sincerely,

Jill Bishop, JD Candidate (U of S 2013)
Sachia Longo, JD Candidate (U of S 2013)
Ryan Dawodharry, JD Candidate (U of S 2013)
Georges Mouton, LLM (U of S 2011)
Sara Hansvall, JD Candidate (U of S 2013)
Marty Wales, LSA President, JD Candidate (U of S 2013)
Heather Hoiness, JD Candidate (U of S 2013)
Dustin Gillanders, JD Candidate (U of S 2013)
Zukhruf Baig, JD Candidate (U of S 2013)
Matthew Straw, JD Candidate (U of S 2013)
Michael Stevens, JD Candidate (U of S 2013)
Kelsey O'Brien, JD Candidate (U of S 2013)
Samuel Edmondson, JD Candidate (U of S 2014)
Steven Robertson, JD Candidate (U of S 2014)

³ *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772, 2001 S.C.C. 31 (at para 69).

⁴ *Ibid.*

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Janelle Anderson, JD Candidate (U of S 2014)
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Lorelle Binnion, JD Candidate (U of S 2015)
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Logan Kachur, JD (U of S 2012)
Peter Kazman, JD (U of S 2012)
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Matthew Fox, JD Candidate (U of S 2015)
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Kathleen McLean, JD Candidate (U of S 2014)
Richika Bodani, JD Candidate (U of S 2014)
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Tovah Moffat, JD Candidate (U of S 2015)
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Kristen Hubbard, JD Candidate (U of S 2015)
Calen Nixon, JD Candidate (U of S 2014)
Stefanie Kingsbury, JD Candidate (U of S 2015)
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Caolan Lemke, JD Candidate (U of S 2015)
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Benjamin Rakochy, JD Candidate (U of S 2014)
Lerissa Thaver, JD Candidate (U of S 2013)
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Kathy He, JD Candidate (U of S 2014)
Rajan Bath, JD Candidate (UBC 2014)
Kimberly Chatfield, JD Candidate (U of S 2014)
David Piche, JD Candidate (U of S 2015)
Patrick Hopf, JD Candidate (U of S 2014)
Katelyn Sheehan, JD Candidate (U of S 2015)
Amelia Lowe-Muller, JD Candidate (U of S 2015)
Robin Burlingham, JD (U of S 2012)
Keira Lintz, JD Candidate (U of S 2014)
Theresa Cooper, JD Candidate (U of S 2015)
Rachel A. Snow, JD Candidate (U of S 2013)
Erica Tang, JD Candidate (U of S 2015)
Glen Nesbitt, JD Candidate (U of S 2013)
Kevin Hoy, JD Candidate (U of S 2014)
Meagan Weber, JD Candidate (U of S 2014)
Janice Charnstrom, JD Candidate (U of S 2014)
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Grace Waschuk, JD Candidate (U of S 2015)
Katherine E. Pintye, JD Candidate (U of S 2013)
Tyler Nightingale, JD Candidate (U of S 2013)
Daniel Pagan, JD Candidate (U of S 2015)
Ryan Nagel, JD Candidate (U of S 2015)
Jacob Young, JD Candidate (U of S 2015)
Amanda Baron, JD (U of S 2012)
Priscila Tamara Padilla, JD Candidate (U of S 2015)
Tyler Arnold, JD Candidate (U of S 2014)
Micah Kowalchuk, JD Candidate (U of S 2013)
Kevin Miller, JD (U of S 2011)
Breanne Lothian, JD Candidate (U of S 2015)
Alexandra Fox, JD Candidate (U of S 2013)
Graham Quick, JD Candidate (U of S 2015)
Ryan Kitzul, JD Candidate (U of S 2013)
Samantha MacKinnon, JD Candidate (U of S 2014)
Mohammad Hajivandi, JD Candidate (U of S 2015)
Clark Hartnett, JD Candidate (U of S 2014)
Rochelle Blocka, JD Candidate (U of S 2015)

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Elise Calvert, JD Candidate (U of S 2014)
Sean Galloway, JD Candidate (U of S 2015)
Celia Ngo, JD Candidate (U of S 2014)
Megan Lorenz, JD Candidate (U of S 2013)
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Scott Allen, JD Candidate (U of S 2013)
Sarah Miller, JD Candidate (U of S 2014)
Fanny Deng, JD Candidate (U of S 2013)
Sandra Ilic, JD Candidate (U of S 2013)
Dustin Patzer, JD Candidate (U of S 2013)
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Leanne Alport, JD Candidate (U of S 2013)
Hayden McGuire, JD Candidate (U of S 2013)
Graham Christie, JD Candidate (U of S 2014)
Brooklyn Thorpe, JD Candidate (U of S 2015)
Lincoln Crooks, JD Candidate (U of S 2013)
Milad Alishahi, JD Candidate (U of S 2013)
Lauren Ignacz, JD (U of S 2012)
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Ada Tang, JD Candidate (U of S 2013)
Lindsay Hill, JD Candidate (U of S 2014)
Paul Kangles, JD Candidate (U of S 2013)
Michael Ramsay, JD Candidate (U of S 2013)
Shawn Heinz, JD Candidate (U of S 2015)
Meghan Vanderkuur, JD Candidate (U of S 2015)
Carly Romanow, JD Candidate (U of S 2014)
Taylor Carson, JD Candidate (U of S 2015)
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Emily Denstedt, JD Candidate (U of S 2014)
Leslie Welsh, JD Candidate (U of S 2015)
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March 18, 2013

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Dear Sirs and Mesdames,

Re: Trinity Western University School of Law Proposal

I have had the advantage of reading two letters from students at the University of British Columbia Faculty of Law regarding the proposed law school at Trinity Western University (herein “TWU”). While they represent two starkly opposed positions, I am in agreement with each of them in different areas, and I beg leave to respond to the letter of the coalition united in support of the position of Dean Flanagan and the Canadian Council of Law Deans (“the letter”).

I neither support nor oppose necessarily a law school at Trinity Western University. I am merely concerned that if only the voices of those in favour and those against the proposed school are heard, a holistic view of both freedom and equality, which form part of Canadian society’s core values, will be lost. I think the concerns expressed in the letter would render vacuous freedom of thought, belief, and conscience, with no perceptible gains in diversity and equality rights, while there may be better approaches to this issue that preserve both religious freedom and equality rights.

I support the equality rights of sexual minorities and diversity, and I agree that there must be a balance between religious freedom and the rights of sexual minorities. In my opinion, however, the letter actually expresses a view that if widely held, would erode genuine diversity of thought, opinion, belief, conscience, and identity. It would allow someone to remain nominally committed to

Christian values, but would not allow him or her to determine them or at least to practice them. For example, the letter states that “while we are respectful of Christian values, a law school should promote an inclusive environment that is fertile ground for debate.” It is a bit disingenuous to say that one respects others’ values, but that they should not practice them. It is also my experience that there is little or no debate on the equality rights of gays and lesbians at UBC (probably because it is considered a settled matter), and greater inclusivity is unlikely to change that.

TWU’s Community Covenant, which has raised much concern, bars its students from “sexual intimacy that violates the sacredness of marriage between a man and a woman.” This is a clear statement of what TWU ostensibly considers to be Christian values. First and foremost, it requires celibacy in most cases and discriminates against sexual intimacy in general. Second, it gives marriage a privileged position, discriminating against the unmarried. Third, it discriminates against same-sex marriage. This covenant does infringe on the rights of students (not necessarily “others” given a community context) to their sexual identity, and I agree that it may be considered homophobic.

Nevertheless, I think this balance between religious freedom and the rights of sexual minorities should give standing to the legal profession as a whole, not each institution, especially private ones. That is, we want a diverse legal profession and a diverse bar, because as the letter pointed out, the legal profession fails in its most basic goals of access to justice when a lack of diversity in the bar produces a legal system that is tone-deaf to the perspectives of certain groups of people. The letter itself expresses a primary concern of diminishing diversity of opinion in the legal profession as a whole, the implication being that members of the queer community will end up forming a smaller proportion of the legal profession if TWU opens a law school. (It is also primarily concerned that development of critical thought and legal analytical skill would be impaired by a lack of sexual minorities in a law school, which is dubious. I hope my analytical skills develop independently of the sexuality of my colleagues.) There is simply no reason to interfere with the admissions of a private law school on representativeness grounds if the legal profession as a whole will remain balanced and representative.

I would like to bring your attention to two things. The first is that there are gay and lesbian students at TWU, who have seen and agreed with the Community Covenant. (I presume they are celibate by choice, and would likely contribute positively to diversity in the legal profession.) The second is that establishing affirmative-action programs in the British Columbia’s three public law schools, if absolutely necessary for diversity in the profession, is a viable and legal option that is far less intrusive into the substantive freedom of religion, thought, belief and conscience of private institutions.

The fact that there are gay and lesbian students at TWU is an encouraging sign that a greater discourse among Christians around issues of homophobia is taking place. In fact, many Christian scholars have devoted their studies to this area. That is why any change in values that leads to a change in the Community Covenant should come from within TWU, not from external pressures, if at all reasonably possible. This is what it means to be free. Otherwise, there can be little respect for autonomous decision-making in the private sector.

Obviously, if the Community Covenant is to be found illegal, this and other letters concerning it would be moot, and TWU’s proposal would get its fair hearing. However, if it is legal, the question is why we as a society would allow such a thing. I think it is because we have come to a position of respect for others’ religious views and their right to practice them. Sometimes such rights will be

forfeited or give way to a more valued right. That is not the case here. There are softer measures that can ameliorate the harms of freedom of religion in this context.

Admittedly, affirmative-action programs have some drawbacks. They should only be created when there is evidence of underrepresentation. They are blunt instruments. Their creation and use is political and selective. They require a disclosure of privacy during admissions (although this already occurs in UBC Law's alternative admission streams). These drawbacks are small in comparison to the consequences of disallowing a core aspect of TWU's identity and existence as an independent institution of higher learning. This would actually squelch diversity as all law schools will be required to have a similar make-up and admit a similar student body as all other law schools. No weight was given in the letter to the possible benefits of adding a law school where celibacy and marriage are a part of both values and conduct, either intrinsic benefits or diversity benefits.

In addition, even if TWU starts a law school we may not need affirmative action if there is evidence that as a whole the law school population in BC remains balanced and representative. As an example of a how diversity brings benefits, even if few queer students attend a hypothetical TWU law school, but gays and lesbians attend the dominant publicly funded law schools in a greater proportion than their share of the general population as a result, this significant boost in the queer population of a law school such as UBC Law may bring many benefits to the queer community. There would be more voices within the public institutions coming from a sexual minority perspective. There would be a greater critical mass of queer students for a greater chance of specialization in issues of sexuality and the law, and this specialization would be far more potent than otherwise. This greater concentration of gay and lesbian students may come about through affirmative action, but it will most likely occur even without. Diversity in action therefore does not stand opposed to freedom in this case, by achieving one you get both.

I agree with the letter that TWU must meet its public obligations. I think those obligations should be imposed on them only after careful consideration.

I hope that TWU reconsiders its position regarding the Community Covenant, and preserve it only if it continues to serve their student community in a positive way by adhering students to their own values. Accreditation should not be determined on the basis of the religious beliefs of students. As I stated earlier, I do not necessarily support the creation of another law school in British Columbia; there are already three after all. There may be many valid reasons to deny accreditation and I hope that only institutions that meet the highest standards of excellence qualify for a law school. However, it is my wish that the relevant accreditation authorities consider the alternatives to denying accreditation if diversity in the legal profession becomes the only concern.

Sincerely,

Edward Wong
JD Candidate 2015
UBC Faculty of Law



THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Office of the President
Cabinet du président

March 18, 2013

Via email: gtrembly@mccarthy.ca

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

Dear Mr. Tremblay:

Re: Trinity Western University School of Law Proposal

I write on behalf of the Canadian Bar Association concerning the application of Trinity Western University for an assessment of whether its proposed law degree meets the Federation's national standards for approving new law degree programs.

The CBA is a national association representing approximately 37,000 jurists, including lawyers, notaries, law teachers and students across Canada, with a mandate that includes seeking improvements in the law and the administration of justice, and promoting equality in the law and in the legal profession.

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

We commend the Federation for its consultations and deliberations in establishing the national standards. In assessing an applicant's compliance with these standards, the Federation is able to:

- a) In its discretion, entertain submissions from persons, organizations, or institutions other than applicants;
- b) Make additional inquiries with the applicant and request such additional written information as it sees fit; and
- c) Control its own process in considering applications for new law degree programs.¹

¹ See the *Final Report of the Task Force on the Canadian Common Law Degree*, Federation of Law Societies of Canada (October 2009), online: <http://www.flsc.ca/documents/Common-Law-Degree->

We have had an opportunity to review the letter from the Council of Canadian Law Deans and your response. We question the perceived limitations on the Federation's role in applying the national standards, and urge you to reconsider your stance in pursuit of the law societies' duty to regulate the legal profession in the public interest.

In our view, the Federation and the Committee charged with approving new Canadian law degree programs must strike a balance between freedom of religion and equality, and give full consideration to its public interest mandate and to the values embodied in Canadian human rights laws.

Based on the delegations of power from its constituent law societies, the Federation has a duty to go beyond a strict determination of a proposed law school's compliance with the national standards. It must assess whether the institution and its program complies with Canadian law, including the protections afforded by the *Canadian Charter of Rights and Freedoms* and the human rights legislation in B.C., and in every province and territory where a proposed law degree may be recognized by the law societies for admission to bar.

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

These are complex issues. Indeed, CBA members hold a range of views on the question of the approval of this particular law school. The CBA's Sexual Orientation and Gender Identity Conference (SOGIC) and Equality Committee have articulated one perspective in the attached letter.

The CBA would be pleased to assist in whatever way you believe would be appropriate.

Yours truly,

A handwritten signature in black ink, appearing to read 'Robert C. Brun', with a stylized flourish at the end.

Robert C. Brun, Q.C.

cc : See Appendix A



March 18, 2013

Via email: grtremblay@mccarthy.ca

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

Dear Mr. Tremblay:

Re: Trinity Western University School of Law Proposal

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

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

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

A. SOGIC and the Equality Committee's Concerns

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

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

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

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

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

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

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

B. Trinity Western's Discriminatory Rules and Practices

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

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

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

³ [2012] 1 S.C.R. 395 (*Doré*).

⁴ *Ibid.*, at para 24.

⁵ *TWU*, *supra* note 2, at para 27.

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

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

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

The Covenant is meant to apply on and off campus and violations may lead to disciplinary sanctions, including dismissal in the case of faculty and staff and removal in the case of students.⁹

The fact that no student may ever be expelled for breaching the Covenant's sexual intimacy rules is not determinative. As acknowledged by the Supreme Court of Canada in *Vriend v. Alberta*,¹⁰ the mere fear of discrimination may in and of itself cause serious psychological harm: "Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. [...] The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination."¹¹

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

I am dismayed that at various points in the history of this case the argument has been made that one can separate condemnation of the "sexual sin" of "homosexual behaviour" from intolerance of those with homosexual or bisexual orientations. This position alleges that one can love the sinner, but condemn the sin. ... The status/conduct or identity/practice distinction for homosexuals and bisexuals should be soundly rejected [...] [Emphasis added]¹³

C. Trinity Western Covenant Incompatible with Human Rights Legislation

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

41 (1) If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a physical or mental disability or by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or corporation must not be considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons. [Emphasis added]

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

⁹ *Id.* As outlined in the Student Handbook, "[i]f a student, in the opinion of the University, is unable, refuses or fails to live up to their commitment, the University reserves the right to discipline, dismiss, or refuse a student's re-admission to the University" (p. 23).

¹⁰ [1998] 1 S.C.R. 493 (*Vriend*).

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

¹² 2013 SCC 11 (*Whatcott*).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²³ *Supra* note 23, at para 130.

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

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

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

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

D. Following these recommendations would not hamper freedom of religion

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

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

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

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

²⁵ S.B.C. 1969, c. 44,

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

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

²⁸ *Ibid.* [emphasis added].

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

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

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

E. The U.S. Experience

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

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

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

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

³⁰ [1996] 1 S.C.R. 825.

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

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

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

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

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

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

³⁷ *Ibid.*, at p. 604.

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

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

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

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

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

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

³⁸ 561 U.S. ___ (2010) ("*CLS*").

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

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

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

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

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

⁴⁴ *Ibid.*, at p. 12.

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

F. Conclusions

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

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

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

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

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

Yours truly,

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

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Co-chair, CBA Sexual
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Level Chan
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cc: See Appendix A

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

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

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

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

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

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

41. (1) If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a physical or mental disability or by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or corporation must not be considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons.

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

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

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

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

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

- 6.** (1) No person shall refuse to employ or to continue to employ any individual
- (a) on a discriminatory basis, including discrimination in any term or condition of employment; or
 - (b) because the individual has been convicted of a criminal or summary conviction offence that is unrelated to the employment or intended employment of the individual.
- (4) This section does not apply to
- [...]
 - (c) an exclusively religious or ethnic organization or an agency of such an organization that is not operated for private profit and that is operated primarily to foster the welfare of a religious or ethnic group with respect to persons of the same religion or ethnic origin as the case may be, if age, colour, creed, ethnic or national origin, family status, marital status, disability, political belief, race, religion, sex, sexual orientation or source of income is a reasonable occupational qualification.
- 10.** (1) No person or agency carrying out a public function, including fire protection or hospital services, through the use in whole or in part of functions volunteers, shall exclude, expel or limit any volunteer applicant on a discriminatory basis.

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

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

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

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

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

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

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

[...]

(3) Subsection (1) does not apply

[...]

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

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

[...]

(8) This section does not apply to an employer

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

[...]

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

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

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

[...]

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

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

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

5. (1) No person shall in respect of
- (a) the provision of or access to services or facilities;
 - [...]
 - (d) employment;
 - (e) volunteer public service;
 - [...]
- discriminate against an individual or class of individuals on account of
- (h) age;
 - (i) race;
 - (j) colour;
 - (k) religion;
 - (l) creed;
 - (m) sex;
 - (n) sexual orientation;
 - (o) physical disability or mental disability;
 - (p) an irrational fear of contracting an illness or disease;
 - (q) ethnic, national or aboriginal origin;
 - (r) family status;
 - (s) marital status;
 - (t) source of income;
 - (u) political belief, affiliation or activity;
 - (v) that individual's association with another individual or class of individuals having characteristics referred to in clauses (h) to (u).
6. Subsection (1) of Section 5 does not apply
- [...]
 - (c) in respect of employment, to
 - [...]
 - (ii) an exclusively religious or ethnic organization or an agency of such an organization that is not operated for private profit and that is operated primarily to foster the welfare of a religious or ethnic group with respect to persons of the same religion or ethnic origin, as the case may be, with respect to a characteristic referred to in clauses (h) to (v) of subsection (1) of Section 5 if that characteristic is a reasonable occupational qualification, or
 - (iii) employees engaged by an exclusively religious organization to perform religious duties;
 - (d) in respect of volunteer public service, to an exclusively religious or ethnic organization that is not operated for private profit and that is operated primarily to foster the welfare of a religious or ethnic group with respect to persons of the same religion or ethnic origin, as the case may be;
 - [...]

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

7. (1) No person shall, on the basis of a prohibited ground of discrimination,
- (a) refuse to employ or refuse to continue to employ an individual or a class of individuals; or
 - (b) discriminate against any individual or class of individuals in regard to employment or

any term or condition of employment.

[...]

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

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

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

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

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

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

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

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

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

7. (1) No employer shall

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

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

[...]

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

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

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

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

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

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

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

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

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

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

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

Appendix A – Carbon Copies

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- Deborah Wolfe, Director, Law School Programs, Federation of Law Societies of Canada dwolfe@flsc.ca

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Trinity Western University

- Dr. Jonathan S. Raymond, President, Trinity Western University president@twu.ca

March 19, 2013

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World Exchange Plaza
1810 – 45 rue O'Connor St.
Ottawa, Ont. K1P 1A4

Dear Sirs and Mesdames,

Re: Trinity Western University School of Law Proposal

We are a group of J.D. candidates and graduates at the University of British Columbia Faculty of Law (UBC Law) who believe that accreditation of the proposed law school at Trinity Western University (TWU) should not be determined on the basis of their religious beliefs. This letter was not circulated among students, alumni and faculty seeking signatures because we wanted to avoid escalating what is becoming a divisive issue among the students at our law school. Other students from UBC Law have also made a submission in opposition to the proposed law school. We wish to make it clear that their position is not representative of the student body as a whole.

As you know, the debate over TWU's proposal has developed as a result of the Community Covenant Agreement. The provision that has aroused the most attention is one where students are asked to "voluntarily abstain" from "sexual intimacy that violates the sacredness of marriage between a man and a woman." This sacredness referred to is derived from the Biblical foundation upon which TWU is based.

Because of the forthright position TWU holds on the expression of a person's sexuality, it is not surprising how quickly public discussion has turned to a debate

around discrimination and equality based on sexual orientation. Equality and tolerance are vital tenets of Canadian society and deserve attention. However, we feel that those who are quick to call for tolerance of the value they hold to be important (equality) also forget to be tolerant of those who hold other values that are equally fundamental under our Charter (freedom of religion).

As the British Columbia Civil Liberties Association recently reminded us, TWU is not to be judged by its beliefs. Founded by the Evangelical Free Churches of Canada and America, TWU's vision has always been to build an educational community for people sharing a faith in Jesus Christ and the Bible. TWU is a private, religious institution aimed at building a community of people who share a faith and a core set of beliefs. As a corporate body, TWU asks those who wish to join to make a public declaration that they will adhere to the beliefs of the community by signing the Covenant. Included, is their belief in Biblical marriage – between a man and a woman. Like any private institution, TWU has a right to require those joining to adhere to the beliefs held by the institution and upon which the institution has been built. Unfortunately, the institution's beliefs are being used as a reason to oppose its bid for a law school. To use TWU's religious beliefs to justify denying them the ability to offer a wider range of academic programs would severely undermine their freedom of religion.

Our peers have argued that the Community Covenant amounts to discrimination on the basis of sexual orientation, and that the Community Covenant is veiled homophobia. Moreover, some have argued that adherence to the Community Covenant would impair legal education and the legal community by diminishing diversity of opinion, stifling the development of critical thought, and denying legal education to queer students. We respectfully disagree with these arguments.

Every law school reflects a set of beliefs. As it stands, law schools have a secular emphasis in which religious views are in the minority, and are, in our experience, often openly derided. There is no reason why the secular world should have a monopoly on legal education. The legal profession and the classrooms of Canada's law schools would benefit greatly from the expansion of legal education in institutions that hold non-mainstream views. Furthermore, it is fallacious to argue that students would be hindered in their ability to contribute to the advancement of the legal community in British Columbia and Canada. Students at TWU law school would be taught the law, and will be required to uphold the law. To suggest otherwise does not accord with how our justice system works: judges and lawyers, regardless of their personal beliefs, are expected to apply the law.

The legal profession as a whole benefits from the diverse backgrounds and beliefs held by its practitioners and academics. Therefore, we must not be threatened by the idea that an institution with beliefs different from our own wishes to enter that space. Indeed, if this space thrives on a diversity of viewpoints, then we should be welcoming the expansion of legal programs that hold beliefs that may be different from our own.

Let us humbly put aside the debate on whether TWU's Covenant with their students is agreeable or not, and recognize that TWU has just as much freedom to hold such beliefs as the groups that oppose them. The issue underlying the discussion around TWU's proposed law school is not solely one of discrimination based on sexual orientation, but also one of upholding a private religious institution's right to operate in accordance with its religious beliefs.

Absent clear evidence that TWU's law program would not be taught in accordance with Canadian laws, there is no reason to deny accreditation. Accreditation of a law school should be based on the proposed program's ability to train law students to meet the basic legal competencies, skills, ethics, and professionalism required to be admitted to the bar; on whether the students graduating from such a law school are qualified to practice law; and, on whether the various bars across Canada have the capacity to admit the number of graduates each year. Accreditation should not be determined on the basis of the institution's religious beliefs and its graduates' voluntary adherence to such beliefs in their personal lives.

Respectfully,

Kate Addison, J.D. Candidate 2013
Samantha Chang, J.D. Candidate 2013
Geoff Dittrich, J.D. Candidate 2013
Ken Smith, J.D. Candidate 2013
Rebecca Stanley, J.D. Candidate 2014
Carmelle Dieleman, J.D. Candidate 2013
Jesse Dunning, J.D. Candidate 2013
Sean Hedley, J.D. Candidate 2015
Simon Charles, JD Graduate 2012

Christian Legal Fellowship – UWO Law Chapter
Western University Faculty of Law
1151 Richmond Street
London, Ontario, Canada
N6A 3K7

March 22, 2013

Laurie H. Pawlitza
Chair, Federation of Canadian Law Societies
Canadian Common Law Program Approval Committee
lpawlitza@torkinmanes.com

World Exchange Plaza
1810 – 45 rue O'Connor St.
Ottawa, Ont. K1P 1A4

Dear Ms. Laurie H Pawlitza,

Re: Trinity Western University Proposed Law School

The Christian Legal Fellowship (CLF) chapter of the University of Western Ontario law school supports the national CLF's official endorsement:

The Board of Directors of Christian Legal Fellowship is pleased to support the development of a School of Law at Trinity Western University. The proposed School of Law encourages students to understand the practice of law as public service and develop professional skills. We believe this will be valuable as the profession is in a state of transition. The proposed School of Law further encourages students to look for areas that are underserved by legal professionals. This includes serving the poor and vulnerable in our society, but also includes potential practice of law in smaller communities. Chief Justice MacLachlin has noted that access to justice is a growing problem in Canada and this proposed law school is attempting to resolve this problem.

We believe that a School of Law at Trinity Western University, a Christian university, could be very positive. It will no doubt have a strong focus on ethics, and imbue a high standard of integrity on students. The university strongly emphasizes servant leadership, which will be an asset to the profession of law.

As a national association of nearly 600 lawyers, law students, and associate members that identify as Christians, and having a mission statement that encourages members to integrate faith with the practice of law, we see the potential to have this integration at law school as a positive step.

In addition to the CLF's endorsement as a club, many Western Law students signed the online petition supporting the proposed law school and the right to establish a private, religious educational institution because they believe it to be desirable and inherently necessary in a democratic society. Further, opposition to the proposed law school, premised on the Trinity Western's "covenant" policies, must be considered in light of *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31. It is our desire that you give careful consideration to the positive impact the school's graduates will have on the practice of law and the sometimes negative public perception of the legal community.

Sincerely,

Christian Legal Fellowship Executive

Digital signatures are viewable at the following link:

http://www.ipetitions.com/petition/support_twu_law/signatures

Western Law Diversity Committee

Western University Faculty of Law
1151 Richmond Street
London, Ontario, Canada
N6A 3K7

March 22, 2013

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World Exchange Plaza
1810 – 45 rue O'Connor St.
Ottawa, Ont. K1P 1A4

Dear Sirs and Mesdames,

Re: Trinity Western University School of Law Proposal

We are current students at Western University's Faculty of Law in London, Ontario. We wish to express our concern about the proposed establishment of a faculty of law at Trinity Western University (TWU). Our concern centres on the restrictive Community Covenant agreement that all students must sign. This covenant bars students from engaging in "sexual intimacy that violates the sacredness of marriage between a man and a woman". Failure to abide by the covenant gives TWU the right to discipline, dismiss, or refuse to readmit the student. We believe this covenant would have a detrimental impact on student life at this proposed law school, and does not foster an ideal state of Canadian legal practice.

Many Canadian law schools have written letters expressing opposition to TWU's proposal. We wish to bring attention to the stifling of diversity and diminishment of quality of student life that would inevitably occur at TWU's law school. Western University has long been recognized for its commitment to student life, and our leaders have worked tirelessly to build Western's reputation for student experience. Our campus organizations, including the University Students' Council and Department of Housing, have laboured for years to ensure *all* students are treated equally and enjoy a wide range of opportunities for personal and professional success. The high level of diversity at Western University is our strength and the result of actively and continually challenging discrimination.

Requiring students belonging to sexual minority groups to abandon or suppress an integral part of their identity is an affront to Canadian values. It was only in the past decade that LGBTQ Canadians fully earned the right to be treated as equals under the law. However, LGBTQ individuals must still actively combat bullying in schools and heteronormativity in the workforce. LGBTQ students continue to take their own lives before they even have the opportunity to enter undergraduate, professional or graduate studies. Slamming the closet door on law students who have successfully triumphed over the many challenges of coming out is both harmful and unacceptable. Further, preventing students of all sexual orientations from engaging in premarital sex is not properly within the realm of university administration.

Canada's legal industry has long struggled with diversity in practice. The percentage of female law school graduates still does not align with the percentage of practicing female lawyers. Many racial, ethnic and sexual minorities are less likely to secure an articling position than their majority counterparts. Many LGBTQ lawyers are uncomfortable being open about their sexuality at work. Minority advancements in law have been hard fought and slow to achieve. Greater diversity in legal practice requires attitudinal shifts in legal education, and TWU's covenant embodies and fosters the type of oppression which has no place in Canadian legal education or practice.

It should be noted that students voluntarily select TWU as their university of choice; however, demand for legal education continues to grow, even outpacing the growth of available articling positions. Forcing students to choose between the study of law and sexual independence is against the spirit of freedom and equality present in Canadian society and Canadian law.

We hope the Law Society of British Columbia and the Federation of Law Societies of Canada take careful consideration of the concerns expressed in this letter before reaching a decision. It is also our hope that TWU reconsiders the restrictive language of its Community Covenant to improve the quality of life for its present and future students.

Sincerely,

William Metcalfe Lee	JD/HBA 2014
Lawrence Burns	JD 2014
Corey Critch	JD 2015
Meredith MacGregor	JD 2014
Thomas Shaw	JD 2015
Stefanie Di Massa	JD 2015
Caitlin Cross	JD 2015
Kathryn Ball	JD 2014
Patrick Shaunessy	JD/MBA 2014
Sabrina Van Damme	JD 2013
Elka Dadmand	JD 2013
Edward O'Dwyer	JD 2013
Cheryl Kornder	JD 2015
Jonathan Rajzman	JD 2014
Maia abbad	JD 2015
Ahad Ahmed	JD 2015
Samita Pachai	JD 2015
Deema Elshourfa	JD 2014
Julia Brown	JD 2013
Rachel Bengino	JD 2014
Josh Shields	JD 2013
mattison Chinneck	JD 2015
Charles Jordan Binns	JD 2016
Aaron Baer	JD 2013
Daniel Levine	JD 2014
Emily Carroll	JD 2014
Meredith Baker	JD 2015
Patricia Gordon	JD 2014
Tori Crawford	JD 2014
Adam Davis	JD 2013
Rob Lanteigne	JD 2014
Elizabeth Barrass	JD 2015
Jordan Michael Korn	JD 2014
Scott Robinson	JD 2013
Scott Robinson	JD 2013
Shaunak Desai	JD 2013
Ciara Pittam	JD 2014
Shirelle Goodman	JD 2015
Holly Cunliffe	JD 2013
Blair Hicks	JD 2013
Gavin Mah	JD 2013
Zachary Silverberg	JD 2014
Devin Fulop	JD 2014
Kristine Spence	JD 2013

Emily Stockley	JD 2013
Serena Gohal	JD 2013
Elizabeth Graper	JD 2013
Tamara Zdravkovic	JD 2013
Brittany Tuer	JD 2014
Agnieszka Kus	JD 2015
Jessica Elie	JD 2013
Samantha Woolley	JD 2014
Rachel Laurion	JD 2014
Denise Brunsdon	JD/MBA 2015
Alexandra MacKenzie	JD 2013
Kenny Choi	JD 2013
Peter Corum Van Esch	JD 2013
Doug Letto	JD 2015
Katherine Mazur	JD 2015
Reet Hess	JD 2014
Hilary Chun	JD 2015
Geoffrey Lowe	JD 2015
Carson Pillar	JD 2015
Jason Rosenberg	JD 2014
Amanda Laird	JD 2015
Aparna Bhushan	JD 2015
Jessica Page	JD 2015
Samantha Wolfish	JD 2014
Laura Meschino	JD 2015
Senayit Belay	JD 2015
Conrad Lee	JD 2014

For Immediate Release – March 20, 2013

For media inquiries contact: Jennifer Watton

Tel: 604.513.2027 ext. 3341

Trinity Western University appreciates the many law students who have spoken this week both for and against the idea of a School of Law at TWU.

As a university with a 51-year history in higher education in British Columbia, TWU actively engages in open, respectful debate and dialogue on any topic, including its proposal for a law school. Trinity Western University is known as a community built on principles of acceptance, respect and compassion. It is, however, also a private, faith-based community and was chartered by the Legislature of British Columbia to be such. As a faith-based community, TWU does have core religious beliefs and values and, we trust, has the religious freedom in Canada to maintain such without penalty or discrimination.

In 2001 the Supreme Court of Canada examined this very issue with respect to an application by TWU for a teacher education program. In a very clear 8 to 1 decision the Supreme Court of Canada indicated that TWU could maintain its religious views and still fully participate in Canadian society. The Supreme Court stated: *...freedom of religion is not accommodated if the consequence of its exercise is the denial of the right of full participation in society..*

TWU has submitted a proposal for a School of Law that was rigorously researched and developed in consultation with many lawyers, judges, academics and other leaders across the country. The proposal is for a small law school in Langley with a focus on professionalism, ethics, skills training and specializations in charities law and entrepreneur law. While this would be the first faith-based law school in Canada, there are around 30 in the United States including Notre Dame, Boston College, Baylor and Pepperdine.

TWU is proud of the contribution we make in Canada as a Christian university. Consistent with our mission and core values, the University will continue in its purpose of pursuing excellence in research and scholarship and developing individuals who are dedicated to treating all people with dignity and respect so that the world may experience Christ's truth, compassion, reconciliation, and hope.

While we value and respect differing views, we trust that a faith-based community still has the religious freedom in Canada to maintain its beliefs and participate fully in society.

-30-

[Proposal for School of Law](#)
[TWU Essence & Ends](#)





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February 5, 2013

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Dear Sirs/Mesdames,

Re: Trinity Western University's Proposed Law School

The Federation of Law Societies of Canada (the Federation) has been asked to approve an application for a law degree program at Trinity Western University (TWU). We write to urge the Federation to reject the application due to TWU's discrimination against gays and lesbians in its hiring and admissions policies. These discriminatory policies make TWU unfit to prepare students for their role in upholding the rule of law and the human rights and equality principles that underlie our legal system in their careers as lawyers.

In the event that the BC government decides to accredit TWU to confer law degrees, it is our position that the Federation should not permit graduates to become licensed to practice law upon completion of their degree, bar exams and articles. At the very least, the Federation should require TWU law graduates to undertake additional study and meet entrance requirements set by the Federation's National Committee on Accreditation, similar to the process for foreign trained lawyers. The study and entrance requirements must be rigorous,

substantive and comprehensive in order to compensate for the shortcomings of a law program offered by an institution that unapologetically discriminates against gays and lesbians.¹

TWU's Discriminatory Policies

TWU is a Christian university and describes itself as “an arm of the church.” All students, faculty and staff are required to pledge “acceptance of the Bible as the divinely inspired, authoritative guide for personal and community life.” The University’s programs are established and implemented on the basis that scripture “must be the final and ultimate standard of truth, the reference point by which every other claim to truthfulness is measured.” Academic faculty are required annually to sign a statement of faith, which requires them to “agree with and agree to support at all times the position” that the bible is “the ultimate authority by which every realm of human knowledge and endeavour should be judged.”

All TWU students and staff must sign a “community code of conduct” pledging, among other things, not to engage in same-sex sexual intimacy. Applicants who do not make this pledge will not be hired or admitted to the University; breach of the pledge by those who do sign it can result in dismissal from the University.

The requirement that prospective students and staff must agree to abstain from same-sex sexual activity discriminates against gays and lesbians. The Supreme Court of Canada, which considered TWU’s policies in a 2001 case challenging the University’s ability to set up a teacher’s college, found that the policies create “unfavourable differential treatment” on the basis of sexual orientation.² The majority of the Court found that “a homosexual student would not be tempted to apply for admission, and could only sign the so-called student contract at a considerable personal cost.”³ While the discriminatory policies were found not to be unlawful because of the religious exemption provided to the University by section 41 of the BC *Human Rights Code*, the Court held that if a public university or government actor adopted TWU’s policies, it would violate the equality rights protected by human rights legislation and the *Canadian Charter of Rights and Freedoms*.

The Federation’s Role in Promoting the Public Interest, Professionalism and Ethics

The Federation of Law Societies acts as the gatekeeper to the profession of law in Canada. Its mission is to act in the public interest by “promoting the cause of justice and the Rule of Law” in a manner that is “focused on the public interest”, “responsible and accountable” and

¹ A comprehensive legal analysis supporting such a decision is provided by Professor Elaine Craig, “The case for the Federation of Law Societies rejecting Trinity Western University’s proposed law degree program” (2013) 25(1) C.J.W.L.

² *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772.

³ *Ibid.* at para. 25.

“consistent with the highest standards of professionalism, excellence, ethics and good governance.”⁴

The Federation is tasked with ensuring that all Canadian law schools comply with a national standard, which specifies the “competencies in basic skills, awareness of appropriate ethical values and core legal knowledge that law students can reasonably be expected to have acquired during the academic component of their education.”⁵

In West Coast LEAF’s submission, it is not in the public interest to train future lawyers in an institution governed by policies that discriminate on the basis of sexual orientation. To approve a law school with policies that would violate human rights law if implemented by any of Canada’s other law schools does not advance the Federation’s mission of “promoting the cause of justice and the Rule of Law”. In our view, it would be incompatible with the Federation’s mandate to act in the public interest and pursue the highest standards of professionalism and ethics for it to approve a TWU law degree.

The Federation’s national standard states that “ethics and professionalism lie at the core of the legal profession,” and the Federation “places particular emphasis on the need for law school graduates who seek entry to law society admission programs to have an understanding of ethics and professionalism.”⁶ As part of its ethics and professionalism requirements, the Federation requires students to demonstrate “an awareness and understanding of the ethical dimensions of the practice of law in Canada and an ability to identify and address ethical dilemmas in a legal context”, which includes “an ability to identify and engage in critical thinking about ethical issues in legal practice”.⁷

One of the ethical and professional duties of Canadian lawyers is the duty not to discriminate. The Federation’s Model Code of Conduct states that “A lawyer must not discriminate against any person,” and emphasizes that “A lawyer has a special responsibility to respect the requirements of human rights laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in human rights laws.”⁸ In our submission, a law school with policies that exclude gays and lesbians and, in the words of the Supreme Court of Canada, create “unfavourable differential treatment” on the basis of sexual orientation cannot impart on prospective lawyers a sufficient understanding of the ethical duty not to discriminate and to honour the obligations enumerated in human rights laws.

⁴ Federation of Law Societies of Canada, Mission and Values Statement, online: <<http://www.flsc.ca/en/our-mission/>>.

⁵ Federation of Law Societies of Canada, *Task Force on the Canadian Common Law Degree: Final Report*, (October 2009), online: <http://www.flsc.ca/_documents/Common-Law-Degree-Report-C.pdf>.

⁶ Federation of Law Societies of Canada, *Common Law Degree Implementation Committee: Final Report* (August 2011) at 15, online: <http://www.flsc.ca/_documents/Implementation-Report-ECC-Aug-2011-R.pdf>.

⁷ Ibid.

⁸ Federation of Law Societies of Canada, *Model Code of Professional Conduct* (as amended 12 December 2012), rule 6.3-5 at 100, online: <http://www.flsc.ca/_documents/ModelCodeRevDec2012TDBL.pdf>.

The *Charter*, as well as human rights legislation in every Canadian province, prohibits discrimination on the basis of sexual orientation. Equality, specifically protected by sections 15 and 28 of the *Charter*, underlies all of the *Charter's* rights protections and is a fundamental component of the rule of law. The Federation's decision whether to approve a law degree from TWU must be consistent with *Charter* values. In West Coast LEAF's view, a proper balancing of the right to freedom of religion, the right to equality, and the Federation's mandate to protect the public interest demands that the Federation reject TWU's application and, at the very least, mandate rigorous additional study and entrance requirements for prospective TWU law school graduates.

Thank-you for considering our submission. We would be pleased to discuss this issue further, if that would be helpful.

Yours truly,



Laura Track
Legal Director

Cc:

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Jonathan Raymond, President, Trinity Western University
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**RUBY
SHILLER
CHAN
HASAN**
BARRISTERS

February 28, 2013

VIA FAX (613.236.7233)

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National Committee on Accreditation
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Dear Mr. Tremblay:

We write to express our views on the current proposal by Trinity Western University (TWU) to establish Canada's first Christian law school. We ask that the Federation not approve TWU's application.

Like all TWU faculty, staff and students, TWU law students would be required to sign a "Community Covenant Agreement" stipulating that "[i]n keeping with Biblical and TWU ideals" all TWU community members will abstain from same sex sexual intimacy. Any student violating the TWU Covenant risks disciplinary measures including expulsion. The TWU Covenant discriminates against gay and lesbian students.

TWU should not be approved as an accredited institution for the delivery of legal education in Canada because of its overt discrimination on the basis of sexual orientation. The discrimination in the Covenant is contrary to the values of equality and non-discrimination codified in the *Charter of Rights and Freedoms* and in provincial, territorial and federal human rights legislation.

By granting accreditation to TWU, the Federation would be allowing segregation of law students and faculty based on their sexual orientation and gender identity. It is unthinkable that gay and lesbian students will have less opportunity and choice to attend law school than other students. If more law school placements are needed, opportunities must be available equally to everyone.



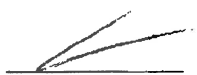
The Covenant and TWU values must also be considered for its effects on the delivery of law school curriculum at TWU. Janet Epp Buckingham, the TWU professor leading the law school proposal, has indicated that a TWU law school would bring a "unique perspective" to the law by incorporating "Christian values" into the curriculum.¹ The hostility to gay and lesbian people that the Covenant suggests that TWU rather means to impose these values on their students. This is alarming. How would a law school explicitly opposed to gay and lesbian people teach its students constitutional law and human rights law, both of which expressly prohibit discrimination on the ground of sexual orientation? The proposed law graduates of TWU may be required to provide advice to employers, unions and employees that discrimination on the basis of sexual orientation is unlawful in every jurisdiction in Canada. Understanding the nature and context of this form of discrimination may be very difficult for graduates of a program whose very essence incorporates such discrimination into its "Covenant".

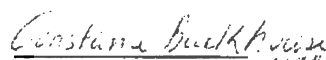
This not to say that a Christian (or Muslim or Jewish) institution cannot successfully teach law. But the peculiar insistence by this institution on accepting only students who agree to renounce their same-sex sexuality on a fundamentalist and narrow interpretation of Christianity is offensive.


It cannot be in the public interest to make students educated in an institutional environment such as the one created by TWU eligible to practice law in Canada. TWU discriminates on the basis of sexual orientation, and this alone makes it incompetent to deliver legal education in the public interest.

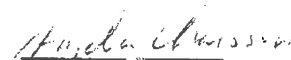
In judging TWU's proposal, the Federation is doing so on behalf of all law societies in Canada, including in those provinces where discrimination on the basis of sexual orientation is not protected by a religious exception. In assessing such programs, the Federation should require the highest standard of equality protection from the law schools, not the least. The Federation should not seek a race to the bottom.

Yours very truly,


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Partner, Ruby
Shiller Chan Hasan


Constance Backhouse,
C.M., O.Ont., LSM
Professor, Faculty of Law
University of Ottawa


Beth Symes,
C.M., LSM
Partner, Symes
Street & Millard LLP


Angela Chaisson,
Barrister and Solicitor
Associate, Ruby
Shiller Chan Hasan

¹ Canadian Lawyer Magazine, "Private B.C. university vying for new law school" (June 25, 2012)





National Association of Women and the Law / L'association Nationale Femmes et Droit

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March 8, 2013

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Chair, Federation of Canadian Law

Law Societies Canadian Common Law

Program Approval Committee

By email: lpawlitz@torkinmanes.com

Dear Sirs/Mesdames,

Re: Trinity Western University School of Law Proposal

The National Association of Women and the Law ("NAWL") is an incorporated not-for-profit feminist organization that promotes the equality rights of Canadian women through legal education, research and law reform advocacy. We write in relation to Trinity Western University ("TWU")'s proposal to establish a School of Law.

NAWL shares the concern expressed by the Canadian Council of Law Deans and others regarding the intentionally discriminatory impact of TWU's "community covenant agreement" on gay, lesbian and bisexual students. As you are aware, all TWU students and staff are required to sign this covenant, which requires, among other things, abstinence "from sexual intimacy that violates the sacredness of marriage between a man or a woman." As noted in an editorial in the *Globe and Mail*: "[t]his covenant is not simply an expression of belief or a request for certain behaviour...[but] is in effect a bar to gay and lesbian students who are married."¹

Since the introduction of the *Canadian Charter of Rights and Freedoms*, equality has come to be recognized, not only as a fundamental constitutional right, but as an overarching value in Canadian society. The meaningful realization of this value is something that we continue to struggle to achieve. As the Honourable Justice L'Heureux-Dubé observed close to fifteen years ago: "The task of rooting out inequality and injustice from our society is now advancing to a higher stage...[which requires] that we understand equality and make it part of our thinking, rather than treading heavily on it with the well-worn shoes of unquestioned, and often stereotypical assumptions."²

¹ "No gay free law school should stand in Canada" *The Globe and Mail*, 7 February 2013, online: <http://www.theglobeandmail.com/commentary/editorials/no-gay-free-law-school-should-stand-in-canada/article8356107/>.

² Honourable Claire L'Heureux-Dubé, "Conversations on Equality" (1999) 26 Man L J 273 at 278-279.

Lawyers have unique powers and obligations in relation to our ongoing struggle to achieve meaningful substantive equality in Canada. As the Federation of Law Societies of Canada's own Model Code of Conduct emphasizes, lawyers have "a special responsibility to respect the requirements of human rights laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in human rights laws" as well as an obligation not to "discriminate against any person."³

A proposal for a "gay free" law school is clearly discriminatory. It is also antithetical to training the next generation of lawyers to live up to their role as guardians of the public interest, which includes protecting and respecting the equality rights of Canadians. It is not sufficient that lawyers simply know where to locate equality protection in various constitutional and statutory instruments; it is necessary, to borrow Justice L'Heureux-Dubé's words, that they "understand equality and make it part of [their] thinking." An educational institution that not only perpetuates discriminatory attitudes towards, but also effectively bans members of an equality-seeking group from attendance, cannot be trusted to promote this constitutionally mandated understanding.

For these reasons, NAWL joins West Coast LEAF in urging the Federation to reject TWU's application. In the event that the British Columbia government decides to accredit TWU to confer law degrees, notwithstanding the equality rights infringement such a decision would represent, NAWL also joins West Coast LEAF in insisting that the Federation should not permit graduates to become licensed to practice law without further study and entrance requirements.

The following passage from the Supreme Court of Canada in *Vriend v. Alberta* is particularly resonant in these circumstances:

It is easy to praise [the concept and principle of equality] as providing the foundation for a just society which permits every individual to live in dignity and in harmony with all. The difficulty lies in giving real effect to equality. Difficult as the goal of equality may be it is worth the arduous struggle to attain.⁴

The Federation has proudly and repeatedly announced that it has a mandate to serve in the public interest. We believe that taking a forceful and pro-active stance against TWU's proposal for a School of Law is not only consistent with this mandate, but is also required.

Yours truly,



JULIE SHUGARMAN
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³ Federation of Law Societies of Canada, *Model Code of Professional Conduct* (as amended 12 December 2012), rule 6.3-5, online: <http://www.flsc.ca/en/federation-model-code-of-professional-conduct/>

⁴ *Vriend v. Alberta*, [1998] 1 SCR 493 at para 68.

cc:

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BY EMAIL

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G  rald R. Tremblay, President
Federation of Law Societies of Canada
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March 10, 2013

Dear Minister Sultan and Mr. Tremblay:

Re: Trinity Western University Law School Proposal

On behalf of the undersigned Christian law students from across Canada, we write in support of the application by Trinity Western University (TWU) to receive accreditation for a proposed law school.

We believe that by having a Christian law school, legal education in Canada would be greatly strengthened, not harmed. Integrating law, ethics and faith is a challenge for many law students across the country. The experience TWU has had fostering students' navigation of professional education, ethics and faith can be invaluable to law students. TWU could offer courses that allow students to specialize in areas that our current schools do not have enough interest, such as charities law. Such law schools are an option available in the United States and would also benefit our own nation that prides itself on freedom of belief and tolerance.

Furthermore, TWU is continuously recognized with various accolades for providing an outstanding education; for example, it recently earned its seventh consecutive A+ for Quality of Teaching and Learning in *The Globe and Mail's* 2013 Canadian University Report, and already has a highly regarded School of Nursing, School of Business and School of Education. The TWU faculty is of the same caliber as that of any public university, the only difference being that members hold Christian beliefs which form the foundation of the private community.

Thus it is with concern that we read some of the statements regarding TWU's application. TWU's Community Covenant is based on Biblical principles that we also hold true. We hold them true regardless of the law school we attend. If commitment to Biblical principles results in the denial of a private institution as capable of teaching law, this implicates our competence as future lawyers also. The fundamental Canadian value of religious freedom and the law of our land would hold otherwise.

In first year Constitutional Law, many of us learned about the leading Supreme Court decision on freedom of religion and private school policies in *Trinity Western University v British Columbia College of Teachers*. Just over a decade ago, an

overwhelming majority of eight judges upheld TWU's right to enforce a code of conduct as a private university that is reflective of Christian beliefs. The majority also recognized that adhering to religious beliefs does not equate to future discriminatory conduct.

TWU has a recognized record of high quality education that currently sees its graduates accepted to legal institutions across Canada. There is no evidence to suggest it will not produce highly competent and professional graduates in the area of law as it does for all other disciplines. We support the proposed TWU law school and believe it will strengthen legal education in Canada through providing institutional diversity that is reflective of Canada's cherished values of freedom and toleration.

Sincerely,

Joshua Beattie, York University, Osgoode Hall Law School
Christian Ferraro, York University, Osgoode Hall Law School
Nicolas Francis, York University, Osgoode Hall Law School
Danny Gurizzan, York University, Osgoode Hall Law School
Hyunju Joo, York University, Osgoode Hall Law School
Shawn Knights, York University, Osgoode Hall Law School
Tyler Koverko, York University, Osgoode Hall Law School
Jonathan Lee, York University, Osgoode Hall Law School
Miyoun Oh, York University, Osgoode Hall Law School
Karol Pawlina, York University, Osgoode Hall Law School
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Alexandra Herbert, Civil Law, University of Ottawa, Faculty of Law
Grace Ko, Common Law, University of Ottawa, Faculty of Law
Nadine Menezes de Vasconcelos, Common Law, University of Ottawa, Faculty of Law
Lindsey Park, Common Law, University of Ottawa, Faculty of Law
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Roger Song, University of Calgary, Faculty of Law
Marie Burgoyne, University of Victoria, Faculty of Law
Julia Lee, University of Victoria, Faculty of Law
Sarah Menzies, University of Alberta, Faculty of Law

cc. Laurie H. Pawlitza, Chair, Canadian Common Law Program Approval Committee
Deborah Wolfe, Director, Law School Programs
Jonathan S. Raymond, Ph.D., President, Trinity Western University

March 12, 2013

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Dear Sirs and Mesdames,

Re: Trinity Western University School of Law Proposal

We are current students from the University of Victoria, Faculty of Law. We are writing to express our apprehension with respect to the application by Trinity Western University (TWU) to establish a law school. In particular, we are concerned with the requirement for students to sign and abide by a "community covenant agreement" as part of the application process for all students attending TWU. As you are aware, the covenant requires abstinence from "sexual intimacy that violates the sacredness of marriage between a man and a woman." It further provides that "[if] a student, in the opinion of the University, is unable, refuses or fails to live up to their commitment, the University reserves the right to discipline, dismiss, or refuse a student's readmission to the University."

The covenant explicitly discriminates on the basis of sexual orientation. Heterosexual couples have the option of marrying and thus are no longer required to abstain from sexual intimacy in order to comply with the covenant. Non-heterosexual couples, however, are treated differently. Intimacy within their legally-recognized marriages will still violate the covenant and put them at risk of expulsion.

We have serious concerns about the ability of TWU to provide a balanced and equality-focused legal education. We are wary of students' ability to remain independent and appropriately value-oriented in such an environment. Law schools are meant to propagate the values of the Canadian legal system, which includes the *Canadian Charter of Rights and Freedoms*. By definition, such a covenant contradicts these very values. They exclude and marginalize already frequently oppressed peoples. While the *Charter* may not apply to Trinity Western University because it is a private university, all law schools should nonetheless attempt to uphold it.

Furthermore, the effect of the covenant on non-heterosexual students, not just those who are married, is unacceptable as it sends the message that LGBT students are not welcome within the TWU community. As explained by Justice L'Heureux-Dube in 2001, you cannot "separate condemnation of the 'sexual sin' of 'homosexual behaviour' from intolerance of those with homosexual or bisexual orientations... [In] the words of the intervener EGALE, '[r]equiring someone not to act in accordance with their identity is harmful and cruel. It destroys the human spirit. Pressure to change their behaviour and deny their sexual identity has proved tremendously damaging to young persons seeking to come to terms with their sexual orientation' (factum, at para. 34)."¹ TWU's claims that the covenant does not prevent non-heterosexual students from attending the University wrongly suggest that it is "possible to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood."²

We, as future lawyers and officers of the court, are committed to equality and promoting the values of the *Charter* within our own practices. We believe that our colleagues should be exposed to a learning environment that fosters the same.

Yours sincerely,

Julie DeWolf, LSS Vice President Internal, J.D. Candidate (UVic 2013)
Nicholas McDonald, LSS Indigenous Law Students Association Representative, J.D. Candidate (UVic 2015)
John Bullock, J.D. Candidate (UVic 2015)
Kristen Withers, J.D. Candidate (UVic 2015)

¹ *Trinity Western University v. College of Teachers*, [2001] 1 SCR 772, 2001 SCC 31 (at para 69).

² *Ibid.*

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Jas Sangra, J.D. Candidate (Uvic 2014)
Kaylee Apostoliuk, J.D. Candidate (JD Candidate 2013)
Haydn Shook, J.D. Candidate (Uvic 2013)

On March 5th, 2013, a Town Hall was held at the **Schulich School of Law** to discuss Trinity Western University's proposal to create Canada's next law school. At issue during the meeting were TWU's discriminatory admissions and hiring policies, which include that no community member shall engage in sexual behaviour that violates the sacred bond of marriage between a man and a woman. The primary discussion point was whether an institution with such policies should educate students for the practice of law.

Those present at the meeting included gays and lesbians, who voiced concern not only about TWU's policies, but also about the fact that another protected right – freedom of religion – could potentially be stifled by any action we might take. One Christian in the room shared with us his own faith-based educational background, and reminded us of the personal and voluntary choice an individual makes when agreeing to TWU's community covenant, a choice that arguably should not be impeded. A number of straight people in attendance felt strongly that religion has no place in the teaching of law, and that TWU's proposal should be opposed. Some felt that it would be best to live and let live.

In short, there was no obvious consensus at the Town Hall about whether or not we, as law students and future members of the legal profession, should take a stance on TWU's proposed law school. What is obvious, though, is that the diversity of thought and opinion within the halls of the Schulich School of Law is great. What is also obvious, is that the respect we have for each other's thoughts and opinions here, no matter how divergent, is also great.

But perhaps the most obvious (and most important) thing is this: a Town Hall like the one held on March 5th would never happen at a TWU law school. Gays and lesbians would never sit in a classroom with Christians and Jews and atheists, challenging each other to take on new perspectives while encouraging respect and tolerance for everyone else's, at a TWU law school.

Whether or not those at TWU would *want* such a meeting to take place is irrelevant. Whether or not they themselves discriminate in their daily lives is also irrelevant. The fact of the matter is that TWU's *policies* simply would not allow for free, open, challenging, critical, respectful dialogue. What is the practice of law, if not all of those things? Does the rule of law not require that it be available freely and openly to all? Does the complexity of law not challenge us to be innovative and resourceful for our clients? Does the study of law not require us to think critically about difficult issues? Does our very own Constitution not require us to respect all of our brothers and sisters, regardless of race, sex, religion, age, sexual orientation, or otherwise?

If TWU is to be granted the privilege of opening Canada's next law school, it should first ask itself if it is up to the challenge of having an open, honest, meaningful discussion about its policies and practices. If it finds itself unable to do so, then, in the words of its own student handbook, it "should seek a living-learning situation more acceptable to them".

We, the Undersigned, support this statement:

Dal OUTlaw

- Annie McFarlane - Dal Law 2013,
- Chelsey Roy - Dal Law 2013
- Cordelle Ellison - Dal Law 2013
- Greg Englehutt - Dal Law 2013

Dal Social Activist Law Student Association

- Georgia Lloyd-Smith - Dal Law 2014
- Yasemin Diamente - Dal Law 2014
- Emily Coyle - Dal Law 2014
- Bruce Muir - Dal Law 2015
- Lara Green - Dal Law 2014
- Zoe Marler - Dal Law 2014
- Aaron Dewitt - Dal Law 2014
- Conor Mullin - Dal Law 2013
- Mary Elizabeth - Dal Law 2015
- Martin Sanderson - Dal Law 2014
- Shawnee Gregory - Dal Law 2015

Stefan Currie-Roberts - Dal Law 2013

Emma Baasch - Dal Law 2014

Ora Morison - Dal Law 2015

Cheri Caplan - Dal Law 2013

Jennifer Asquin - Dal Law 2013

Katherine Ruta - Dal Law 2014

Michelle Yung - Dal Law 2013

Angela MacKenzie - Dal Law 2014

Maria Constantine - Dal Law 2013

Shannon Paine - Dal Law 2013

Chris Gleddie - Dal Law 2013

Allison Reed - Dal Law 2013

Mick Levin - Dal Law 2015

Amy Sakalauskas - Practicing Member of the NSBS

Laura Dunnigan - Dal Law 2013

Dave Dhillon - Dal Law 2014

Kelsey Nearing - Dal Law 2014

Kristy MacKinnon - Dal Law 2015

Aaron Lemkow - Dal Law 2015

Christy Meredith - Dal Law 2014

Ashley Wilson - Dal Law 2014

David Gruber - Dal Law 2015

Barbara Grochalova - Dal Law 2014

David Abrams - Dal Law 2015

Christa Korens - Dal Law 2014
Steven Evans - Dal Law 2014
Caitlin Regan-Cottreau - Dal Law 2014
Celeste Woods - Dal MSc, SLP 2013
Cameron Foster - Dal Law 2013
Will Horne - Dal Law 2014
Aileen Fury - Dal Law 2015
Deanna Bru - Dal Law 2015
Andrea Van der Heyden - Dal Law 2014
Michael Oland - Dal Law 2014
Alandra Harlington - Dal Law 2013
Ashley Schuitema - Dal Law 2014
Kate Fairbrother - Dal Law 2013
Amanda Whitehead - Dal Law 2014
Alec Young - Dal Law 2013
Nigel Jenkins - Dal Law 2013
Simon Turner - Dal Law 2013
Dan Manchee - Dal Law 2013
Kylan Kidd - Dal Law 2015
Gregory Johansson - Dal Law 2015
Natasha Meier - Dal Law 2014
Jenna Clark - Dal Law 2015
Margarete Daugela - Dal Law 2015
Lindsay Thomson - Dal Law 2013
Amanda Fricker - Dal Law 2013
Jim Kehoe - Dal Law 2013
Nick Lenehan - Dal Law 2013
Mathieu Poirier - Dal Law 2014
Katie Sammon - Dal Law 2013
James P Barry - Dal Law 2013
Daniel Pink - Dal Law 2011
Sarah Turgeon - Dal Law 2013
Lénie Tessier-Beaulieu - Dal Law 2012
Nick Cosulich - Dal Law 2014
Allison Smith - Dal Law 2014
Tricia Parker - Dal Law 2015
Samantha Jenkins - Dal Law 2014
Sara D. Gardezi - Dal Law 2012
Leah Burt - Dal Law 2014
Cathy Rasmussen - Dal Law 2014
Christena McIsaac - Dal Law 2014
Tim Hansen - Dal Law 2014
Jared Leon - Dal Law 2014
Leonard Loewith - Dal Law 2013
Nathan Coles - Dal Law 2013
Stephen Hurley - Dal Law 2014

James Violande - Dal Law 2013
Lorne J. Graburn - Dal Law 2012
Max Ma - Queen's Law 2015, BA (Hons) (Dal)
Ken Cadigan - Dal Law 2013
James Foy - Dal Law 2014
Kelsey Evaniew - Dal Law 2014

March 14, 2013

G rard R. Tremblay, C.M., O.Q., Q.C.,
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World Exchange Plaza
1810 – 45 rue O’Connor St.
Ottawa, Ont. K1P 1A4

Dear Sirs and Mesdames,

Re: Trinity Western University School of Law Proposal

We represent a broad coalition of law students and alumni from the University of British Columbia Faculty of Law united in support of Dean Flanagan and the Canadian Council of Law Deans (“CCLD”). We agree with the CCLD position that Trinity Western University’s (“TWU’s”) Community Covenant, which bars its students from “sexual intimacy that violates the sacredness of marriage between a man and a woman,” amounts to discrimination on the basis of sexual orientation, which is unlawful in Canada and fundamentally at odds with the core values of all Canadian law schools.

Most of the criticism to date has focused on the legality of TWU’s Community Covenant. We support that criticism, yet feel we have an additional perspective to add to the discussion. Little has been said about the effect strict adherence to the Covenant would have on the law school experience. This is the focus of our critique.

We are particularly concerned about two damaging effects the Covenant could have: (1) It would exclude sexual minorities, which would diminish diversity of opinion in the legal profession and

impair the development of critical thought and legal analytical skill; (2) It would provide opportunities to access legal education in a discriminatory manner. Such an education confers significant social privileges and queer students should have no less access to it than any other.

The law does not exist in isolation. Learning the law requires some analysis of its social context. As part of our legal education, we are regularly encouraged to bring our own perspectives into our legal analyses, whether based on religion, gender, sexual orientation, or other beliefs, identities, and experiences. This diversity encourages us to challenge, debate, and discuss the law in its broader context. This discourse deepens our understanding of both the law and our role as future members of the legal profession.

It is our concern that the Covenant exemplifies a limited tolerance of diversity. While we are respectful of Christian values, a law school should promote an inclusive environment that is fertile ground for debate. All law schools, and the legal profession as a whole, should strive to promote such an environment.

There is tremendous competition for law school admission. Any additional opportunities to a legal education should not be denied to persons based on their sexual orientation. Sexual minorities still face significant social discrimination. Approving a law school that binds students to the TWU Covenant does nothing to alleviate this disadvantage; indeed it has the potential to exacerbate it.

While TWU is a private university, it is not absolved from its public obligations. Legal education is a public good. The practice of the law is publicly regulated and lawyers are officers of the court - they are compelled to act in the public interest. Law schools are safeguarded by provincial law societies because lawyers have duties to the court and their communities, regardless of where they are trained.

Religious freedom is an important right that will continue to be protected in Canada. However, our concern is that TWU's Community Covenant veils homophobia in Christian values. TWU's policy does not allow for balance between religious freedom and the rights of others to their sexual identity.

We hope TWU reconsiders its position regarding the Community Covenant. It is also our desire to see the province of British Columbia, the Law Society of British Columbia, and the Federation of Law Societies of Canada consider the concerns articulated in our letter throughout all approval processes.

Sincerely,

UBC OUTlaws

UBC Social Justice Action Network

1. Dustin Klaudt - JD Candidate (UBC 2013)
2. Rebecca Coad - JD Candidate (UBC 2013)
3. Kate Parisotto - JD Candidate (UBC 2013)
4. Rachel Barsky - JD (UBC 2012)
5. Karen Segal - JD Candidate (UBC 2014)
6. Laura Hawes - JD (UBC 2012)
7. Noah Stewart - Member of the LSS Executive, JD Candidate (UBC 2014)
8. Flora Vineberg - JD Candidate (UBC 2015)
9. Martina Zanetti - JD Candidate (UBC 2013)

10. Lisa Jørgensen - JD Candidate (UBC 2013)
11. Andrea Ritchie - JD (UBC 2012)
12. Kaylon Quinn - JD Candidate (UBC 2014)
13. Catrina Webster - JD Candidate (UBC 2014)
14. Iva Erceg - JD Candidate (UBC 2013)
15. Megan Dyer - JD Candidate (UBC 2013)
16. Brian Koh - JD (UBC 2012)
17. Matthew Fingas - JD Candidate (UBC 2014)
18. Jeanette O'Sullivan - JD (UBC 2012)
19. Amelia Boulton - JD Candidate (UBC 2014)
20. Michelle Reinhart - JD Candidate (UBC 2014)
21. Rachel Schechter - JD Candidate (UBC 2013)
22. Alissa Perry - JD Candidate (UBC 2013)
23. Nora Bergh - JD Candidate (UBC 2013)
24. JoAnne Barnum - Member of the LSS Executive, JD Candidate (UBC 2013)
25. Brendan DePoe - JD Candidate (UBC 2013)
26. Camille Israël - JD Candidate (UBC 2013)
27. Tim Pritchard - JD Candidate (UBC 2013)
28. Raylene Smith - JD Candidate (UBC 2013)
29. Claire Haaf - Member of the LSS Executive, JD Candidate (UBC 2013)
30. Ian Wiebe - JD (UBC 2011)
31. James Boxall - JD Candidate (UBC 2013)
32. Molly Shamess - JD Candidate (UBC 2013)
33. Paul Kressock - JD Candidate (UBC 2014)
34. Paul Mereau - JD Candidate (UBC 2013)
35. Tyson Gratton - JD Candidate (UBC 2013)
36. Brittany Weikum - JD (UBC 2012)
37. Karoline Clarke - JD Candidate (UBC 2014)
38. Anthony Pugh - JD Candidate (UBC 2014)
39. Elizabeth Pan - JD Candidate (UBC 2014)
40. Meera Jain - JD (UBC 2012)
41. Michelle Beda - JD Candidate (UBC 2015)
42. Jessie Caryl - JD Candidate (UBC 2014)
43. Alexander Mackoff - JD Candidate (UBC 2013)
44. Juliana Dalley - JD Candidate (UBC 2013)
45. David Penner - JD Candidate (UBC 2013)
46. Ravi Bindra - JD Candidate (UBC 2013)
47. Alex Norris - JD Candidate (UBC 2013)
48. David Kemp - Member of the LSS Executive - JD Candidate (UBC 2015)
49. Aicha Kouyate - JD Candidate (UBC 2014)
50. Lauren Read - Member of the LSS Executive, JD Candidate (UBC 2015)
51. Nicole Bakker - JD Candidate (UBC 2014)
52. Katie Comley - JD Candidate (UBC 2015)
53. Julie Brown - JD (UBC 2012)
54. Sara Gray - JD Candidate (UBC 2015)
55. Clayton Rubinstein - JD Candidate (UBC 2013)
56. Peter Senften - Bmus (UBC 2008) BA Psychology (UBC 2014)
57. Kenneth Deane Craig - LLMCL Candidate (UBC 2013)
58. Ben Chiou - JD Candidate (UBC 2015)
59. Valerie Haaf, EIT - Bachelor of Applied Science (UBC 2012)
60. William House - JD Candidate (UBC 2013)

61. Erin Kizell - JD Candidate (UBC 2013)
62. Michela Fiorido - JD Candidate (UBC 2014)
63. Rita Davie - JD Candidate (UBC 2014)
64. Rachel Heinrichs - JD Candidate (UBC 2013)
65. William Skinner - JD Candidate (UBC 2015)
66. Maxime Walker - JD Candidate (UBC 2015)
67. Robin Phillips - JD Candidate (UBC 2014)
68. Brian Stephenson - JD Candidate (UBC 2015)
69. Will Shaw - JD Candidate (UBC 2013)
70. Alex Hudson - JD Candidate (UBC 2013)
71. Daniel Kent - JD Candidate (UBC 2013)
72. Janis Ko - JD (UBC 2012)
73. Patrick Beechinor - JD Candidate (UBC 2014)
74. Emsie Hung - JD Candidate (UBC 2015)
75. Julia Barsel - JD Candidate (UBC 2013)
76. Sam Arden - JD Candidate (UBC 2013)
77. Jonathan Braun - Member of the LSS, JD Candidate (UBC 2015)
78. Todd Shikaze - JD Candidate (UBC 2013)
79. Shannon Fenrich - JD Candidate (UBC 2013)
80. Victoria Petrenko - JD Candidate (UBC 2015)
81. Dionne Lau - JD Candidate (UBC 2015)
82. Zoe Si - JD Candidate (UBC 2013)
83. Chantelle Yan - JD Candidate (UBC 2015)
84. Michael Burokas - JD Candidate (UBC 2014)
85. Ainslie Hurd - JD Candidate (UBC 2015)
86. Anna Kontsedalova - JD Candidate (UBC 2013)
87. Kaitlin Green - JD Candidate (UBC 2015)
88. Savitri Gordian - JD (UBC 2012)
89. Chris Thompson - JD Candidate (UBC 2013)
90. Jessica Magalios - JD Candidate (2013)
91. Georgia Clark - JD Candidate (UBC 2015)
92. Farah Malik - JD Candidate (UBC 2013)
93. Gregory Rabin - JD Candidate (UBC 2015)
94. Roni Jones - JD Candidate (UBC 2013)
95. Emily Gray - JD Candidate (UBC 2015)
96. Grant Sikkes - JD Candidate (UBC 2014)
97. Genevieve Hillsburg - JD Candidate (UBC 2015)
98. Elise Hahn - M.A. Candidate (UBC 2014)
99. Spencer Landsiedel - JD/M.B.A. Candidate (UBC 2015)
100. Nivedhya Ramaswamy - JD Candidate (UBC 2014)
101. Natasha Rana - JD Candidate (UBC 2014)
102. Cassie Preston - JD Candidate (UBC 2014)
103. Audrey Bouffard-Nesbitt - JD Candidate (UBC 2013)
104. Megan Coyle - JD Candidate (UBC 2015)
105. Laura Morrison - JD Candidate (UBC 2013)
106. Sherry Shir - JD Candidate (UBC 2014)
107. Trevor Simpson - JD Candidate (UBC 2015)
108. Andrea Fraser - JD Candidate (UBC 2015)
109. Dustin Paul - JD Candidate (UBC 2013)
110. Tahsin Najam - JD Candidate (UBC 2015)
111. Brendan Dawes - JD Candidate (UBC 2015)

112. Joshua Spruyt - JD Candidate (UBC 2013)
113. Servane Phillips - JD (UBC 2012)
114. Alexander Smith - JD Candidate (UBC 2013)
115. Graham Mack - JD Candidate (UBC 2015)
116. Hamish Stewart - JD Candidate (UBC 2014)
117. Heather Adlam - JD Candidate (UBC 2014)
118. Catherine Repel - JD Candidate (UBC 2015)
119. Nigel Blondeau - JD Candidate (UBC 2014)
120. Emily McClintock - JD Candidate (UBC 2015)
121. David Ferguson - JD Candidate (UBC 2015)
122. Marie Diane Irvine - JD Candidate (UBC 2013)
123. Jessica Johnson - JD Candidate (UBC 2013)
124. Torrey Sirdevan-Bachelor of Applied Science (UBC 2015)
125. Alexander Currie - JD Candidate (UBC 2015)
126. Mark McPhee - JD Candidate (UBC 2013)
127. Jessica Sheehan - JD Candidate (UBC 2015)
128. Kyle Thompson - JD Candidate (UBC 2015)
129. Claire Hildebrand - J.D Candidate (UBC 2015)
130. Jennifer Flood - JD Candidate (UBC 2013)
132. Laura Kasian - JD Candidate (UBC 2013)
133. Negar Jalali - JD Candidate (UBC 2015)
134. Grace Andrea Jackson - JD (UBC 2012)
135. Clayton Gallant - JD Candidate (UBC 2015)
136. Victor Ryans - JD Candidate (UBC 2015)
137. Martin Ferreira Pinho - JD Candidate (UBC 2013)
138. Danielle Lewchuk - JD Candidate (UBC 2013)
139. Ryan LaPlante - JD Candidate (UBC 2015)
140. Kit McGuinness - JD (UBC 2012)
141. Laura Smith - JD (UBC 2012)
142. Tessa Seager - JD Candidate (UBC 2015)
143. Jessie Lee Cameron - JD Candidate (UBC 2013)
144. Daniel Kozera - JD Candidate (UBC 2015)
145. Iain Bailey- JD Candidate (UBC 2015)
146. Darcy McKittrick - JD Candidate (UBC 2015)
147. Kendra Shupe - JD Candidate (UBC 2014)
148. Lindsay Wright - JD Candidate (UBC 2013)
149. Alex Choi - JD Candidate (Queen's 2013)
150. Samuel Turcott - JD Candidate (UBC 2014)
151. Maureen Gillis - JD Candidate (UBC 2013)
152. Christopher Munroe - JD (UBC 2012)
153. Zohar Amouyal - JD Candidate (UBC 2013)
154. Alain Saint-Onge - JD Candidate (UBC 2014)
155. Dan H Griffith - JD Candidate (UBC 2014)
156. Parveen K. Shergill - JD Candidate (UBC 2013)
157. Delaine Friedrich - JD Candidate (UBC 2015)
158. Stuart Wright - JD Candidate (UBC 2015)
159. Jessie Gill - JD Candidate (UBC 2014)
160. Malcolm Funt - JD Candidate (UBC 2014)
161. Dylan Mazur - JD Candidate (UBC 2015)
162. Laura Wilson - JD Candidate (UBC 2015)
163. Emily Snow - Member of the UBC ILSA Executive, JD Candidate (UBC 2014)

164. Margaret MacDonald - JD Candidate (UBC 2014)
165. Amber Timothy - JD Candidate (UBC 2013)
166. Kelsey Rose - JD Candidate (UBC 2014)
167. Sasa Pudar - JD Candidate (UBC 2014)
168. Andrea Lejay - JD Candidate (UBC 2014)
169. Benjamin Schach - JD Candidate (UBC 2015)
170. Nicole Schnurr - JD Candidate (UBC 2014)
171. David Wu - JD Candidate (UBC 2015)
172. Brittany Durrant - JD Candidate (UBC 2014)
173. Alex Evans - JD Candidate (UBC 2014)
174. Glenn Grande - JD Candidate (UBC 2014)
175. Mikhael Magaril - JD Candidate (UBC 2014)
176. Adam Freud - JD Candidate (UBC 2013)
177. Trevor Bant - JD Candidate (UBC 2014)
178. Hennadiy Kutsenko - JD Candidate (UBC 2014)
179. Kelsey Mack- JD (UBC 2012)
180. Lisa Frey - JD (UBC 2012)
181. Vanessa Johnson - JD Candidate (UBC 2014)
182. Jessica Todd - JD Candidate (UBC 2014)
183. Christina Gray - JD Candidate (UBC 2013)
184. Caitlin Ohama-Darcus - JD Candidate (UBC 2015)
185. Michael Fitzmaurice - JD Candidate (UBC 2014)
186. Kayla Baldwin - JD Candidate (UBC 2014)
187. Courtenay Landsiedel - JD Candidate (UBC 2014)
188. Amanda Koralewicz - JD Candidate (UBC 2014)
189. Jessie Ramsay - Member of the UBC ILSA Executive, JD Candidate (UBC 2014)
190. Audrey Wong UBC - JD Candidate (UBC 2013)
191. Hester Soles - JD Candidate (UBC 2014)
192. Kevin Chiarot - JD (UBC 2012)
193. Heather Doi - JD Candidate (UBC 2015)
194. Kate Phillips - JD Candidate (UBC 2014)
195. Blair McRadu - JD Candidate (UBC 2015)
196. Sarah McCalla - JD Candidate (UBC 2014)
197. Jessica Lewis - JD Candidate (UBC 2015)
198. Angela Lee - JD Candidate (UBC 2015)
199. Bryan Badali - JD Candidate (UBC 2013)
200. Joanne Tsang - JD Candidate (UBC 2013)
201. Robin McMurachy - JD Candidate (UBC 2015)
202. Alexandra Russell - JD Candidate (UBC 2015)
203. Harshada Deshpande - JD Candidate (UBC 2014)
204. Aletha Utley - JD Candidate (UBC 2014)
205. Riley O'Brien - JD Candidate (UBC 2015)
206. Katie Blundy - JD Candidate (UBC 2015)
207. Ruben Lindy - JD Candidate (UBC 2015)
208. Jamie Hansen- JD Candidate (UBC 2014)
209. Lucas McFadden - JD Candidate (UBC 2015)
210. Jonjit Singh - JD Candidate (UBC 2014)
211. Jason Scott - JD Candidate (UBC 2015)
212. Leanne Moses - JD Candidate (UBC 2015)
213. Krisha Dhaliwal - JD Candidate (UBC 2015)
214. Stephen Hedley - JD Candidate (UBC 2014)

- 215. Wesley Chenne - JD Candidate (UBC 2015)
- 216. Stefan Kruse - JD Candidate (UBC 2015)
- 217. Michael Davis - Member of the LSS, ILSA Executive, JD Candidate (UBC 2014)
- 218. Aaron Samuel - JD Candidate (UBC 2015)
- 219. Joty Sandhu - JD Candidate (UBC 2015)
- 220. Jason Hughes - JD Candidate (UBC 2014)

Cc:

Bill Flanagan, President, Council of Canadian Law Deans

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Hon. Ralph Sultan, Minister of Advanced Education, Innovation, Technology and
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THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Office of the President
Cabinet du président

March 18, 2013

Via email: gtr Tremblay@mccarthy.ca

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

Dear Mr. Tremblay:

Re: Trinity Western University School of Law Proposal

I write on behalf of the Canadian Bar Association concerning the application of Trinity Western University for an assessment of whether its proposed law degree meets the Federation's national standards for approving new law degree programs.

The CBA is a national association representing approximately 37,000 jurists, including lawyers, notaries, law teachers and students across Canada, with a mandate that includes seeking improvements in the law and the administration of justice, and promoting equality in the law and in the legal profession.

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

We commend the Federation for its consultations and deliberations in establishing the national standards. In assessing an applicant's compliance with these standards, the Federation is able to:

- a) In its discretion, entertain submissions from persons, organizations, or institutions other than applicants;
- b) Make additional inquiries with the applicant and request such additional written information as it sees fit; and
- c) Control its own process in considering applications for new law degree programs.¹

¹ See the *Final Report of the Task Force on the Canadian Common Law Degree*, Federation of Law Societies of Canada (October 2009), online: <http://www.flsc.ca/documents/Common-Law-Degree->

We have had an opportunity to review the letter from the Council of Canadian Law Deans and your response. We question the perceived limitations on the Federation's role in applying the national standards, and urge you to reconsider your stance in pursuit of the law societies' duty to regulate the legal profession in the public interest.

In our view, the Federation and the Committee charged with approving new Canadian law degree programs must strike a balance between freedom of religion and equality, and give full consideration to its public interest mandate and to the values embodied in Canadian human rights laws.

Based on the delegations of power from its constituent law societies, the Federation has a duty to go beyond a strict determination of a proposed law school's compliance with the national standards. It must assess whether the institution and its program complies with Canadian law, including the protections afforded by the *Canadian Charter of Rights and Freedoms* and the human rights legislation in B.C., and in every province and territory where a proposed law degree may be recognized by the law societies for admission to bar.

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

These are complex issues. Indeed, CBA members hold a range of views on the question of the approval of this particular law school. The CBA's Sexual Orientation and Gender Identity Conference (SOGIC) and Equality Committee have articulated one perspective in the attached letter.

The CBA would be pleased to assist in whatever way you believe would be appropriate.

Yours truly,

A handwritten signature in black ink, appearing to read 'Robert C. Brun'.

Robert C. Brun, Q.C.

cc : See Appendix A



March 18, 2013

Via email: grtremblay@mccarthy.ca

Mr. Gérald R. Tremblay, C.M., O.Q., Q.C., Ad.E.

President

Federation of the Law Societies of Canada

World Exchange Plaza

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Ottawa, ON K1P 1A4

Dear Mr. Tremblay:

Re: Trinity Western University School of Law Proposal

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

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

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

A. SOGIC and the Equality Committee's Concerns

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

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

500-865 Carling Avenue, Ottawa, ON, Canada K1S 5S8

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

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

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

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

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

B. Trinity Western's Discriminatory Rules and Practices

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

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

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

³ [2012] 1 S.C.R. 395 (*Doré*).

⁴ *Ibid.*, at para 24.

⁵ *TWU*, *supra* note 2, at para 27.

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

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

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

The Covenant is meant to apply on and off campus and violations may lead to disciplinary sanctions, including dismissal in the case of faculty and staff and removal in the case of students.⁹

The fact that no student may ever be expelled for breaching the Covenant's sexual intimacy rules is not determinative. As acknowledged by the Supreme Court of Canada in *Vriend v. Alberta*,¹⁰ the mere fear of discrimination may in and of itself cause serious psychological harm: "Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. [...] The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination."¹¹

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

I am dismayed that at various points in the history of this case the argument has been made that one can separate condemnation of the "sexual sin" of "homosexual behaviour" from intolerance of those with homosexual or bisexual orientations. This position alleges that one can love the sinner, but condemn the sin. ... The status/conduct or identity/practice distinction for homosexuals and bisexuals should be soundly rejected [...] [Emphasis added]¹³

C. Trinity Western Covenant Incompatible with Human Rights Legislation

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

41 (1) If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a physical or mental disability or by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or corporation must not be considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons. [Emphasis added]

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

⁹ *Id.* As outlined in the Student Handbook, "[i]f a student, in the opinion of the University, is unable, refuses or fails to live up to their commitment, the University reserves the right to discipline, dismiss, or refuse a student's re-admission to the University" (p. 23).

¹⁰ [1998] 1 S.C.R. 493 (*Vriend*).

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

¹² 2013 SCC 11 (*Whatcott*).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²³ *Supra* note 23, at para 130.

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

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

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

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

D. Following these recommendations would not hamper freedom of religion

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

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

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

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

²⁵ S.B.C. 1969, c. 44,

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

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

²⁸ *Ibid.* [emphasis added].

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

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

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

E. The U.S. Experience

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

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

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

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

³⁰ [1996] 1 S.C.R. 825.

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

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

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

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

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

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

³⁷ *Ibid.*, at p. 604.

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

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

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

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

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

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

³⁸ 561 U.S. ___ (2010) ("*CLS*").

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

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

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

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

⁴³ Available online at: http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_ab_a_standards_and_rules.authcheckdam.pdf.

⁴⁴ *Ibid.*, at p. 12.

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

F. Conclusions

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

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

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

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

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

Yours truly,

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

Amy Sakalauskas
Co-chair, CBA Sexual
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Identity Conference

Robert Peterson
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cc: See Appendix A

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

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

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

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

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

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

41. (1) If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a physical or mental disability or by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or corporation must not be considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons.

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

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

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

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

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

- 6.** (1) No person shall refuse to employ or to continue to employ any individual
- (a) on a discriminatory basis, including discrimination in any term or condition of employment; or
 - (b) because the individual has been convicted of a criminal or summary conviction offence that is unrelated to the employment or intended employment of the individual.
- (4) This section does not apply to
- [...]
 - (c) an exclusively religious or ethnic organization or an agency of such an organization that is not operated for private profit and that is operated primarily to foster the welfare of a religious or ethnic group with respect to persons of the same religion or ethnic origin as the case may be, if age, colour, creed, ethnic or national origin, family status, marital status, disability, political belief, race, religion, sex, sexual orientation or source of income is a reasonable occupational qualification.

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

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

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

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

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

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

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

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

[...]

(3) Subsection (1) does not apply

[...]

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

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

[...]

(8) This section does not apply to an employer

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

[...]

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

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

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

[...]

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

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

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

5. (1) No person shall in respect of
- (a) the provision of or access to services or facilities;
 - [...]
 - (d) employment;
 - (e) volunteer public service;
 - [...]
- discriminate against an individual or class of individuals on account of
- (h) age;
 - (i) race;
 - (j) colour;
 - (k) religion;
 - (l) creed;
 - (m) sex;
 - (n) sexual orientation;
 - (o) physical disability or mental disability;
 - (p) an irrational fear of contracting an illness or disease;
 - (q) ethnic, national or aboriginal origin;
 - (r) family status;
 - (s) marital status;
 - (t) source of income;
 - (u) political belief, affiliation or activity;
 - (v) that individual's association with another individual or class of individuals having characteristics referred to in clauses (h) to (u).
6. Subsection (1) of Section 5 does not apply
- [...]
 - (c) in respect of employment, to
 - [...]
 - (ii) an exclusively religious or ethnic organization or an agency of such an organization that is not operated for private profit and that is operated primarily to foster the welfare of a religious or ethnic group with respect to persons of the same religion or ethnic origin, as the case may be, with respect to a characteristic referred to in clauses (h) to (v) of subsection (1) of Section 5 if that characteristic is a reasonable occupational qualification, or
 - (iii) employees engaged by an exclusively religious organization to perform religious duties;
 - (d) in respect of volunteer public service, to an exclusively religious or ethnic organization that is not operated for private profit and that is operated primarily to foster the welfare of a religious or ethnic group with respect to persons of the same religion or ethnic origin, as the case may be;
 - [...]

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

7. (1) No person shall, on the basis of a prohibited ground of discrimination,
- (a) refuse to employ or refuse to continue to employ an individual or a class of individuals; or
 - (b) discriminate against any individual or class of individuals in regard to employment or

any term or condition of employment.

[...]

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

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

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

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

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

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

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

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

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

7. (1) No employer shall

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

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

[...]

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

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

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

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

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

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

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

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

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

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

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

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March 18, 2013

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Dear Mr. Tremblay, Mr. Herman, Ms. Wolfe, and Ms. Pawlitza:

Re: Trinity Western University School of Law Proposal

We are writing as current students and alumni from Osgoode Hall Law School at York University. We wish to express our concerns regarding the application of Trinity Western University ("TWU") to establish a law school. We understand that the Federation of Canadian Law Societies is currently considering TWU's proposal.

We are particularly concerned by TWU's requirement that its students sign a community covenant agreement. The covenant requires that students abstain from "sexual intimacy that violates the sacredness of marriage between a man and a woman".¹ There are "formal accountability procedures to address actions by community members that represent a disregard for this covenant."² The TWU Student Handbook provides that "[i]f a student, in the opinion of the University, is unable, refuses or fails to live up to their commitment, the University reserves the right to discipline, dismiss, or refuse a student's readmission to the University."³

The covenant at TWU discriminates on the basis of sexual orientation, contrary to the *Canadian Charter of Rights and Freedoms* and provincial human rights legislation. While heterosexual students are permitted to practice sexual intimacy within marriage, the definition of marriage in the covenant excludes same-sex marriage. Non-heterosexual married couples are singled out by the covenant and barred from sexual intimacy, at the risk of expulsion. TWU's definition of marriage deprives LGBTQ students of rights that others enjoy, and is therefore discriminatory.

¹ Trinity Western University Community Covenant Agreement at page 3, available online:
<<http://twu.ca/studenthandbook/twu-community-covenant-agreement.pdf>>

² *Ibid.* at page 5.

³ Trinity Western University Student Handbook, Student Accountability Process, available online:
<<http://twu.ca/studenthandbook/university-policies/student-accountability-process.html>>

In addition, we are concerned about the suitability of TWU as a forum for legal education. Law schools are to propagate the values of the Canadian legal system, including those set out in the *Charter of Rights and Freedoms*. While the *Charter* may not apply to private schools such as TWU, all law schools should seek to uphold it. TWU maintains a covenant that marginalizes individuals on the basis of sexual orientation, contrary to the *Charter* and provincial human rights legislation. It is evident that policies at TWU contradict the values of the Canadian legal system. We conclude that the school would fail to provide a balanced legal education.

The effect of the covenant on all non-heterosexual students is unacceptable. It sends a message that LGBTQ students are not welcome within the TWU community. As explained by Justice L'Heureux-Dube in 2001, you cannot "separate condemnation of the 'sexual sin' of 'homosexual behaviour' from intolerance of those with homosexual or bisexual orientations... [In] the words of the intervener EGALE, '[r]equiring someone not to act in accordance with their identity is harmful and cruel. It destroys the human spirit. Pressure to change their behaviour and deny their sexual identity has proved tremendously damaging to young persons seeking to come to terms with their sexual orientation' (factum, at para. 34)."⁴ TWU's claims that the covenant does not prevent non-heterosexual students from attending the University wrongly suggest that it is "possible to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood."⁵

As current and future officers of the court, we are committed to promoting the values of the *Charter* within our own practices. We believe that our colleagues should be exposed to a learning environment that fosters the same dedication to equality. We ask that these concerns be weighted heavily in considering TWU's proposed law school.

Sincerely,

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⁴ *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772, 2001 S.C.C. 31 at para 69.

⁵ *Ibid.*

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Dear Mr. Tremblay, Mr. Herman, Ms. Wolfe, and Ms. Pawlitza:

Re: Trinity Western University School of Law Proposal

We are current students of the University of Alberta Faculty of Law and we are writing today to express our concern over the proposed establishment of a law school at Trinity Western University. Our concern centers on the fact that students are required to sign and abide by the community covenant agreement that requires the student to abstain from “sexual intimacy that violates the sacredness of marriage between a man and a woman.” Failure to abide by the covenant gives the University the right to discipline, dismiss, or refuse to readmit the student.

This covenant actively discriminates against persons on the basis of sexual orientation. Where married heterosexual couples are free to engage in sexual intimacy without fear of discipline or expulsion from the University, same-sex married couples are not afforded this same security, despite having legally recognized marriages. This exclusion of same-sex marriage from the covenant is contrary to the *Canadian Charter of Rights and Freedoms* and Canadian Human Rights legislation.

We recognize the fact that the *Charter* does not apply to private schools such as TWU. All law schools, however, should strive to provide a legal education that is balanced and equality focused. Students should be taught to uphold the values of the Canadian legal system, including those found in the *Charter*. We are concerned that students would be unable to learn such values in an environment where such discrimination occurs against individuals in the LGBTQ community, an already marginalized community. Even though TWU is a private institution, the

students graduating from the program would still need to be recognized by provincial Law Societies, which are public bodies who have a duty to promote justice equality and respect for the law, including *Charter* values.

Furthermore, the effect of the covenant on all non-heterosexual students is unacceptable. It sends a message that LGBTQ students are not welcome within the TWU community. As explained by Justice L'Heureux-Dube in 2001, you cannot "separate condemnation of the 'sexual sin' of 'homosexual behaviour' from intolerance of those with homosexual or bisexual orientations... [In] the words of the intervener EGALE, '[r]equiring someone not to act in accordance with their identity is harmful and cruel. It destroys the human spirit. Pressure to change their behaviour and deny their sexual identity has proved tremendously damaging to young persons seeking to come to terms with their sexual orientation' (factum, at para. 34)." ¹ TWU's claims that the covenant does not prevent non-heterosexual students from attending the University wrongly suggest that it is "possible to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood." ²

We, as future lawyers and officers of the court, are committed to equality and promoting the values of the *Charter* within our own practices. We believe that our colleagues should be exposed to a learning environment that fosters the same.

Yours sincerely,

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¹ *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772, 2001 S.C.C. 31 at para 6.

² *Ibid.*

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Monday, March 18th 2013
Ottawa, Ontario

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Dear Sirs and Mesdames,

Re: Trinity Western University School of Law Proposal

Recently, several articles have been published in The National Post debating the appropriateness of creating a law school at the private Christian university, Trinity Western. The Canadian Council of Law Deans (CCLD), many law professors, legal practitioners, and student organizations have already spoken out against establishing such a law school. There has also been a great deal of support for Trinity-Western's proposal. A decision on the issue will be made soon.

As members of uOttawa OUTLaw, the LGBTQ student society at the University of Ottawa Faculty of Law, we would like to offer our thoughts on this contentious issue.

There are many things to commend about Trinity Western University. While much of the debate has focused on negative aspects of their Community Covenant Agreement, it is worth noting that this Covenant promotes positive values as well, and specifically asks that its signatories refrain from any form of harassment or discrimination. This Covenant has evolved over the years since Trinity Western was founded, to better reflect the changing norms and attitudes of Canadian society. Ultimately, the Covenant still retains several provisions that inherently discriminate against LGBTQ students, faculty, and staff.

As law students, and particularly as LGBTQ law students, many of us feel that we would not be welcomed in an environment such as the one fostered at TWU through this Covenant. Law school is



already an intensely competitive, stressful experience, and no student needs the added stress of being explicitly discriminated against by the codes of their institution. At the University of Ottawa, we have felt nothing but support and acceptance from our faculty and staff. We believe that this has had a direct impact on our success at law school. Our colleagues across the country should be afforded the same opportunity. We are concerned that this would not be the case at TWU, where all faculty and staff are required to sign the Covenant.

While the Supreme Court clarified in *Trinity Western University v British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31 that a discriminatory environment will not necessarily produce discriminatory teachers, we are still concerned that the Covenant institutionalizes discrimination against the LGBTQ community, and that a discriminatory university environment would be detrimental to LGBTQ law students, the general student population, and the public at large.

We recognize that the Covenant as a whole promotes many positive values. There remain several problematic provisions. Section 3, “Community Life at TWU” requires students to abstain from “sexual intimacy that violates the sacredness of marriage between a man and a woman.”¹ Section 4, “Areas for Careful Discernment and Sensitivity” states that “sexual intimacy is reserved for marriage between one man and one woman, and within that marriage bond it is God’s intention that it be enjoyed as a means for marital intimacy and procreation.”² The references to the marital union of one man and one woman exclude trans* identified people, polyamorous relationships, other forms of nonmonogamy, unmarried same-sex couples, married same-sex couples, any other form of sexual expression—effectively rendering LGBTQ families and marginalized sexualities invisible.

In the twelve years since *TWU v BCCT* (2001), much has changed in the law surrounding same-sex relationships. Same-sex marriage has been legalized in Canada. Same-sex couples are able to adopt children in many parts of the country, and three-parent families have been recognized in certain court decisions. We believe that a law school cannot provide a complete legal education of these concepts while simultaneously requiring its students, faculty and staff to sign an agreement that denigrates them.

Regardless of whether it is enforced, the Covenant is a significant symbolic document for the university. The Covenant makes it known to everyone who wishes to enter the TWU community that LGBTQ students and families will not be deemed equals. The Covenant not only effectively permits institutionalized discrimination against those members of the TWU community, it promotes such discrimination.

Our principle concern is that a law school at TWU would create a discriminatory academic environment for potential LGBTQ students, and send a negative message about the legal status of the LGBTQ community more broadly. As currently written, the Covenant creates a distinction between LGBTQ students, faculty and staff, and their straight counterparts. We believe that an environment free from such discrimination and inequality is fundamental to the well-being of an academic community, and the legal profession.

Sincerely,

University of Ottawa OUTLAW Executive

¹ Trinity Western University Community Covenant Agreement at page 3, available online: <<http://twu.ca/studenthandbook/twu-community-covenant-agreement.pdf>>

² *Ibid* at page 4



Le lundi 18 mars 2013
Ottawa, Ontario

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Sujet: Demande quant à la mise en œuvre d'une faculté de droit à l'Université *Trinity Western*

Chères Mesdames,
Chers Messieurs,

Plusieurs articles ont récemment été publiés dans le *National Post* qui portent sur débat quant à la pertinence de la mise en œuvre d'une nouvelle faculté de droit à l'université privée chrétienne, *Trinity Western*. Le Conseil canadien des doyens en droit, de nombreux professeurs et professeurs de droit, des juristes et des organisations étudiantes se sont déjà prononcés contre l'établissement d'une telle école de droit. En revanche, il y a également un certain soutien important appuyant la proposition de *Trinity Western*. Cela étant, une décision sur la question sera bientôt faite.

En tant que membres de *OUTlaw* de l'Université d'Ottawa, l'association des étudiantes et étudiants LGBT de la Faculté de droit de l'Université d'Ottawa, nous tenons à partager nos réflexions sur cette question controversée.

Il ne fait pas doute qu'il y a certaines qualités très remarquables et appréciables à l'Université *Trinity Western*. Bien qu'une partie importante du débat porte sur les aspects néfastes de l'entente sur la convention collective communautaire, il convient à noter que la présente convention promeut également des valeurs admirables, et sollicite expressément que les signataires s'abstiennent de toute forme



d'harcèlement ou de discrimination. Cette convention a évolué au fil des ans depuis la fondation de Trinity Western afin de mieux refléter le progrès des normes et des attitudes de la société canadienne. Cependant, il reste que la convention dispose toujours de certaines dispositions intrinsèquement discriminatoires à l'égard des étudiantes et étudiants, des professeures et professeurs, ainsi que et des membres du personnel appartenant à la communauté LGBT.

En tant qu'étudiantes et étudiants en droit s'identifiant à la communauté LGBT, une grande part d'entre nous opine que nous ne serions pas accueillis dans un environnement tel que celui à UTW de par la convention qui lui est rattachée. Les études en droit engendrent déjà plusieurs stressés, et aucun étudiante ou étudiant ne devrait être assujéti à un stress supplémentaire occasionné par des règlements scolaires qui promeuvent de la discrimination au sein de son institution académique. À l'Université d'Ottawa, l'esprit d'ouverture, d'inclusion et d'acceptation du corps professoral et du personnel de soutien fait en sorte que nous nous sentions bienvenus et appréciés à la Faculté de droit. Nous estimons avec raison que cela a indéniablement un impact profond sur notre succès à la Faculté de droit. De par ce fait, nous croyons que tous nos collègues au Canada devraient jouir de cette même occasion, soit de connaître des véritables succès dans un environnement respectueux, propice à l'épanouissement de toutes et de tous. Malheureusement, nous craignons que ce ne serait pas le cas à UTW, où tous les professeures et professeurs, ainsi que personnel de soutien sont tenus à signer la convention.

Bien que la Cour suprême du Canada a précisé dans *Université Trinity Western c British Columbia College of Teachers*, [2001] 1 RCS 772, 2001 CSC 31, qu'un environnement discriminatoire ne formerait pas forcément des enseignants discriminatoires, nous sommes néanmoins préoccupés par le fait que la convention sert à institutionnaliser la discrimination contre de la communauté LGBT, et qu'un tel milieu universitaire serait préjudiciable aux étudiantes et étudiants LGBT en droit, à la population étudiante en général et au grand public.

Nous reconnaissons que la convention dans son ensemble favorise de nombreuses valeurs admirables. Toutefois, certaines dispositions problématiques s'y trouvent toujours. Selon la section 3: «La vie communautaire à l'UTW», les étudiantes et étudiants doivent s'abstenir de «l'intimité sexuelle qui viole le caractère sacré du mariage entre un homme et une femme.»³ La section 4, «Domaines de discernement attentif et de sensibilité» stipule que «l'intimité sexuelle est réservée pour le mariage entre un homme et une femme, et que dans le cadre de cette relation se trouve l'intention de Dieu que le mariage soit apprécié en tant que moyen propice à l'intimité conjugale et à la procréation.»⁴ On ne peut faire fi que ces définitions portées à l'union conjugale entre un homme et une femme excluent à la fois les personnes qui s'identifient en tant que trans*, les relations polyamoureuses, d'autres formes de non monogamie, des couples homosexuels non mariés, des couples homosexuels mariés, ainsi toute autre forme d'expression sexuelle, chose qui rend invisibles les couples LGBT et autres minorités sexuelles marginalisées.

Au cours des douze années écoulées depuis *Université Trinity Western c British Columbia College of Teachers* (2001), plusieurs changements importants quant aux relations homosexuelles ont été adoptés par le droit canadien. D'abord, le mariage homosexuel a été légalisé au Canada. Ensuite, les couples homosexuels peuvent maintenant adopter des enfants dans de nombreuses régions au pays, et des familles «triparentales» ont été reconnues par certaines juridictions. Certes, nous croyons qu'une institution académique de droit ne serait pas en mesure d'offrir à la fois une véritable éducation juridique

³ [TRADUCTION] L'entente sur la convention collective communautaire de l'Université *Trinity Western* à la page 3, disponible en ligne: <<http://twu.ca/studenthandbook/twu-community-covenant-agreement.pdf>>.

⁴ [TRADUCTION] *Ibid* à la page 4.



complète quant à ces derniers concepts, tout en exigeant que ses étudiantes et étudiants, professeures et professeurs, et employées et employés signent une convention qui dénigre ceux-là.

Peu importe si elle est appliquée en pratique, la convention est un document important, voire de valeur symbolique, pour l'Université. Elle fait valoir l'idée que les étudiantes et étudiants et les familles LGBT qui souhaitent fréquenter l'Université *Trinity Western* ne sont pas sur le même pied d'égalité par rapport aux autres. Qui plus est, la convention permet non seulement la discrimination institutionnalisée contre les membres de la communauté LGBT de l'UTW, elle favorise une telle discrimination.

Notre principale préoccupation est qu'une faculté de droit à l'UTW créerait un environnement académique discriminatoire pour les étudiantes et étudiants potentiels appartenant à la communauté LGBT, et enverrait un message néfaste au sujet du statut légal et juridique de la communauté LGBT en général. Comme il est actuellement stipulé, la convention distingue expressément entre les étudiantes et étudiants, professeures et professeurs, employées et employés LGBT, et leurs homologues hétérosexuels. C'est pourquoi nous tenons à souligner fermement notre position qu'un esprit qui vise un environnement sans discrimination et sans inégalités est fondamental au bien-être d'une communauté universitaire et à l'exercice de la profession juridique.

Veuillez recevoir, Mesdames, Messieurs, l'expression de nos sentiments les plus sincères.

Le comité exécutif de OUTLAW de l'Université d'Ottawa

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 Canadian Lawyers for International Human Rights (University of Ottawa Chapter)
 University of Ottawa Black Law Students Association
 University of Ottawa Law Union Steering Committee
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Federation of Canadian Law Societies
Canadian Common Law Program Approval
Committee
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Dear Sirs and Mesdames,

Re: Trinity Western University School of Law Proposal

We are current students and alumni from the University of Saskatchewan, College of Law. We write to express our concern respecting the application by Trinity Western University ("TWU") to establish a law school. We are particularly concerned by the school's requirement that students at TWU sign a "community covenant agreement". Our concern is that the covenant requires abstinence from "sexual intimacy that violates the sacredness of marriage between a man and a woman".¹ As you are aware, the covenant further provides that "[if] a student, in the opinion of the University, is unable, refuses or fails to live up to their commitment, the University reserves the right to discipline, dismiss, or refuse a student's readmission to the University."²

The covenant at TWU discriminates on the basis of sexual orientation, contrary to *Canadian Charter of Rights and Freedoms* and provincial human rights legislation. While heterosexual students are permitted to practice sexual intimacy within marriage, the definition of marriage in the covenant excludes same-sex marriage. Non-heterosexual couples are singled out by the covenant, and are barred from sexual intimacy while attending TWU at the risk of expulsion.

¹Trinity Western University Community Covenant Agreement at page 3, available online:
<<http://twu.ca/studenthandbook/twu-community-covenant-agreement.pdf>>

²Trinity Western University Student Handbook, Student Accountability Process, online:
<<http://twu.ca/studenthandbook/university-policies/student-accountability-process.html>>

TWU's definition of marriage deprives LGBT students of rights that others enjoy, and is therefore discriminatory.

We are concerned about the suitability of TWU as forum for legal education. Law schools are to propagate the values of the Canadian legal system, including the values set out in the *Canadian Charter of Rights and Freedoms*. While the *Charter* may not apply to private schools such as TWU, all law schools should seek to uphold it. TWU maintains a discriminatory covenant that marginalizes individuals on the basis of sexual orientation, contrary to the *Charter* and provincial human rights legislation. It is evident that policies at TWU contradict the values of the Canadian legal system. We conclude that the school would fail to provide a balanced legal education.

Furthermore, the effect of the covenant on all non-heterosexual students is unacceptable. It sends a message that LGBT students are not welcome within the TWU community. As explained by Justice L'Heureux-Dube in 2001, you cannot "separate condemnation of the 'sexual sin' of 'homosexual behaviour' from intolerance of those with homosexual or bisexual orientations... [In] the words of the intervener EGALE, '[r]equiring someone not to act in accordance with their identity is harmful and cruel. It destroys the human spirit. Pressure to change their behaviour and deny their sexual identity has proved tremendously damaging to young persons seeking to come to terms with their sexual orientation' (factum, at para. 34)."³ TWU's claims that the covenant does not prevent non-heterosexual students from attending the University wrongly suggest that it is "possible to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood."⁴

We, as current and future lawyers and officers of the court, are committed promoting the values of the *Charter* within our own practices. We believe that our colleagues should be exposed to a learning environment that fosters the same dedication to equality

Sincerely,

Jill Bishop, JD Candidate (U of S 2013)
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Georges Mouton, LLM (U of S 2011)
Sara Hansvall, JD Candidate (U of S 2013)
Marty Wales, LSA President, JD Candidate (U of S 2013)
Heather Hoiness, JD Candidate (U of S 2013)
Dustin Gillanders, JD Candidate (U of S 2013)
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Matthew Straw, JD Candidate (U of S 2013)
Michael Stevens, JD Candidate (U of S 2013)
Kelsey O'Brien, JD Candidate (U of S 2013)
Samuel Edmondson, JD Candidate (U of S 2014)
Steven Robertson, JD Candidate (U of S 2014)

³ *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772, 2001 S.C.C. 31 (at para 69).

⁴ *Ibid.*

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Dawid M. Werminski, JD Candidate (U of S 2013)
David James, JD Candidate (U of S 2013)
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Loree Gillert, JD Candidate (U of S 2013)
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Alex Morrison, JD Candidate (U of S 2014)
Mark Kopitar, JD Candidate (U of S 2014)
Thomas McNerney, JD Candidate (U of S 2013)
Joshua Steele, JD Candidate (U of S 2013)
Siobhan Morgan, JD Candidate (U of S 2014)
Matthew Fox, JD Candidate (U of S 2015)
Michael Adams, JD Candidate (U of S 2015)
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Ida Mirzadeh, JD Candidate (U of S 2015)
Kathleen McLean, JD Candidate (U of S 2014)
Richika Bodani, JD Candidate (U of S 2014)
Colton Fehr, JD Candidate (U of S 2013)
Tovah Moffat, JD Candidate (U of S 2015)
Stephanie Laskoski, JD Candidate (U of S 2014)
Katelyn Rattray, JD Candidate (U of S 2015)
Mackenzie Tulloch, JD Candidate (U of S 2015)
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Benjamin Rakochy, JD Candidate (U of S 2014)
Lerissa Thaver, JD Candidate (U of S 2013)
Devin Beaton, JD Candidate (U of S 2014)
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Robin Burlingham, JD (U of S 2012)
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Leslie Welsh, JD Candidate (U of S 2015)
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MAR-18-2013 MON 11:53 AM EVANS & EVANS

FAX NO. 905 775 8835

P. 01

EVANS & EVANS
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THOMAS M. PEACOCK

T.W.W. EVANS, Q.C. (1894-1955)
CHARLES T.S. EVANS, Q.C. (1926 - 1986)
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March 18, 2013

The Federation of Law Societies of Canada
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Fax: (613) 236-7233

Attention: Bâtonnier Gérard R. Tremblay, President

Re: Proposal for a law school at Trinity Western University

Greetings

Our eldest daughter is extraordinarily successful in her life. My wife and I give some of the credit for her success to her four years at Trinity Western University, where she received an excellent education and a great life experience.

Many Canadian Universities have been founded on Christian principles, including Victoria College, Trinity College and St. Michael's College at the University of Toronto. It would be most unfortunate, indeed tragic, if our Christian based universities were barred from establishing law faculties and other faculties of higher learning.

I refer to the article on page A18 of the Toronto Star of March 2, 2013 under the heading "Lawyers oppose Christian law school." While I fully agree with Clayton Ruby in opposing discrimination on the basis of the grounds detailed in the Canadian Charter of Rights and Freedoms, I support the establishment of a law school at Trinity Western.

MAR-18-2013 MON 11:54 AM EVANS & EVANS

FAX NO. 905 775 8835

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It is my hope that discrimination will continue to diminish in Canada, with the world wide lessons derived from the horror of the holocaust of World War II, and peacefully through our Charter of Rights and Freedoms which is becoming more and more a reality in the every day lives of Canadians.

I believe that there is room for improvement for all of us as individuals and for all institutions.

It is my hope and my request that the Federation of Law Societies of Canada and that the lawyers of Canada will support Trinity Western University in its proposal to establish a law school. My expectation, through our daughter's experiences as a student, is that Trinity Western will establish a fine faculty of law in which we can all take pride.

Yours truly



Robert F. Evans

Regional Bencher, Central East
Law Society of Upper Canada

c.c. Tom Conway, Treasurer, LSUC, fax (416) 947-7609
c.c. Clayton Ruby, fax (416) 964-9193

March 18, 2013

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Dear Sirs and Mesdames,

Re: Trinity Western University School of Law Proposal

I have had the advantage of reading two letters from students at the University of British Columbia Faculty of Law regarding the proposed law school at Trinity Western University (herein “TWU”). While they represent two starkly opposed positions, I am in agreement with each of them in different areas, and I beg leave to respond to the letter of the coalition united in support of the position of Dean Flanagan and the Canadian Council of Law Deans (“the letter”).

I neither support nor oppose necessarily a law school at Trinity Western University. I am merely concerned that if only the voices of those in favour and those against the proposed school are heard, a holistic view of both freedom and equality, which form part of Canadian society’s core values, will be lost. I think the concerns expressed in the letter would render vacuous freedom of thought, belief, and conscience, with no perceptible gains in diversity and equality rights, while there may be better approaches to this issue that preserve both religious freedom and equality rights.

I support the equality rights of sexual minorities and diversity, and I agree that there must be a balance between religious freedom and the rights of sexual minorities. In my opinion, however, the letter actually expresses a view that if widely held, would erode genuine diversity of thought, opinion, belief, conscience, and identity. It would allow someone to remain nominally committed to

Christian values, but would not allow him or her to determine them or at least to practice them. For example, the letter states that “while we are respectful of Christian values, a law school should promote an inclusive environment that is fertile ground for debate.” It is a bit disingenuous to say that one respects others’ values, but that they should not practice them. It is also my experience that there is little or no debate on the equality rights of gays and lesbians at UBC (probably because it is considered a settled matter), and greater inclusivity is unlikely to change that.

TWU’s Community Covenant, which has raised much concern, bars its students from “sexual intimacy that violates the sacredness of marriage between a man and a woman.” This is a clear statement of what TWU ostensibly considers to be Christian values. First and foremost, it requires celibacy in most cases and discriminates against sexual intimacy in general. Second, it gives marriage a privileged position, discriminating against the unmarried. Third, it discriminates against same-sex marriage. This covenant does infringe on the rights of students (not necessarily “others” given a community context) to their sexual identity, and I agree that it may be considered homophobic.

Nevertheless, I think this balance between religious freedom and the rights of sexual minorities should give standing to the legal profession as a whole, not each institution, especially private ones. That is, we want a diverse legal profession and a diverse bar, because as the letter pointed out, the legal profession fails in its most basic goals of access to justice when a lack of diversity in the bar produces a legal system that is tone-deaf to the perspectives of certain groups of people. The letter itself expresses a primary concern of diminishing diversity of opinion in the legal profession as a whole, the implication being that members of the queer community will end up forming a smaller proportion of the legal profession if TWU opens a law school. (It is also primarily concerned that development of critical thought and legal analytical skill would be impaired by a lack of sexual minorities in a law school, which is dubious. I hope my analytical skills develop independently of the sexuality of my colleagues.) There is simply no reason to interfere with the admissions of a private law school on representativeness grounds if the legal profession as a whole will remain balanced and representative.

I would like to bring your attention to two things. The first is that there are gay and lesbian students at TWU, who have seen and agreed with the Community Covenant. (I presume they are celibate by choice, and would likely contribute positively to diversity in the legal profession.) The second is that establishing affirmative-action programs in the British Columbia’s three public law schools, if absolutely necessary for diversity in the profession, is a viable and legal option that is far less intrusive into the substantive freedom of religion, thought, belief and conscience of private institutions.

The fact that there are gay and lesbian students at TWU is an encouraging sign that a greater discourse among Christians around issues of homophobia is taking place. In fact, many Christian scholars have devoted their studies to this area. That is why any change in values that leads to a change in the Community Covenant should come from within TWU, not from external pressures, if at all reasonably possible. This is what it means to be free. Otherwise, there can be little respect for autonomous decision-making in the private sector.

Obviously, if the Community Covenant is to be found illegal, this and other letters concerning it would be moot, and TWU’s proposal would get its fair hearing. However, if it is legal, the question is why we as a society would allow such a thing. I think it is because we have come to a position of respect for others’ religious views and their right to practice them. Sometimes such rights will be

forfeited or give way to a more valued right. That is not the case here. There are softer measures that can ameliorate the harms of freedom of religion in this context.

Admittedly, affirmative-action programs have some drawbacks. They should only be created when there is evidence of underrepresentation. They are blunt instruments. Their creation and use is political and selective. They require a disclosure of privacy during admissions (although this already occurs in UBC Law's alternative admission streams). These drawbacks are small in comparison to the consequences of disallowing a core aspect of TWU's identity and existence as an independent institution of higher learning. This would actually squelch diversity as all law schools will be required to have a similar make-up and admit a similar student body as all other law schools. No weight was given in the letter to the possible benefits of adding a law school where celibacy and marriage are a part of both values and conduct, either intrinsic benefits or diversity benefits.

In addition, even if TWU starts a law school we may not need affirmative action if there is evidence that as a whole the law school population in BC remains balanced and representative. As an example of a how diversity brings benefits, even if few queer students attend a hypothetical TWU law school, but gays and lesbians attend the dominant publicly funded law schools in a greater proportion than their share of the general population as a result, this significant boost in the queer population of a law school such as UBC Law may bring many benefits to the queer community. There would be more voices within the public institutions coming from a sexual minority perspective. There would be a greater critical mass of queer students for a greater chance of specialization in issues of sexuality and the law, and this specialization would be far more potent than otherwise. This greater concentration of gay and lesbian students may come about through affirmative action, but it will most likely occur even without. Diversity in action therefore does not stand opposed to freedom in this case, by achieving one you get both.

I agree with the letter that TWU must meet its public obligations. I think those obligations should be imposed on them only after careful consideration.

I hope that TWU reconsiders its position regarding the Community Covenant, and preserve it only if it continues to serve their student community in a positive way by adhering students to their own values. Accreditation should not be determined on the basis of the religious beliefs of students. As I stated earlier, I do not necessarily support the creation of another law school in British Columbia; there are already three after all. There may be many valid reasons to deny accreditation and I hope that only institutions that meet the highest standards of excellence qualify for a law school. However, it is my wish that the relevant accreditation authorities consider the alternatives to denying accreditation if diversity in the legal profession becomes the only concern.

Sincerely,

Edward Wong
JD Candidate 2015
UBC Faculty of Law

March 19, 2013

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Dear Sirs and Mesdames,

Re: Trinity Western University School of Law Proposal

We are a group of J.D. candidates and graduates at the University of British Columbia Faculty of Law (UBC Law) who believe that accreditation of the proposed law school at Trinity Western University (TWU) should not be determined on the basis of their religious beliefs. This letter was not circulated among students, alumni and faculty seeking signatures because we wanted to avoid escalating what is becoming a divisive issue among the students at our law school. Other students from UBC Law have also made a submission in opposition to the proposed law school. We wish to make it clear that their position is not representative of the student body as a whole.

As you know, the debate over TWU's proposal has developed as a result of the Community Covenant Agreement. The provision that has aroused the most attention is one where students are asked to "voluntarily abstain" from "sexual intimacy that violates the sacredness of marriage between a man and a woman." This sacredness referred to is derived from the Biblical foundation upon which TWU is based.

Because of the forthright position TWU holds on the expression of a person's sexuality, it is not surprising how quickly public discussion has turned to a debate

around discrimination and equality based on sexual orientation. Equality and tolerance are vital tenets of Canadian society and deserve attention. However, we feel that those who are quick to call for tolerance of the value they hold to be important (equality) also forget to be tolerant of those who hold other values that are equally fundamental under our Charter (freedom of religion).

As the British Columbia Civil Liberties Association recently reminded us, TWU is not to be judged by its beliefs. Founded by the Evangelical Free Churches of Canada and America, TWU's vision has always been to build an educational community for people sharing a faith in Jesus Christ and the Bible. TWU is a private, religious institution aimed at building a community of people who share a faith and a core set of beliefs. As a corporate body, TWU asks those who wish to join to make a public declaration that they will adhere to the beliefs of the community by signing the Covenant. Included, is their belief in Biblical marriage – between a man and a woman. Like any private institution, TWU has a right to require those joining to adhere to the beliefs held by the institution and upon which the institution has been built. Unfortunately, the institution's beliefs are being used as a reason to oppose its bid for a law school. To use TWU's religious beliefs to justify denying them the ability to offer a wider range of academic programs would severely undermine their freedom of religion.

Our peers have argued that the Community Covenant amounts to discrimination on the basis of sexual orientation, and that the Community Covenant is veiled homophobia. Moreover, some have argued that adherence to the Community Covenant would impair legal education and the legal community by diminishing diversity of opinion, stifling the development of critical thought, and denying legal education to queer students. We respectfully disagree with these arguments.

Every law school reflects a set of beliefs. As it stands, law schools have a secular emphasis in which religious views are in the minority, and are, in our experience, often openly derided. There is no reason why the secular world should have a monopoly on legal education. The legal profession and the classrooms of Canada's law schools would benefit greatly from the expansion of legal education in institutions that hold non-mainstream views. Furthermore, it is fallacious to argue that students would be hindered in their ability to contribute to the advancement of the legal community in British Columbia and Canada. Students at TWU law school would be taught the law, and will be required to uphold the law. To suggest otherwise does not accord with how our justice system works: judges and lawyers, regardless of their personal beliefs, are expected to apply the law.

The legal profession as a whole benefits from the diverse backgrounds and beliefs held by its practitioners and academics. Therefore, we must not be threatened by the idea that an institution with beliefs different from our own wishes to enter that space. Indeed, if this space thrives on a diversity of viewpoints, then we should be welcoming the expansion of legal programs that hold beliefs that may be different from our own.

Let us humbly put aside the debate on whether TWU's Covenant with their students is agreeable or not, and recognize that TWU has just as much freedom to hold such beliefs as the groups that oppose them. The issue underlying the discussion around TWU's proposed law school is not solely one of discrimination based on sexual orientation, but also one of upholding a private religious institution's right to operate in accordance with its religious beliefs.

Absent clear evidence that TWU's law program would not be taught in accordance with Canadian laws, there is no reason to deny accreditation. Accreditation of a law school should be based on the proposed program's ability to train law students to meet the basic legal competencies, skills, ethics, and professionalism required to be admitted to the bar; on whether the students graduating from such a law school are qualified to practice law; and, on whether the various bars across Canada have the capacity to admit the number of graduates each year. Accreditation should not be determined on the basis of the institution's religious beliefs and its graduates' voluntary adherence to such beliefs in their personal lives.

Respectfully,

Kate Addison, J.D. Candidate 2013
Samantha Chang, J.D. Candidate 2013
Geoff Dittrich, J.D. Candidate 2013
Ken Smith, J.D. Candidate 2013
Rebecca Stanley, J.D. Candidate 2014
Carmelle Dieleman, J.D. Candidate 2013
Jesse Dunning, J.D. Candidate 2013
Sean Hedley, J.D. Candidate 2015
Simon Charles, JD Graduate 2012



March 21, 2013

Canadian Common Law Program Approval Committee
Federation of Law Societies of Canada
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Dear Committee Members:

Re: TWU School of Law Proposal

It is of some concern to us that there has been a barrage of letters sent to the Federation both in support of and opposed to the proposal to have a law school at Trinity Western University. We appreciate that the Committee has stated that the issue of the Community Covenant is beyond the mandate of the Federation. However, that has not stopped lawyers and law students from expressing their views to the Federation on this issue.

I wish to take this opportunity to clear up any misconceptions that may have been created by the letters and by the media.

First, Trinity Western University has been a fully recognized university for 28 years under the oversight of the British Columbia Ministry of Advance Education. It offers 42 undergraduate and 16 graduate programs, all of which have been approved by the Ministry. The Ministry is currently reviewing our application for approval of the J.D. program and an expert review panel will be making a site visit to the university on March 26.

Under our founding legislation, Trinity Western University is required to be a Christian university. As such, we have policies that are different than public universities. One of these policies is the Community Covenant, which sets out common expectations of staff, faculty and students. The Community Covenant has been developed by the community itself, through a committee comprised of faculty, staff and students. It is reviewed periodically to ensure that it corresponds with the values of the community. The most fundamental aspect of the Community Covenant is an affirmation of respect for every member of the community.

Much has been made of the fact that the Community Covenant defines marriage as being between a man and a woman. That definition of marriage reflects a traditional evangelical Christian doctrinal understanding of marriage. In the *Civil Marriage Act*, passed in 2005, the federal government redefined marriage for civil purposes as being between two persons. Both in



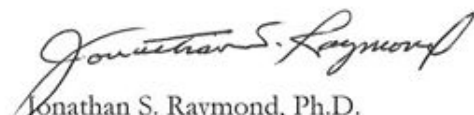
that legislation and in the reference before the Supreme Court of Canada, it was affirmed that religious intuitions' definitions of marriage for religious purposes would be respected. The *Civil Marriage Act* includes a preamble which states, "it is not against the public interest to hold and publicly express diverse views on marriage."

Those who have written to this Committee, urging you not to approve the law school proposal, are asking that you discriminate against the University based on our religious beliefs about marriage. We find this deeply disturbing in a multicultural country like Canada that respects diversity. Not only is religious freedom protected in Canada's *Charter of Rights and Freedoms*, but equality on the basis of religion is also protected. These are core values in Canadian society.

We indicated in a previous letter, dated November 29, 2012, that we believe that the 2001 Supreme Court of Canada decision *Trinity Western University v. British Columbia College of Teachers* clearly determined that the University has the right to maintain a religiously-based community covenant in the context of a professional program. As noted above, the *Civil Marriage Act* has not changed the law as it applies to religious institutions.

We appreciate the position of the Federation of Law Societies of Canada as set out in the letter of December 4, 2012 to Dean Flanagan. However, given the volume of letters we know you have received thought it might be helpful to provide the above comments. I and others at TWU would be pleased to meet with the Committee to discuss this or provide you with further information to the extent it may be required.

Yours truly,



Jonathan S. Raymond, Ph.D.
President and Professor | Acting Chancellor

Western Law Diversity Committee

Western University Faculty of Law
1151 Richmond Street
London, Ontario, Canada
N6A 3K7

March 22, 2013

Mr. Gérard R. Tremblay, C.M., O.Q., Q.C., Ad. E.
President, Federation of Canadian Law Societies
grtremblay@mccarthy.ca

Jonathan G. Herman
Chief Executive Officer, Federation of Canadian Law Societies
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Deborah Wolfe, P. Eng.
Managing Director, National Committee on Accreditation
Director, Law School Programs, Federation of Canadian Law Societies
dwolfe@flsc.ca

Laurie H. Pawlitza
Chair, Federation of Canadian Law Societies
Canadian Common Law Program Approval Committee
lpawlitza@torkinmanes.com

World Exchange Plaza
1810 – 45 rue O'Connor St.
Ottawa, Ont. K1P 1A4

Dear Sirs and Mesdames,

Re: Trinity Western University School of Law Proposal

We are current students at Western University's Faculty of Law in London, Ontario. We wish to express our concern about the proposed establishment of a faculty of law at Trinity Western University (TWU). Our concern centres on the restrictive Community Covenant agreement that all students must sign. This covenant bars students from engaging in "sexual intimacy that violates the sacredness of marriage between a man and a woman". Failure to abide by the covenant gives TWU the right to discipline, dismiss, or refuse to readmit the student. We believe this covenant would have a detrimental impact on student life at this proposed law school, and does not foster an ideal state of Canadian legal practice.

Many Canadian law schools have written letters expressing opposition to TWU's proposal. We wish to bring attention to the stifling of diversity and diminishment of quality of student life that would inevitably occur at TWU's law school. Western University has long been recognized for its commitment to student life, and our leaders have worked tirelessly to build Western's reputation for student experience. Our campus organizations, including the University Students' Council and Department of Housing, have laboured for years to ensure *all* students are treated equally and enjoy a wide range of opportunities for personal and professional success. The high level of diversity at Western University is our strength and the result of actively and continually challenging discrimination.

Requiring students belonging to sexual minority groups to abandon or suppress an integral part of their identity is an affront to Canadian values. It was only in the past decade that LGBTQ Canadians fully earned the right to be treated as equals under the law. However, LGBTQ individuals must still actively combat bullying in schools and heteronormativity in the workforce. LGBTQ students continue to take their own lives before they even have the opportunity to enter undergraduate, professional or graduate studies. Slamming the closet door on law students who have successfully triumphed over the many challenges of coming out is both harmful and unacceptable. Further, preventing students of all sexual orientations from engaging in premarital sex is not properly within the realm of university administration.

Canada's legal industry has long struggled with diversity in practice. The percentage of female law school graduates still does not align with the percentage of practicing female lawyers. Many racial, ethnic and sexual minorities are less likely to secure an articling position than their majority counterparts. Many LGBTQ lawyers are uncomfortable being open about their sexuality at work. Minority advancements in law have been hard fought and slow to achieve. Greater diversity in legal practice requires attitudinal shifts in legal education, and TWU's covenant embodies and fosters the type of oppression which has no place in Canadian legal education or practice.

It should be noted that students voluntarily select TWU as their university of choice; however, demand for legal education continues to grow, even outpacing the growth of available articling positions. Forcing students to choose between the study of law and sexual independence is against the spirit of freedom and equality present in Canadian society and Canadian law.

We hope the Law Society of British Columbia and the Federation of Law Societies of Canada take careful consideration of the concerns expressed in this letter before reaching a decision. It is also our hope that TWU reconsiders the restrictive language of its Community Covenant to improve the quality of life for its present and future students.

Sincerely,

William Metcalfe Lee	JD/HBA 2014
Lawrence Burns	JD 2014
Corey Critch	JD 2015
Meredith MacGregor	JD 2014
Thomas Shaw	JD 2015
Stefanie Di Massa	JD 2015
Caitlin Cross	JD 2015
Kathryn Ball	JD 2014
Patrick Shaunessy	JD/MBA 2014
Sabrina Van Damme	JD 2013
Elka Dadmand	JD 2013
Edward O'Dwyer	JD 2013
Cheryl Kornder	JD 2015
Jonathan Rajzman	JD 2014
Maia abbad	JD 2015
Ahad Ahmed	JD 2015
Samita Pachai	JD 2015
Deema Elshourfa	JD 2014
Julia Brown	JD 2013
Rachel Bengino	JD 2014
Josh Shields	JD 2013
mattison Chinneck	JD 2015
Charles Jordan Binns	JD 2016
Aaron Baer	JD 2013
Daniel Levine	JD 2014
Emily Carroll	JD 2014
Meredith Baker	JD 2015
Patricia Gordon	JD 2014
Tori Crawford	JD 2014
Adam Davis	JD 2013
Rob Lanteigne	JD 2014
Elizabeth Barrass	JD 2015
Jordan Michael Korn	JD 2014
Scott Robinson	JD 2013
Scott Robinson	JD 2013
Shaunak Desai	JD 2013
Ciara Pittam	JD 2014
Shirelle Goodman	JD 2015
Holly Cunliffe	JD 2013
Blair Hicks	JD 2013
Gavin Mah	JD 2013
Zachary Silverberg	JD 2014
Devin Fulop	JD 2014
Kristine Spence	JD 2013

Emily Stockley	JD 2013
Serena Gohal	JD 2013
Elizabeth Graper	JD 2013
Tamara Zdravkovic	JD 2013
Brittany Tuer	JD 2014
Agnieszka Kus	JD 2015
Jessica Elie	JD 2013
Samantha Woolley	JD 2014
Rachel Laurion	JD 2014
Denise Brunsdon	JD/MBA 2015
Alexandra MacKenzie	JD 2013
Kenny Choi	JD 2013
Peter Corum Van Esch	JD 2013
Doug Letto	JD 2015
Katherine Mazur	JD 2015
Reet Hess	JD 2014
Hilary Chun	JD 2015
Geoffrey Lowe	JD 2015
Carson Pillar	JD 2015
Jason Rosenberg	JD 2014
Amanda Laird	JD 2015
Aparna Bhushan	JD 2015
Jessica Page	JD 2015
Samantha Wolfish	JD 2014
Laura Meschino	JD 2015
Senayit Belay	JD 2015
Conrad Lee	JD 2014

Christian Legal Fellowship – UWO Law Chapter
Western University Faculty of Law
1151 Richmond Street
London, Ontario, Canada
N6A 3K7

March 22, 2013

Laurie H. Pawlitza
Chair, Federation of Canadian Law Societies
Canadian Common Law Program Approval Committee
lpawlitza@torkinmanes.com

World Exchange Plaza
1810 – 45 rue O'Connor St.
Ottawa, Ont. K1P 1A4

Dear Ms. Laurie H Pawlitza,

Re: Trinity Western University Proposed Law School

The Christian Legal Fellowship (CLF) chapter of the University of Western Ontario law school supports the national CLF's official endorsement:

The Board of Directors of Christian Legal Fellowship is pleased to support the development of a School of Law at Trinity Western University. The proposed School of Law encourages students to understand the practice of law as public service and develop professional skills. We believe this will be valuable as the profession is in a state of transition. The proposed School of Law further encourages students to look for areas that are underserved by legal professionals. This includes serving the poor and vulnerable in our society, but also includes potential practice of law in smaller communities. Chief Justice MacLachlin has noted that access to justice is a growing problem in Canada and this proposed law school is attempting to resolve this problem.

We believe that a School of Law at Trinity Western University, a Christian university, could be very positive. It will no doubt have a strong focus on ethics, and imbue a high standard of integrity on students. The university strongly emphasizes servant leadership, which will be an asset to the profession of law.

As a national association of nearly 600 lawyers, law students, and associate members that identify as Christians, and having a mission statement that encourages members to integrate faith with the practice of law, we see the potential to have this integration at law school as a positive step.

In addition to the CLF's endorsement as a club, many Western Law students signed the online petition supporting the proposed law school and the right to establish a private, religious educational institution because they believe it to be desirable and inherently necessary in a democratic society. Further, opposition to the proposed law school, premised on the Trinity Western's "covenant" policies, must be considered in light of *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31. It is our desire that you give careful consideration to the positive impact the school's graduates will have on the practice of law and the sometimes negative public perception of the legal community.

Sincerely,

Christian Legal Fellowship Executive

Digital signatures are viewable at the following link:

http://www.ipetitions.com/petition/support_twu_law/signatures



APR 25 2013

RECEIVED

BY E-MAIL
(Original By Mail)

April 24, 2013

Canadian Common Law Program Approval Committee
Federation of Law Societies of Canada
World Exchange Plaza
45 O'Connor Street, Suite 1810
Ottawa, ON
K1P 1A4

Attention: Gérald R. Tremblay, President

Dear Mr. Tremblay:

RE: CREATION OF A SPECIAL ADVISORY COMMITTEE

Thank you for your phone call last week and subsequent letter dated April 22, 2013. We also very much appreciate the time and work that the Federation of Law Societies of Canada (the "Federation") is putting into the review of Trinity Western University's (TWU) School of Law proposal.

Your letter raised two significant concerns. The first is with respect to the mandate of the Special Advisory Committee and the Federation itself. Your letter of December 4, 2012 to Dean Flanagan, along with your letter of April 22, 2013, indicates that consideration of TWU's Community Covenant is outside of the mandate of the Approvals Committee. It is clearly stated in the Terms of Reference that "*certain issues have been raised regarding the proposal that are outside of the mandate of the Approval Committee.*" If these issues are





outside of the mandate of the Approval Committee, why would they be within the mandate of the Special Advisory Committee?

Our understanding of the correct mandate of the Federation and the Approval Committee is exactly as set out in the Terms of Reference; which is to determine whether graduates of a School of Law at TWU would meet the national requirements. Consideration of other issues, whether by the Approval Committee or the Special Advisory Committee, would be extraneous to that mandate. Consideration of other issues would also be amending the requirements for approval part way through the approval process which is contrary to principles of procedural fairness.

Should the Federation elect to proceed with the Special Advisory Committee notwithstanding the above noted concern, a second concern would then be with respect to the record and representations available for consideration by the Special Advisory Council. The terms of reference indicate that the Special Advisory Committee *would take into account all representations received by the Federation to date including any representations by TWU*. This creates procedural unfairness. TWU is aware that the Federation has received letters from various people and groups. However, in reliance on the advice in your December 4, 2012 letter to Dean Flanagan (copied to us) that such matters are not relevant to the Approval Committee's consideration of TWU's proposal, the University did not deem it necessary to fully respond to each of those letters.

There is considerable support for the School of Law across the country. Again, in reliance on your letter we have intentionally not requested supporters of the School of Law to write to the Federation. There has clearly been an organized campaign by opponents of TWU's proposal that has largely gone unanswered by TWU. We have not attempted to "balance the ledger" or make substantive submissions as we had no notice or any indication whatsoever that such was necessary. In fact, the converse was communicated to TWU. If the record on which this matter is now to be reviewed is "representations received by the Federation to date," the University is placed at a significant disadvantage which, in our view, would constitute procedural unfairness.





We trust the Federation will reconsider the creation of a Special Advisory Committee and proceed with a review by the Approval Committee of TWU's proposal pursuant to its stated mandate.

Yours truly,

TRINITY WESTERN UNIVERSITY

A handwritten signature in black ink that reads 'Jonathan S. Raymond'.

Jonathan S. Raymond, Ph.D.
President

JSR/hkp



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**Elizabeth
Swarbrick**

Barrister
Solicitor
Notary Public

National Committee on Accreditation
C/O Federation of Law Societies of Canada
World Exchange Plaza
45 O'Connor Street
Suite 1810
Ottawa, Ontario
K1P 1A4

April 24, 2013



APR 25 2013

RECEIVED

To Whom It May Concern:

Re: Application of Trinity Western University

"The Law School Proposed by Trinity Western University in BC is something special and I support that."

You may all recognize this as a quote from Eugene Meehan in an opinion letter to the Lawyers Weekly from March, 2013.

We agree with him wholeheartedly.

It is prudent for the Law Society of Upper Canada, its Benchers, and the Federation of Law Societies to not only have input from large, politically-driven interest groups, but also from individual practicing lawyers on issues which it is required to consider.

There are critical issues in this case which potentially impact many members of society. These necessitate a balancing of freedom of religion with freedom from discrimination.

The TWU application has to pass some basic tests. These include the requirement for acceptable teaching standards. The students would be fully apprised of, and competent to practice in, Canadian law. In a recent CBC Radio interview on The Current, Professor Janet Epp - Buckingham, a lawyer and professor from TWU, indicated that the proposed law program would incorporate both excellent academics, as well as a practical education component. This, we submit, is long overdue in legal education in Canada. They pass this test.

The thorny issue is the community contract. The Sexual Orientation and Gender Identity Conference of the Canadian Bar Association ("SOGIC"), is opposed to TWA's law school proposal because of the contract. This is not surprising since TWU's contract is clearly in

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Almonte, Ontario K0A 1A0



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conflict with SOGIC's mandate. But does that mean that TWA's bid for a law school should fail? The arguments are not convincing. Amy Sakalauskas, a spokesperson for SOGIC, said repeatedly in the same CBC Radio interview that TWU's policies will impair critical thinking. On the contrary, it seems to us that this type of law school is the best place for students to learn critical thought - it is situated at the intersection of Charter rights, at the crossroads of equality. It is more likely that the tension between freedom of religion and freedom from discrimination will pervade every Charter discussion and every ethics/professionalism class taught at TWU. Where better to explore the difficulties and dynamics of Charter jurisprudence than at this type of law school? TWU law students will be confronted with this juxtaposition every day, and therefore will be forced to engage in the law perhaps even more than the typical Canadian law student.

In fact, following along the lines of Professor Epp-Buckingham's argument, one could argue that rather than turning back the clock, TWU is pushing the boundaries of Charter interpretation. Equality rights, as she said in the CBC Radio interview, cut both ways. This is the new frontier of Charter jurisprudence, balancing the right to believe and practice your religion with the right of people not to be discriminated against on the basis of sexual orientation. TWU receives no government funding. It is a private university. It does not deny admittance to gay, lesbian, bisexual or trans-gendered people. No one is forcing gay, lesbian, bisexual or trans-gendered people to attend school there. Does the Charter protect freedom of religion or not?

It appears that the situation here is along the same lines as the *Trinity Western v. British Columbia College of Teachers*, [2001] case from the Supreme Court of Canada. Certainly, all persons reading this letter would have carefully reviewed that Supreme Court of Canada case.

To paraphrase the 8-1 majority in Paragraph 36, the line needs to be drawn between *belief* and *conduct*. The freedom to hold beliefs is broader than the freedom to act on them. As the College of Teachers had no concrete evidence that teachers trained at TWU would foster discrimination, the TWU Application had to be permitted. "For better or worse, tolerance of divergent beliefs is a hallmark of a democratic society." (from the majority).

While Charter jurisprudence on the subject of equality rights has developed and enlarged over the last decade, the same principles remain true. Just because a person holds a religious belief -- in this situation, that any sexual activity outside marriage between a man and a woman is against their moral belief -- does not mean that the person, as a trained lawyer, is incapable of critical thinking on this point, and incapable of representing an individual client with different morals and beliefs of their own.

If that was the situation, by this logic, discriminating behaviour by lawyers would be rampant, as many lawyers hold to differing religious beliefs. However, that is not the case.

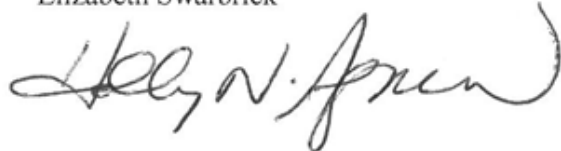
This case reiterates the importance of the Supreme Court of Canada's approach from 2001, that "it cannot be reasonably concluded that private institutions are protected, but their graduates are de facto considered unworthy of fully participating in public activities."

We support the pluralistic nature of Canadian society, and submit that the Federation of Law Societies is bound to do the same and support the application of TWU.

Yours very truly,



Elizabeth Swarbrick



Holly Agnew, Barrister & Solicitor,
250 Bridge Street, Carleton Place, Ontario,
K7C 3 H4

ES/ls

cc: Thomas Conway, Treasurer, LSUC
Adriana Doyle (Bencher), LSUC
Susan Armitage Richer (Bencher), LSUC

RUBY
SHILLER
CHAN
HASAN
BARRISTERS

July 12, 2013

VIA FAX (613.236.7233)

Ms Frederica Wilson
Senior Director, Regulatory and Public Affairs
Federation of Law Societies of Canada
World Exchange Plaza
45 O'Connor Street
Suite 1810
Ottawa, Ontario
K1P 1A4

Dear Ms Wilson:

Re: Trinity Western University Accreditation

The mandate of the Special Advisory Committee of the Federation of Law Societies of Canada is to provide advice to the Council of the Federation on the following question:

What additional considerations, if any, should be taken into account 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, given the requirement that all students and faculty of TWU must agree to abide by TWU's Community Covenant Agreement as a condition of admission and employment, respectively?

Focusing on "future graduates" and their fitness to be licensed by provincial law societies is the wrong focus. This question is the wrong question. It is based in an unprovable proposition that graduates of Trinity Western University may discriminate against gay and lesbian persons. But one can never predict who is going to discriminate based on their education. It is impossible to meet this onus of proof.

The correct issue is whether or not is acceptable to establish a quota system for law students, based on sexual and gender orientation. Should Trinity Western University gain accreditation, there will be fewer Canadian openings for queer applicants than for heterosexual applicants. A quota system was unacceptable for Jews and it is equally unacceptable for gays and lesbians.

FAXED
11:36 am
7/12/13

Clayton Ruby, C.M.
B.A., LL.B., LL.M., LL.D.
(honoris causa)
(Professional Corporation)

11 Prince Arthur Avenue
Toronto, Ontario
M5R 1B2

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RSCH

We ask the Federation to consider the dangers of approving such a law school, and to exercise its discretion against the application.

Would you please distribute this letter to the members of the Special Advisory Committee.

Yours very truly,



Clayton Ruby,
C.M.
Partner, Ruby
Shiller Chan Hasan

Constance Backhouse,
C.M., O.Ont., LSM
Professor, Faculty of Law
University of Ottawa

Beth Symes,
C.M., LSM
Partner, Symes
Street & Millard LLP



Angela Chaisson,
Barrister and Solicitor
Associate, Ruby
Shiller Chan Hasan

Neighbourhood Legal Services

(London & Middlesex) Inc.

BY E-MAIL

August 6, 2013

Federation of Law Societies of Canada - Special Committee

John J.L. Hunter, Q.C.

Mona T. Duckett, Q.C.

Derry Millar

Madeleine Lemieux

Morgan C. Cooper

National Committee on Accreditation

c/o Federation of Law Societies of Canada

Mr. Gerald Tremblay

Ms. Frederica Wilson

The Law Society of Upper Canada

Mr. Thomas G. Conway, Treasurer

Dear Sir/Madam:

RE: Accreditation of Trinity Western University Law School

Neighbourhood Legal Services is a poverty law clinic that assists low-income residents of London and Middlesex County with social justice issues. We are writing today to oppose the accreditation of the proposed law school at Trinity Western University.

Neighbourhood Legal Services endorses the arguments presented by Clayton Ruby and Gerald Chan in the attached article: "A law school at Trinity Western University will impose a queer quota."

In particular, we believe the following:

- Legal professionals enjoy a unique and privileged position in Canadian society. With that position comes responsibility, including the responsibility to respect and protect fundamental rights and freedoms.
- It is antithetical to the nature of the legal profession to endorse, promote or give credit to programs that seek to discriminate on the basis of "immutable" personal

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dicksons@lao.on.ca

Jeff Schlemmer, LL.B. Director Patty Gunness, C.L.W. Monica Wolf, B.A.(Hons.), LL.B. Michael Joudrey, Duty Counsel
Mike Laliberte, B.A., B. Ed., LL.B. Bruce Wright, M.A., LL.B. Kristina Pagniello, M.A., LL.B. Stephanie Dickson, B.A., LL.B./B.C.L.



characteristics, whether they be related to, *inter alia*, race, gender, or sexual orientation.

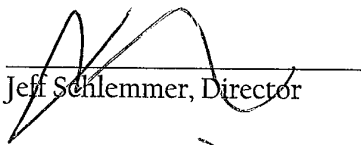
- It is important to distinguish between a school's right to free speech/beliefs and its right to act on such beliefs by imposing rules and regulations that are fundamentally discriminatory against a specific class of people.
- It is important to reject the distinction, as did the Supreme Court of Canada, between "gay behaviour" and "gay identity". In other words, it is unacceptable for Trinity Western University to purport to admit homosexuals but restrict them from engaging in "homosexual activity".
- The legal system, including its regulatory societies, should not permit religious-based screening for the legal profession. Nor should we endorse what is effectively a "queer quota" in the Canadian legal profession, by supporting the existence of anti-gay schools. This is no less outrageous than a law school that proposes to bar women or blacks based on a system of beliefs.

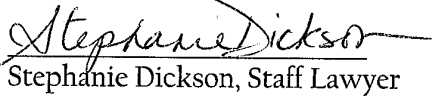
It is unfortunate that Trinity Western University seeks to teach future lawyers that it is acceptable to discriminate. What kind of beginning is this to a legal career?

The message that ought to be sent to Trinity Western University is that the Federation of Law Societies of Canada will not accredit a law school that restricts access to our noble profession to heterosexual students only.

It is our sincere personal and professional hope that the Federation of Law Societies of Canada will deny this request for accreditation.

On behalf of Neighbourhood Legal Services,


Jeff Schlemmer, Director


Stephanie Dickson, Staff Lawyer

RALPH F. WATZKE, LL.B., Barrister & Solicitor

ralphwatzke@gmail.com

122 Carter Crescent, Regina SK, S4X 2C7, Telephone (cellular): 306-502-5030

Mr. Jonathan Herman, CEO
Mrs. Deborah Wolfe, Director, Law School Programs
Federation of Law Societies of Canada
World Exchange Plaza
45 O'Connor St., Suite 1810,
OTTAWA, ON K1P 1A4
jherman@flsc.ca ; dwolfe@flsc.ca

Dear Mr. Herman and Ms. Wolfe:

RE: STATEMENTS BY MR. CLAYTON RUBY AND OTHERS (INCLUDING
CANADIAN COUNCIL OF LAW DEANS "CCLD" & CANADIAN BAR
ASSOCIATION "CBA") ON THE APPLICATION BY TRINITY WESTERN
UNIVERSITY "TWU" FOR ACCREDITATION OF ITS LAW SCHOOL

I have been asked by the Canadian Association for Free Expression ("CAFÉ"),
and its Executive Director, Mr. F. Paul Fromm, to write on this important issue
facing Trinity Western University ("TWU"), its potential future law students, and
the future of legal education in Canada.

I have known Mr. Fromm for a number of years, as a result of his attendance and
involvement in many Court and tribunal matters over the years, in which I assisted
the lead counsel, pertaining to freedom of expression, religion, association, and
the other freedoms and rights guaranteed by the Constitution and the laws.

The Canadian Association for Free Expression has granted me authorization to
write on behalf of the association, in this matter.

This association was incorporated by Letters Patent, on the 13th day of April, 1983,
as a non-profit corporation in the Province of Ontario under the Corporations Act.
Among its goals and purposes, are to educate people about, and promote civil
freedoms, liberties and rights. It has long stood for the protection of freedom of
expression, freedom of association, and freedom of religion and conscience. It
has long stood for the protection of persons and organizations from unlawful
discrimination – and this includes educational institutions, universities, schools,
churches, religious organizations, and those persons who are members of, or
affiliated with them.

The organization has long been a participant and intervenor in many matters
before Courts, tribunals, and other bodies, in matters pertaining to freedoms and
human rights.

Supporters of freedom of expression and religion, read with concern statements
reported in the media, and attributed to lawyer Clayton Ruby (as well as similar
statements attributed to others such as the CCLD, apparently in a letter of
November 24, 2012, addressed to you), regarding the application by TWU for
Accreditation for a Proposed Law School. Ruby and the CCLD, we understand,
seek to halt this proposed law school, rekindling opposition to this Christian
university in British Columbia establishing one, on the claim that it might
potentially discriminate against homosexuals.

Trinity Western University is a private liberal-arts school in Langley, B.C. It applied for accreditation to the Federation of Law Societies of Canada in the summer of 2012. Controversy arose within the legal and lesbian, gay, bisexual and transgender ("GLBT") communities because all students, staff and faculty at the school must adhere to a covenant in which they promise not to lie, cheat or steal, and agree not to engage in "sexual intimacy that violates the sacredness of marriage between a man and a woman."

The covenant, lawyer Clayton Ruby told The Globe and Mail's editorial board, was claimed by him to essentially create a "queer quota" (his words!!! – sic.) in university law schools. Canadian universities have a total of 3,547 places for first-year law students. The proposed Trinity Western law school would add 60.

"If you're queer (sic.), you can't apply to the extra 60 seats," Mr. Ruby said. "... We find that just to be anathema." (I will refute this claim later in this letter)

Mr. Ruby acknowledged that the covenant affects all the university's students, but said he is targeting the law school as a first step out of concern that lawyers would get their training in ethics and rights in an environment he thinks is contrary to Canadian laws. (I shall refute this as well)

The Federation of Law Societies of Canada has set up a special advisory committee to deal with the controversy, as I understand, and I have been informed that it has received more than 30 submissions from interested groups. The federation said that it will take applicable law into account, including the Canadian Charter of Rights and Freedoms.

However, as the decision draws nearer, Mr. Ruby is voicing concern that the issue the federation is examining – whether Trinity Western graduates would discriminate against the "GLBT" community in their careers – is the wrong question. My argument – and this is the crux of the matter, is that there is **ABSOLUTELY NO EVIDENCE THAT TWU LAW GRADUATES, OR IN FACT, ANY CHRISTIAN OR RELIGIOUS LAWYERS, WILL, OR DO, SO DISCRIMINATE IN THEIR CAREERS.**

Trinity Western's spokesperson said the university will not give interviews until after the decision, which could come before the end of August. But it has argued that students choose the university knowing they will be obliged to obey the covenant.

When the university proposed the law school last year, it wrote on its website: "Establishing a law school has been on the strategic plan for the university for many years and fits well with the university's mission to develop godly leaders for the marketplaces of life."

The university receives no public funds, except competitive research grants that faculty are awarded, but the proposed law school has encountered opposition from the Canadian Bar Association and the Council of Canadian Law Deans, and individuals such as Clayton Ruby, who disturbingly enough, purports to be a spokesman for civil liberties and human rights (being very selective in only supporting some liberties and rights, and opposing or ignoring others).

Bob Gallagher, a homosexual advocate, alleges: "To us, it is really quite offensive that you would be able to bar us from being able to even apply to a limited number

of seats to be able to practice law." But I disagree with that; there would be that that you would be able to bar us from even being able to apply to a limited number of seats to be able to practice law". But I disagree with that, there would be absolutely no bar to any person or group of persons to apply, as I will indicate.

Both Mr. Gallagher and Mr. Ruby said they are not opposed to people practising their religion, but they do object when it excludes certain groups of people.

It is of huge concern, that Toronto lawyer Ruby, as well as certain law deans, have made presentations to other legal professional bodies, apparently in a concerted effort to have the TWU application denied without notice to, or an invitation to, TWU to respond.

The concerns expressed herein are fourfold.

Firstly, the notion that existing law schools ought to monopolize legal education in Canada, so as to exclude religious or conscience-based universities, is totally unacceptable.

Secondly, the premise expressed by both Mr. Ruby and the CCLD, that persons who adhere to religious principles ought to be excluded from legal education, must be rejected categorically.

Thirdly, the suggestions by Ruby and CCLD that the Association of University and College Teachers' ("AUCT") concerns over academic freedom in religious or conscience-based universities disqualify such universities from providing an accredited legal education are entirely erroneous. (It must be noted that it is very prevalent in other countries such as USA, to have multiple accredited law schools as part of religious-based universities, such as Yeshiva (Orthodox Jewish), Brigham Young (Mormon), Notre Dame (Catholic), Georgetown (Catholic), Gonzaga (Catholic), Pepperdine, Baylor, and many, many more - all of these being very highly respected accredited law schools.)

Fourthly, there is concern that the process of evaluation of TWU's application may be tainted were any of Clayton Ruby, CCLD, or their nominees to participate in the process or decision.

Regarding the first concern, Canada is widely considered to be a country of diversity and tolerance. It is thus startling for someone portraying himself as a civil liberties/human rights lawyer, and for deans of publicly-funded law schools, to use their positions to thwart entry of another voice into academe, albeit a religious one. It is noted that the BC Human Rights Code expressly provides for religious-based groups (among others) to be exempt from certain provisions when they grant preferences to members of those groups. To survive, such groups must be able to prescribe membership conditions and their fundamental beliefs. Ruby seems to miss this point.

A very similar issue, relating to teacher education and the teaching profession, was emphatically and explicitly decided by the Supreme Court of Canada in the important decision: *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, where the issue was whether TWU as a private, religious based university should be denied accreditation for its educational degree. The Court there rejected the attempt to deny accreditation of TWU's educational training program based on assumptions made about whether religiously-based

beliefs that it promoted would result in discrimination if its graduates were hired as teachers in the public school system. The Court's majority wrote thus:

"TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions. That said, the admissions policy of TWU alone is not in itself sufficient to establish discrimination as it is understood in our s. 15 jurisprudence. It is important to note that this is a private institution that is exempted in part, from the British Columbia human rights legislation and to which the Charter does not apply. 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."

Further, the Court decided that the BC College of Teachers had inappropriately narrowed its consideration of matters. Instead of considering all rights, it focused just on discrimination. Instead of considering whether there was real evidence of misconduct, it focused on whether it regarded the beliefs of a particular religious group as acceptable. The Court found that the BC College of Teachers was improperly forcing TWU to elect to abandon its beliefs in order to obtain accreditation.

On this point, the SCC stated, very clearly:

"There is no denying that the decision of the BCCT 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. If TWU does not abandon its Community Standards, it renounces certification and full control of a teacher education program permitting access to the public school system. Students are likewise affected because the affirmation of their religious beliefs and attendance at TWU will not lead to certification as public school teachers unless they attend a public university for at least one year. These are important considerations. What the BCCT was required to do was to determine whether the rights were in conflict in reality."

Finally, the Court concluded that the BCCT should have left accreditation of TWU's program in place, and deal with any discriminatory misconduct by a TWU-educated teacher (or any other teacher, for that matter) through its usual disciplinary processes; in the following words:

"Instead, the proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them. Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of BC, the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected. The BCCT, rightfully, does not require public universities with teacher education programs to screen out applicants who hold sexist, racist, or homophobic beliefs. For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society."

Ruby and the CCLD clearly are aware of this Court decision, but reject its application here. With respect, their implicit derogation of the SCC's decision as being unprincipled is inappropriate. CCLD posits, and Ruby concurs, that discrimination on the basis of sexual orientation is unlawful in Canada and fundamentally at odds with the core values of all Canadian law schools.

If the topic was just about public law schools, then most would likely agree. But the topic here is whether private educational institutions formed by religious or conscience-based groups are to have their constitutional rights recognized and protected. Leaving that out of the equation is unprincipled. The approach of CCLD and Ruby, is as burdensome to fundamental freedoms and as contrary to the Charter and its underlying common-law-based freedoms, as the BCCT's approach was.

The second concern noted above was the premise that those who are religiously minded should be excluded from law school. That would, by extension from their argument, include all professors, students and eventually, lawyers and judges who held the religious views that they say are repugnant. Yet the same law schools that CCLD preside over have in fact admitted TWU undergraduates into their law schools. There are many religious adherents among the student population in existing law schools in Canada. There are also, clearly, professors and instructors (and not just a few) who are known to be members of religions.

The main finding of the SCC's decision can be stated as follows:

"In the circumstances of this case, the Council of the BC College of Teachers...erroneously concluded that equality of rights on the basis of sexual orientation trump freedom of religion and association. They do not."

Also one notes that Law Societies across Canada have not made a question about the religious beliefs of applicants part of their questionnaire for articling student program admissions. At one time, Communists were denied entry to the Bar (*Martin v LSBC*, 1950); it is unclear if there was ever a formal prohibition against "GLBT" persons. In any event, there is no doubt that "GLBT" persons are very well represented in law schools and in the legal profession (at least among the younger lawyers), and that they haven't encountered any problems in getting into law schools in the normal way (high academic averages and high LSAT scores), at least for the past four decades or more. There was not in the past, and is not today, any real reason for "GLBT" students to self-declare, and many choose not to do so, even today, not being a "visible minority", and not being academically disadvantaged.

The third concern was over the use by Ruby and CCLD of the criticism derived from CAUT of TWU and other religiously-based educational institutions as somehow not being places of academic freedom. Given the absence among publicly-funded universities of encouragement for religiously-based academics to voice their perspective, one could be forgiven for questioning why CAUT would find fault elsewhere when diversity is not uniformly practiced in public universities, at least as CAUT preaches it.

Our information is that TWU has in fact long practiced Affirmative Action/Equity in its admissions, in ensuring that categories of persons who might otherwise face barriers to admission, such as Aboriginals, Afro-Canadians, Hispanics, Asian-Canadians and the disabled are reasonably represented in the student body.

From its founding, it has been part of TWU's mission to be inclusive of minorities, and most especially Canada's Aboriginals to ensure that they have the opportunity of a University education. TWU is committed to continue this.

These are, of course, "visible" minorities, and ones that have historically been

under-represented in Canadian universities.

Ruby claims that allowing TWU to have a law school, would mean 60 fewer seats for homosexuals. This is an empty and specious argument.

After all, equity/affirmative action admissions for Aboriginals, Afro-Canadians, Hispanics, and the disabled, equally means fewer seats for those, not in these categories. One does not hear Ruby complaining about that.

Ruby would appear to suggest in the media, that there be a quota established for "GLBT" persons to enter law schools. But is that really necessary, or even desirable?

Affirmative action/equity was established for certain Visible Minority groups, only because historically they have had difficulty attaining the academic standings and admission test scores of other students.

But this clearly does not apply to "GLBT" students; by all accounts, as indicated previously, they are well-represented in law school, very often without having declared themselves as such.


The idea of a "gay quota" can have disturbing implications, as this is eerily reminiscent of the odious "numerus clausus" quota on Jews, that until the 1940's or 1950's restricted admissions of Jewish students to most Canadian universities. Up until that time, Canadian university administrators thought that there were too many Jewish people being admitted to universities, so they restricted their numbers. Most people nowadays would consider that very offensive, and certainly Mr. Ruby would have to agree with that.

Also, the contention that Christians or religious believers who are lawyers, would somehow discriminate against "GLBT" persons is ridiculous.

There are many, many lawyers in Canada who are Christians, or members of religious faiths, including myself. Almost all of us have represented "GLBT" clients; we do not refuse them as clients, nor criticize their way of life.

In conclusion, it is suggested that the Federation of Law Societies of Canada give proper consideration to the application of TWU and reject the anti-freedom-of-religion precepts enunciated by Clayton Ruby and the CCLD in their public statements and correspondence.

Yours very sincerely,



R. WATZKE, LL.B.

BRITISH COLUMBIA HUMANIST ASSOCIATION

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Reject the proposed School of Law at Trinity Western University

To:

Federation of Law Societies of Canada Special Advisory Committee on TWU's Proposed School of Law

Degree Quality Assessment Board, Government of British Columbia

Amrik Virk, Minister of Advanced Education, Government of British Columbia

David Eby, Opposition Critic for Advanced Education

Because of its discriminatory admittance and hiring policies, the BC Humanist Association calls for the proposed School of Law at Trinity Western University to be rejected.

TWU's policies violate the fundamental notion of equality. Approving their law school would create an extra path to becoming a lawyer in Canada that is not available to students who do not fit with TWU's vision of heterosexual Christians.

It is well documented that TWU's Community Covenant discriminates against gay and lesbian students. The Covenant also requires that students adopt an anti-choice stance (students must "uphold...worth from conception") contrary to Canada's ongoing commitment to women's reproductive freedoms. Furthermore, the mandatory Statement of Faith for faculty and staff discriminates against the non-religious and others who are not Christian. These restrictions threaten academic freedom at TWU.

Our Board of Directors, in solidarity with numerous other organizations, have taken a strong stance against this proposal (see attached) and urge the FLSC and Government of British Columbia to stand up for prospective LGBT and non-Christian lawyers by rejecting this discriminatory law school.

Sincerely,

Ian Bushfield
Executive Director

BRITISH COLUMBIA HUMANIST ASSOCIATION

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Reject the TWU Law Degree Program

For ratification: 14 August 2013

Whereas Humanism is committed to the equal dignity of all persons, regardless of belief or sexual orientation, and to the separation of church and state;

Whereas the *UN Declaration of Human Rights*, the *Canadian Charter of Rights and Freedoms*, and the *BC Human Rights Code* prohibit discrimination on the basis of religion or sexual orientation;

Whereas Trinity Western University's (TWU) Community Covenant discriminates against women¹ and against gay, lesbian, and bisexual students²;

Whereas the Canadian Association of University Teachers (CAUT) determined TWU's policies, including their mandatory Statement of Faith for faculty and staff, violate the principle of academic freedom³;

Whereas TWU has received at least \$6.3 million in funding from the Governments of BC and Canada⁴;

Whereas TWU has applied the Federation of Law Societies of Canada (FLSC) to create an accredited law school;

And whereas a rejection of TWU's application by the FLSC could potentially survive a court challenge⁵;

The Board of Directors of the British Columbia Humanist Association calls on that the Province of British Columbia and the FLSC to deny the application by TWU to create a law degree program.

¹ "Members of the TWU community, therefore, commit themselves to...uphold [all persons'] God-given worth from conception to death." *TWU Community Covenant Agreement* Source: <http://twu.ca/studenthandbook/twu-community-covenant-agreement.pdf>

² "...community members voluntarily abstain from...sexual intimacy that violates the sacredness of marriage between a man and a woman." *Ibid*.

³ Source: <http://www.caut.ca/docs/reports/report-of-caut-ad-hoc-investigatory-committee-on-twu.pdf?sfvrsn=0>

⁴ \$2.6 million in 2009 from both the Governments of BC and Canada source:

<http://www.ic.gc.ca/eic/site/696.nsf/eng/00512.html> and \$1.1 million in 2011 source:

http://www.markwarawa.com/In%20the%20media/mark_in_the_news/twu-granted-1.1-million

⁵ Craig, Elaine, "The Case for the Federation of Law Societies Rejecting Trinity Western University's Proposed Law Degree Program." *Canadian Journal of Women and the Law*, Vol. 25(1), 2013. <http://ssrn.com/abstract=2202408>



VIA FAX TO: 613-236-7233

August 16, 2013

Mr. Gerald Tremblay
National Committee of Accreditation
c/o Federation of Law Societies of Canada
World Exchange Plaza
45 O'Connor Street
Suite 1810
Ottawa, Ontario, K1P 1A4

Dear Mr. Tremblay:

We welcome the opportunity to provide this submission on behalf of Legal Leaders for Diversity ("LLD"). LLD is an organization of over 70 general counsel from Canadian corporations across Canada. We are responding to Trinity Western University's application for an assessment of whether its proposed common law program meets the Federation's national requirements. The LLD is dedicated to encouraging diversity and inclusion in our own businesses and co-operating to foster these values throughout the legal profession and the larger Canadian business community.¹

The LLD supports the role of the Federation in determining whether new law degree programs meet national standards for entry to law society licensing programs across Canada and commends the Special Advisory Committee for its consultation with interested members of the public on this matter.

We understand that Trinity Western University would request that its students sign a covenant which would, among other things, require them to abstain "from sexual intimacy that violates the sacredness of marriage between a man and a woman" and if "a student, in the opinion of the University, is unable, refuses or fails to live up to their commitment, the University reserves the right to discipline, dismiss, or refuse a student's re-admission to the University."² The LLD's view is that, such an open exclusion of gay, lesbian and bi-sexual law students is discriminatory. Furthermore, the establishment of a law school that would reduce the opportunity for entry for gay, lesbian and bi-sexual students would impose a quota system on these students, which is unacceptable.

Cont/d...

¹ See Mission Statement, Diversity Renewal, Legal Leaders for Diversity, online: <http://legalleadersfordiversity.com/about-us/>.

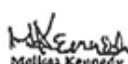
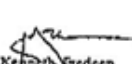
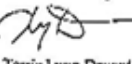
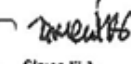


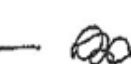
² See the Student Handbook (Sept. 2011 - Sept. 2012), Trinity Western University, online: <http://twu.ca/studenthandbook/university-policies/student-accountability-process.html>.

Page 2/...
 Mr. Gerald Tremblay
 National Committee of Accreditation

As part of the LLD's ongoing commitment to diversity in the workplace we launched "Be an Advocate" initiatives, a key priority of which is to hire from a diverse pool.³ A quota system for any law school would not be aligned with the LLD's core values and, we respectfully submit, the Federation's Vision Statement of "acting in the public interest by strengthening Canada's system of governance of an independent legal profession, reinforcing public confidence in it and making it a leading example for justice systems around the world."⁴

In light of the foregoing, we urge the Federation to carefully consider whether Trinity Western University's application and, in particular, the covenant it intends to impose on its students, violates the spirit of the legal profession and Canadian law, including the protections afforded by the *Canadian Charter of Rights and Freedoms* and human rights legislation in all provinces and territories.

Yours truly,
 Executive Committee, Legal Leaders for Diversity

						
Melissa Kennedy General Counsel Ontario Teachers' Pension Plan	Kenneth Predeen General Counsel Deloitte Canada	Terrie Lynn Devondah General Counsel AON Canada	Simon Fish General Counsel BMO Financial Group	Ar Mahara General Counsel Kellogg Canada Inc.	David Allgood General Counsel RBC Financial Group	Dorothy Quann General Counsel Xerox Canada

³ See Be an Advocate Initiatives, Legal Leaders for Diversity, online: <http://legalleadersfordiversity.com/about-us/>.

⁴ See Our Vision Statement, Federation of Law Societies of Canada, online: <http://www.flsc.ca/en/our-mission/>.

Tab 3.2

BACKGROUND MATERIAL
LAW SOCIETY OF UPPER CANADA



Tab 3.2.1

Background

Convocation Approval of Federation Task Report on the Canadian Common Law Degree (February 2010) and Federation Implementation Committee Report (October 2011)

1. In recent years, in large part because of the development of the Federation of Law Societies of Canada (“the Federation”) Mobility Agreements, as well as the Canadian Agreement on Internal Trade, law societies have recognized the increasing importance of developing national standards in key areas of regulation. These enable them to be assured that regardless of from which jurisdiction a lawyer transfers he or she will have met similar regulatory requirements. This enhances public protection across the country.
2. Over the last decade, for example, law societies have been developing national standards through the auspices of the Federation to address disciplinary issues, a model code of conduct, harmonization of foreign legal consultant regimes, national competency standards, and in 2009 and 2011 a national requirement for the Canadian common law degree.

Task Force on the Canadian Common Law Degree

3. The Federation established the Task Force on the Canadian Common Law Degree in June 2007 (“the Federation Task Force”) to “review the criteria in place establishing the approved LL.B/ J.D. law degree for the purposes of entrance to law societies’ bar admission/ licensing programs and, if appropriate, to recommend changes.” The Federation Task Force submitted its final report (“the final report”) to Federation Council in October 2009. The report is set out at **[TAB 3.2.1.1: Federation Task Force Final Report.](#)**

4. The final report recommended that,
 - a. law societies in common law jurisdictions adopt a uniform national requirement for entry to their bar admission programs;
 - b. the National Committee on Accreditation (“NCA”) apply this national requirement in assessing the credentials of applicants educated outside Canada; and
 - c. the national requirement be applied in considering applications for new Canadian law schools.
5. The final report detailed the basis for the national requirement necessary for an “approved law degree,” outlining the qualifying academic program and the necessary learning resources with which graduates seeking entry to licensing programs must have complied.
6. It also provided for the establishment of a process to determine how the national requirement would be implemented.
7. On February 25, 2010, Convocation approved the Federation final report. See [TAB 3.2.1.2: Report to Convocation 2010](#).

Implementation Committee Report

8. To address implementation of the national requirement, the Federation established a Committee, made up of five law society representatives and three law school representatives, who were current or former Law Deans, to develop a proposal to implement the national requirement. That Committee submitted its final report to the Federation Council in August 2011. The report is set out at [TAB 3.2.1.3: Implementation Committee Report](#).
9. The Implementation Committee Report contained 20 recommendations, including the establishment of an Approval Committee with the following mandate:
 - To determine law school program compliance with the national requirement for the purpose of entry of Canadian common law school graduates to Canadian law society admission programs. This will apply

to the programs of established Canadian law schools and those of new Canadian law schools.

- To make any changes, revisions or additions to the annual law school report as it determines necessary, provided the changes, revisions or additions conform to the approved national requirement and reflect the purposes described in this report.
 - To make any changes, revisions or additions to the draft reporting timeline in Appendix 4 and any other reporting timelines as it determines necessary to ensure that the compliance process operates in an effective manner.
 - To post its final annual reports on the Federation public website and to post information reports on the website, covering, at a minimum, the list of approved law school programs and issues of interest respecting the continuum of legal education.
 - To participate in efforts and initiatives to enhance the institutional relationship between law societies and law schools at a national level. This could, for example, include efforts such as promoting a voluntary national collaboration on ethics and professionalism learning that would further enhance teaching, learning and practice in this area.
 - To ensure appropriate training for its members.
 - To undertake such other activities and make any necessary changes, additions or improvements to its processes as it determines necessary to ensure the effective implementation of the national requirement, provided these reflect the purposes described in this report.
10. On October 27, 2011, Convocation approved the Implementation Committee's report. See **TAB 3.2.1.4: Report to Convocation 2011.**
11. In accordance with the processes Convocation approved in February 2010 respecting the national requirement and in October 2011 respecting the approval of law school academic requirements, the Approval Committee has determined that Trinity Western University should receive conditional approval for its proposed law school program based on the national requirement.

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

TASK FORCE ON THE CANADIAN COMMON LAW DEGREE

FINAL REPORT

October 2009

The Task Force presents this report and recommendations for consideration and discussion. The report and recommendations have not been endorsed by the governing body of the Federation and do not represent the official position of the Federation or its member law societies.

EXECUTIVE SUMMARY

The provincial and territorial law societies of Canada have the statutory responsibility to regulate the legal profession in the public interest. This responsibility includes the task of admitting lawyers to the profession. In all common law provinces and territories there are three requirements for admission to the bar: a Canadian law degree or its equivalent, successful completion of a bar admission or licensing program and completion of an apprenticeship known as articling. For applicants who receive their legal training outside Canada the determination of what constitutes qualifications “equivalent to” a Canadian law degree is made by the National Committee on Accreditation (“NCA”), a committee of the Federation of Law Societies of Canada (“the Federation”).

Unlike other common law jurisdictions, Canada has never had a national standard for academic requirements of a Canadian law degree. The closest *de facto* standard has been a set of requirements the Law Society of Upper Canada approved in 1957 and revised in 1969. These have not been reviewed in 40 years and in any event have never been explicitly accepted by other law societies.

The regulatory landscape has changed greatly since 1969. Public scrutiny of regulated professions has increased. Recent events have converged to focus particular attention on the need for transparent regulatory processes and on the implications of government initiatives to harmonize regulatory requirements across the country:

- Three provinces have enacted legislation respecting access to regulated professions that require regulators to ensure that admission processes for domestic and internationally trained applicants are transparent, objective, impartial and fair.
- The number of internationally trained applicants for entry to bar admission programs has greatly increased and the requirement for equivalency has created a need to articulate what law societies regard as the essential features of a lawyer's academic preparation.
- New law schools are being proposed for the first time in more than 25 years and recognition of their degrees as meeting the academic requirements for entry to bar admission programs requires a more explicit statement of what is required.
- Federal and provincial governments have made clear their commitment to national labour mobility and harmonized standards. A 2007 Canadian Competition Bureau (“CCB”) Study on regulated professions questioned the rationale behind the different admissions requirements of various law societies. Recent amendments to the Agreement on Internal Trade (“AIT”) have made it clear that all levels of government view professions as national entities that must have the same admission standards. Anyone certified for an occupation by a regulator in one province or territory must be recognized to practise that occupation in all other provinces and territories. The legal profession has had national mobility for a number of years, beginning with the negotiation of the

National Mobility Agreement in 2002. A national academic requirement would further enhance national mobility by providing a common, transparent method for entry to any of the common law bar admission programs in Canada.

The Federation appointed this Task Force in June 2007 to review the existing academic requirements for entry to bar admission programs and to recommend any modifications that might be necessary.

The Task Force's recommendations follow this Executive Summary. The Task Force recommends that the Federation adopt a national academic requirement for entry to the bar admission programs of the common law jurisdictions. The intent behind developing a requirement that applies equally to applicants educated in Canada and internationally is to ensure that all those seeking to enter bar admission programs in Canadian common law jurisdictions have demonstrated certain essential and predefined competencies in the academic portion of their legal education.

In developing the recommended content of this national requirement the Task Force has had the benefit of input from the legal academy, the profession and other interested parties. In particular, the Council of Canadian Law Deans has been of considerable assistance as the Task Force has addressed the difficult challenge of creating a national requirement while at the same time preserving the flexibility Canadian law schools require to continue the innovation in legal education that positions graduates for valuable and diverse roles in society.

Accrediting bodies in jurisdictions similar to Canada commonly use one of two approaches to determine that an applicant for admission meets the necessary academic requirements: successful completion of specified courses or passage of a substantive law bar examination. In recent years, however, there has been increasing focus on learning outcomes, rather than prescriptive input requirements. The Task Force is of the view that this focus represents the appropriate regulatory approach.

Accordingly, the Task Force proposes a national requirement expressed in terms of competencies in basic skills, awareness of appropriate ethical values and core legal knowledge that law students can reasonably be expected to have acquired during the academic component of their education.

The skills competencies the Task Force recommends are in problem solving, legal research and oral and written communication skills. These skills are fundamental to any work a lawyer undertakes in the profession.

In general the Task Force recommends that the Federation leave it to law schools to determine how their graduates accomplish the required competencies. It has concluded, however, that the Federation should require applicants seeking entry to bar admission programs to demonstrate that they have had specific instruction in ethics and professionalism, in a stand-alone course dedicated to the subject. Ethics and professionalism lie at the core of the legal profession. It is important that students begin to appreciate this early in their legal education.

In determining the required substantive legal knowledge, the Task Force considered the continued relevance of the current first-year curriculum of the 16 law schools offering a common law degree, the importance of students having foundational knowledge in both public and private law, the competency research undertaken by various law societies in Canada, the regulatory approach in other comparable common law jurisdictions and the importance of ensuring that the requirements do not interfere with the flexibility and innovation in current law school education.

The Task Force's recommendations reflect its view that every Canadian law school graduate entering a bar admission program or a recipient of an NCA Certificate of Qualification should understand,

- the foundations of law, including principles of common law and equity, the process of statutory construction and analysis and the administration of the law in Canada;
- the constitutional law of Canada that frames the legal system; and
- the principles of criminal, contract, tort, property and Canadian administrative law and legal and fiduciary principles in commercial relationships.

In addition to the competencies set out in the national requirement the Task Force recommends that law schools meet certain institutional requirements, as follows:

- The prerequisite for entry to law school must at a minimum include successful completion of two years of postsecondary education at a recognized university or CEGEP, subject to special circumstances.
- The law school's program for the study of law must consist of three academic years or its equivalent in course credits.
- The program of study must consist primarily of in-person instruction and learning and/or instruction and learning that involves direct interaction between instructor and students.
- The law school must be adequately resourced to meet its objectives.
- The law school must have appropriate numbers of qualified academic staff to meet the needs of the academic program.
- The law school must have adequate physical resources for both faculty and students to permit effective student learning.
- The law school must have adequate information and communication technology to support its academic program.
- The law school must maintain a law library in electronic and/or paper form that permits it to foster and attain its teaching, learning and research objectives.

The national requirement will be applied to all applicants for entry to bar admission programs whether educated in Canada or internationally.

Where a Canadian law school offers an academic and professional legal education that meets the national requirement, its graduates will have met the requirements for entry to bar admission programs.

For applicants trained outside Canada the Task Force recommends that the NCA continue to assess them individually. The national requirement will provide appropriate guidance and result in NCA applicants being assessed in a manner consistent with the requirements for graduates from Canadian law schools.

The Task Force also recommends that the Federation apply the national requirement when considering proposals for new Canadian law schools.

The Task Force recommends that Canadian law school compliance with the national requirement, including the competencies, be determined by a standardized annual report. Each law school Dean will complete the report confirming that the law school has conformed to the academic program and learning resources requirements and explaining how the program of study ensures that each graduate of the law school has met the competency requirements.

If the law societies of Canada approve these recommendations, the Task Force recommends that the Federation establish a committee to implement them.

The Task Force recommends that by no later than 2015, and thereafter, all applicants seeking to enter a bar admission program must meet the national requirement. This transition period accommodates students who have already begun their studies, applicants currently in the NCA process and law schools that will require modifications to their programs.

The proposed national requirements and the Task Force's more detailed discussion of the issues follow this Executive Summary.

THE TASK FORCE'S RECOMMENDATIONS

1. The Task Force recommends that the law societies in common law jurisdictions in Canada adopt forthwith a uniform national requirement for entry to their bar admission programs ("national requirement").
2. The Task Force recommends that the National Committee on Accreditation ("NCA") apply this national requirement in assessing the credentials of applicants educated outside Canada.
3. The Task Force recommends that this national requirement be applied in considering applications for new Canadian law schools.
4. The Task Force recommends that the following constitute the national requirement:

A. Statement of Standard

1. Definitions

In this standard,

- a. "bar admission program" refers to any bar admission program or licensing process operated under the auspices of a provincial or territorial law society leading to admission as a lawyer in a Canadian common law jurisdiction;*
- b. "competency requirements" refers to the competency requirements, more fully described in section B, that each student must possess for entry to a bar admission program; and*
- c. "law school" refers to any educational institution in Canada that has been granted the power to award an LL.B. or J.D. degree by the appropriate provincial or territorial educational authority.*

2. General Standard

An applicant for entry to a bar admission program ("the applicant") must satisfy the competency requirements by either,

- a. successful completion of an LL.B. or J.D. degree that has been accepted by the Federation of Law Societies of Canada ("the Federation"); or*

- b. *possessing a Certificate of Qualification from the Federation's National Committee on Accreditation.*

B. Competency Requirements

1. Skills Competencies

The applicant must have demonstrated the following competencies:

1.1 Problem-Solving

In solving legal problems, the applicant must have demonstrated the ability to,

- a. identify relevant facts;*
- b. identify legal, practical, and policy issues and conduct the necessary research arising from those issues;*
- c. analyze the results of research;*
- d. apply the law to the facts; and*
- e. identify and evaluate the appropriateness of alternatives for resolution of the issue or dispute.*

1.2 Legal Research

The applicant must have demonstrated the ability to,

- a. identify legal issues;*
- b. select sources and methods and conduct legal research relevant to Canadian law;*
- c. use techniques of legal reasoning and argument, such as case analysis and statutory interpretation, to analyze legal issues;*
- d. identify, interpret and apply results of research; and*
- e. effectively communicate the results of research.*

1.3 Oral and Written Legal Communication

The applicant must have demonstrated the ability to,

- a. communicate clearly in the English or French language;*

- b. identify the purpose of the proposed communication;*
- c. use correct grammar, spelling and language suitable to the purpose of the communication and for its intended audience; and*
- d. effectively formulate and present well reasoned and accurate legal argument, analysis, advice or submissions.*

2. *Ethics and Professionalism*

The applicant must have demonstrated an awareness and understanding of the ethical requirements for the practice of law in Canada, including,

- a. the duty to communicate with civility;*
- b. the ability to identify and address ethical dilemmas in a legal context;*
- c. familiarity with the general principles of ethics and professionalism applying to the practice of law in Canada, including those related to,*
 - i. circumstances that give rise to ethical problems;*
 - ii. the fiduciary nature of the lawyer's relationship with the client;*
 - iii. conflicts of interest;*
 - iv. duties to the administration of justice;*
 - v. duties relating to confidentiality and disclosure;*
 - vi. an awareness of the importance of professionalism in dealing with clients, other counsel, judges, court staff and members of the public; and*
 - vii. the importance and value of serving and promoting the public interest in the administration of justice.*

3. *Substantive Legal Knowledge*

The applicant must have undertaken a sufficiently comprehensive program of study to obtain an understanding of the complexity of

the law and the interrelationship between different areas of legal knowledge. In the course of this program of study the applicant must have demonstrated a general understanding of the core legal concepts applicable to the practice of law in Canada, including as a minimum the following areas:

3.1 Foundations of Law

The applicant must have an understanding of the foundations of law, including,

- a. principles of common law and equity;*
- b. the process of statutory construction and analysis; and*
- c. the administration of the law in Canada.*

3.2 Public Law of Canada

The applicant must have an understanding of the core principles of public law in Canada, including,

- a. the constitutional law of Canada, including federalism and the distribution of legislative powers, the Charter of Rights and Freedoms, human rights principles and the rights of Aboriginal peoples of Canada;*
- b. Canadian criminal law; and*
- c. the principles of Canadian administrative law.*

3.3 Private Law Principles

The applicant must demonstrate an understanding of the foundational legal principles that apply to private relationships, including,

- a. contracts, torts and property law; and*
- b. legal and fiduciary concepts in commercial relationships.*

C. Approved Canadian Law Degree

The Federation will accept an LL.B. or J.D. degree from a Canadian law school as meeting the competency requirements if the law school offers an academic

and professional legal education that will prepare the student for entry to a bar admission program and the law school meets the following criteria:

1. *Academic Program:*
 - 1.1 *The law school's academic program for the study of law consists of three academic years or its equivalent in course credits.*
 - 1.2 *The course of study consists primarily of in-person instruction and learning and/or instruction and learning that involves direct interaction between instructor and students.*
 - 1.3 *Holders of the degree have met the competency requirements.*
 - 1.4 *The academic program includes instruction in ethics and professionalism in a course dedicated to those subjects and addressing the required competencies.*
 - 1.5 *Subject to special circumstances, the admission requirements for the law school include, at a minimum, successful completion of two years of postsecondary education at a recognized university or CEGEP.*
2. *Learning Resources:*
 - 2.1 *The law school is adequately resourced to enable it to meet its objectives, and in particular, has appropriate numbers of properly qualified academic staff to meet the needs of the academic program.*
 - 2.2 *The law school has adequate physical resources for both faculty and students to permit effective student learning.*
 - 2.3 *The law school has adequate information and communication technology to support its academic program.*
 - 2.4 *The law school maintains a law library in electronic and/or paper form that provides services and collections sufficient in quality and quantity to permit the law school to foster and attain its teaching, learning and research objectives.*
5. The Task Force recommends that the compliance mechanism for law schools be a standardized annual report that each law school Dean completes and submits to the

Federation or the body it designates to perform this function. In the annual report the Dean will confirm that the law school has conformed to the academic program and learning resources requirements and will explain how the program of study ensures that each graduate of the law school has met the competency requirements.

6. The Task Force recommends that the Federation, or the body it designates to consider proposals for new Canadian law schools, be entitled to approve a proposal with such conditions as it thinks appropriate, relevant to the national requirement.
7. The Task Force recommends that by no later than 2015, and thereafter, all applicants seeking entry to a bar admission program must meet the national requirement.
8. The Task Force recommends that the Federation establish a committee to implement the Task Force's recommendations.

THE REPORT

INTRODUCTION

The legal profession in Canada is self-regulating. Provincial and territorial legislation has for decades and in some cases centuries granted law societies responsibility to admit applicants to the profession, establish codes of professional conduct and standards of competence, and discipline lawyers when they fall below acceptable standards.

Law societies regulate lawyers “in the public interest.” In the 21st century self-regulation is neither a static concept, nor one that can or should be taken for granted. The context within which the legal profession operates has changed significantly since the days when the members of the profession were homogeneous in make-up and relatively few in number, the profession’s monopoly was not challenged and consumer awareness had not become an important factor in the provision of legal services. Today, regulators must pay attention to the internal and external pressures on self-regulation that will affect its future operation.

The legal profession in Canada remains virtually the last in the common law world to be self-regulating.¹ Across Canada regulators are under greater government scrutiny than ever before. The heightened scrutiny is not directed specifically at the legal profession, but to all professions as governments determine their own public interest priorities and consider ways to create a more seamless pan-Canadian approach to governance.

Governments are increasingly responding to public demands for transparency, fairness, objectivity and consistency in decision making whether it be at the government level or by statutory authorities. The passage of fair access to professions legislation by three provincial governments, the 2008 national amendments to the Agreement on Internal

¹ The nature of self-regulation of the legal profession in Canada has evolved over a long period. It is now commonplace for law society benchers (directors) to include public representatives, often referred to as “lay benchers” who participate as full voting members. Nevertheless, in all provinces and territories the majority of benchers are lawyers that the profession elects to regulate lawyers in the public interest, independent of government control, to ensure that the public continues to be served by an independent bar.

Trade (“AIT”) with a commitment to full labour mobility across Canada by August 2009, and the recently undertaken provincial and territorial agreement to develop a pan-Canadian framework for foreign qualification recognition demonstrate the commitment to transparent and accessible process that governments have made and expect regulators to meet. Moreover, while regulators have been consulted on these developments, their influence has been limited to discussing details, not to influencing the policy direction underlying the initiatives.

Today and in the future, self-regulation requires regulators to anticipate areas of government and public scrutiny and changing societal priorities and ensure that their processes withstand that scrutiny. The Federation’s 2002 National Mobility Agreement (“the NMA”) is a good example of what can be achieved by changing the understanding of the public interest and developing policy to address it. Because of the NMA, law societies were already compliant with the amendments to the AIT.

The establishment of this Task Force to consider the development of a national requirement for the entry of applicants to provincial and territorial law society bar admission programs is in large part a response to the heightened government scrutiny of regulators. It also arises from a realization that there are areas of regulation in which law societies have done little recent policy work to reflect the changing regulatory landscape. In part this inactivity has been reflective of the historic isolation of law societies from one another. National regulatory projects were for decades quite limited.

Yet law societies in common law jurisdictions in Canada share the same values and responsibilities.² All law societies regulate their members in the public interest, which includes responsibility for the competence, integrity, standards of learning and professional ethics of those they admit to the profession and a commitment to access to legal services. Their codes of professional conduct reflect similar duties and responsibilities to the court, to clients and to the public. Every law society requires new lawyers to complete a pre-call program, including articling, prior to admission. Despite

² Law societies in common law jurisdictions also share many of these same values with the Barreau du Québec; however because of somewhat different legal systems, this Task Force’s mandate is to address requirements only as they apply to entry into the law societies of common law jurisdictions.

features that reflect their unique provincial or territorial circumstances all law societies regulate on the basis of these shared values, which render lawyers from common law jurisdictions more similar than not. Increasingly, law societies recognize the need to address the shared nature of their responsibilities in formal ways to ensure that the profession keeps ahead of a constantly changing landscape and regulation continues to reflect the public interest.

The enhancement of the Federation's role and the advent of national mobility have engendered greater interaction and cooperation across the country. There are now good reasons to reflect a national perspective whenever possible and to articulate it in a transparent, fair and objective manner.

In June 2007 the Federation appointed this Task Force with a mandate to review the criteria currently in place establishing the approved LL.B/ J.D. law degree for the purposes of entry to law societies' bar admission/ licensing programs and, if appropriate, to recommend changes. The mandate includes considering the implications of any changes for the National Committee on Accreditation ("the NCA") requirements for granting a certificate of qualification to internationally educated applicants.

The Task Force has met over the last two and a half years, has provided three reports and has undertaken a consultation process. It reported on the results of the consultation process in March 2009 and has taken the comments it received both in writing and in meetings into account in reaching its recommendations. The information on its process is set out at **Appendix 1**.

This is the Task Force's final report, with its recommendations, which it presents to Federation Council for its consideration.

THE ROLE OF LAW SOCIETIES IN REGULATING ENTRY TO THE PROFESSION

Law societies in Canada are responsible for determining who is admitted to the profession. The responsibility is a significant one, because each decision to admit an

applicant tells the public that the newly licensed lawyer has met high standards of learning, competence and professional ethics. In the context of lawyer mobility and the AIT, the admission of a lawyer in one common law jurisdiction in Canada is effectively admission in every other common law jurisdiction.

Law societies in the common law provinces carry out their responsibility by requiring candidates for admission to earn a Canadian common law degree or its equivalent, to successfully complete a law society bar admission program³ and to complete a period of apprenticeship, known as articling. Currently, the successful attainment of a Canadian common law degree⁴ satisfies the regulators' academic requirement. The bar admission and articling stages provide practical training for the practice of law.

To assess the qualifications of persons who receive their legal training outside Canada, the Federation established the NCA. The NCA determines what additional requirements the applicant must meet to achieve equivalency with the Canadian LL.B./J.D. degree. When satisfied that equivalency has been achieved, the NCA issues a Certificate of Qualification that law societies generally use to determine whether an applicant meets the academic requirements for entry to a bar admission program.

The concept of an approved Canadian law degree developed in large part as a result of the debate in Ontario in the 1940's and 1950's over control of legal education. In 1957 the benchers of the Law Society of Upper Canada agreed that graduates "from an approved law course in an approved university in Ontario" would meet the academic requirements for entry to the bar admission course. This resulted in the relatively quick development of law schools at Queen's, Western, Ottawa and Windsor, the further development of the law faculty at the University of Toronto, and ultimately the relocation

³ The term "bar admission program" refers to and includes all the pre-licensing processes leading to admission to the profession in the common law provinces and territories.

⁴ In some provinces, the academic requirement is expressed simply as "a Canadian common law degree" (e.g. Law Society of Alberta - Rule 50.2; Law Society of British Columbia, Rule 2-27(4)(a): "successful completion for the requirements for a bachelor of laws or the equivalent degree from a common law faculty of law in a Canadian university"); in others, the degree must be from a "recognized school of law" (e.g. Saskatchewan – www.lawsociety.sk.ca/newlook/Programs/admission.htm) or from an "accredited law school" (e.g. Ontario - Law Society of Upper Canada By-Law 4, section 9.).

of the original Osgoode Hall Law School to a university setting at York University in 1969. The Law Society of Upper Canada subsequently expanded the scope of acceptable law programs to include law schools throughout Canada and, over the next two decades, proceeded to approve the law degrees of all 16 Canadian common law faculties for entry to its bar admission program. In 1984, Kenneth Jarvis, while Secretary of the Law Society of Upper Canada, described this process in a letter to the Federation, set out at **Appendix 2**.

The Law Society of Upper Canada's 1957/69 requirements defined an approved law faculty for the purpose of entry of their graduates to the bar admission course. The Law Society originally prescribed eleven mandatory courses that every student was required to take and a number of additional courses that the schools were required to offer. In 1969, as a result of a request by the Ontario Law Deans for greater flexibility in program development, the Law Society amended the standards, reducing the number of required courses from eleven to seven ("the 1957/69 requirements".) The 1957/69 requirements are set out at **Appendix 3**.

There has never been a national requirement for approval of law programs or law schools in Canada. For a half century no law societies in common law jurisdictions have analyzed the criteria governing entry of a graduate from a Canadian common law school to their bar admission programs. Moreover, neither the Law Society of Upper Canada nor any other law society appears to have updated the 1957/1969 requirements.

In 1976, 1979 and 1980 three new law schools opened their doors at Victoria, Calgary and Moncton. Because there was no national law program approval body, each provincial law society had to consider whether to recognize law degrees from these institutions as meeting the academic requirements for entry to their respective bar admission programs.

It is perhaps not surprising that law societies have never established national requirements for entry to their bar admission programs. Until recently law societies operated in relative isolation from one another, preoccupied with internal regulatory

issues. They spent little time developing national approaches despite their common responsibilities. Further, unlike the United States where there are hundreds of law schools, there are only 16 in Canada that grant common law degrees. There has not been a new school approved in 29 years. While the existing law faculties were established under differing circumstances and vary in their missions, objectives, size, access to resources and other features, law societies have been satisfied that they all provide quality programs. This remains the case today.

Law societies respect the academic freedom that law schools vigorously defend. There is a strong tradition within the legal education system, particularly in North America, to view law school education as not simply a forum for training individuals to become practitioners of a profession, but also as an intellectual pursuit that positions its graduates to play myriad roles in and make valuable contributions to society.

Why in the face of this respect for law schools' missions and the quality of law schools and their faculties would the Federation establish a national requirement that graduates of these law schools will be required to meet to enter bar admission programs? Why not assume that the status quo continues to be sufficient?

The regulatory landscape has changed greatly since law societies last addressed this issue in 1969. Public scrutiny has increased, with recent events converging to focus particular attention on the need for transparent processes and national regulatory requirements.

Fair Access Legislation and National Committee on Accreditation

Three provinces have enacted legislation respecting fair access to regulated professions that require regulatory authorities to ensure that their admission processes for domestic and internationally trained candidates are transparent, objective, impartial and fair.⁵ The legislation includes provisions for ongoing monitoring of regulators' compliance with the requirements. To the extent a regulator has delegated the

⁵ *Fair Access to Regulated Professions Act*, S.O. 2006, c.31 (Ontario); *The Fair Registration Practices in Regulated Professions Act*, S.M. 2002, c.21 (Manitoba); and *Fair Registration Practices Act*, S.N.S. 2008, .38 (Nova Scotia – to be proclaimed.)

assessment of international qualifications to a third party it must ensure that the third party complies with the requirements of the fair access legislation.

Law societies have delegated the responsibility for evaluation of international credentials to the NCA. It evaluates the credentials to determine the scope and extent of any further legal education that in its opinion an applicant must complete *to equal the standard of those who have earned a Canadian LL.B./ J.D. degree*. The difficulty with this test is that there is no articulated national standard or requirement for the Canadian LL.B./J.D. degree against which the NCA requirements can be measured.

Given the need to meet the fair access standards of transparency, objectivity, impartiality and fairness a national requirement is necessary for the regulation of entry to bar admission programs for both domestic and international candidates.

Proposals for New Canadian Law Faculties and Law Degree Granting Institutions

Until 2007 there had been no proposals for new faculties of law in Canada for over 25 years. Within established faculties of law there has been only a limited increase in the number of law school places. As the number of applicants to law schools has continued to increase, some unsuccessful applicants have attended law schools elsewhere in the world. Applicants who earn law degrees outside Canada and wish to return to Canada must go through the NCA process for an assessment of their credentials.

The increased number of law school applications has given rise to at least two developments. The first, as described above, is the increase and change in the nature of some of the candidates seeking evaluation through the NCA. To address the NCA requirements for these students some international law schools have begun tailoring their curriculum to teach Canadian law.

The second development is the renewed interest in Canada in the establishment of new law schools, either as part of a university or within a private, degree granting institution. The first proposals came from Ontario in 2007 from at least two universities, with a number of other universities expressing interest. The government of Ontario announced

in 2008 that it would not fund new schools at this time, but the issue has not receded. British Columbia recently approved the creation of a law school at Thompson Rivers University in partnership with the Faculty of Law at the University of Calgary. In addition, a private provincially approved degree granting institution in British Columbia has recently submitted an application for authority to offer a J.D. degree.⁶

New law schools will want to ensure that their graduates are eligible to enter bar admission programs in any common law jurisdiction in Canada. The adequacy and portability of their law degree for this purpose will be as essential to them and their students as it is to the already established law faculties. A clearly articulated national requirement is necessary to ensure that new Canadian law schools know what they must do to enable their graduates to enter bar admission programs.

National Mobility of Lawyers and Government Harmonization Initiatives

The legal profession in Canada has had open and transparent national mobility for a number of years, beginning with the negotiation of the NMA in August 2002.⁷ In addition, national labour mobility is now a clear governmental objective, both federally and provincially.

At the Council of the Federation meeting in July 2008 provincial and territorial premiers emphasized the critical importance of full labour mobility for all Canadians and the need to amend the AIT by January 2009. The premiers stated that the proposed amendments should provide that any worker certified for an occupation by a regulatory authority of one province or territory be recognized as qualified to practise that occupation in all other provinces and territories. The premiers directed that any exceptions to full labour mobility would have to be clearly identified and justified as necessary to achieve a “legitimate objective,” a term defined in the AIT. Governments would share their list and post these on a public website. Full labour mobility was to have been achieved by August 2009.

⁶ Learning Wise Inc. doing business as University Canada West.

⁷ Federation of Law Societies of Canada. National Mobility Agreement, August 16, 2002. www.flsc.ca/en/pdf/mobility_agreement_aug02.pdf

Despite provincial and territorial regulation of professions, the amendments to Chapter 7 of the AIT have made it clear that all levels of government view the professions as national entities that must have the same admission standards. Any differences in provincial approach must be harmonized to permit seamless mobility. Establishment of a national requirement for entry to bar admission programs is in keeping with this harmonized approach.

Canadian Competition Bureau (“CCB”)

In a 2007 study of a number of professions, the CCB pointed to a number of areas in which it believed the legal profession’s practices were restrictive. It noted, for example, variations in the length of bar admission and articling requirements across the country and could not see a justification for the differences. The CCB study is a further example of an external pressure for a national approach to professional regulation that is uniform, transparent and clear.

Law societies stand between law schools that seek autonomy to fulfill their academic objectives unimpeded and governments that seek accountability, transparency and consistency in the regulation of the profession. Law societies must seek a balance that addresses both these imperatives, always keeping the public interest in mind.

The development of regulatory requirements for entry to bar admission programs involves a balancing of considerations, because what regulators prescribe as a prerequisite for those seeking entry to bar admission programs will also *de facto* be part of the “exit” requirements for those graduating from law schools. Accordingly, the Task Force’s recommendations reflect its understanding of why requirements are necessary and what those requirements should be, while paying attention to the legitimate concerns of the legal academy that the requirements support quality, innovation and excellence in Canadian law schools.

This balancing is a complex process because while law societies and the legal academy have overlapping interests, they also have, in part, different priorities and requirements.

These include statutory obligations in the case of regulators, academic imperatives in the case of the schools and different external pressures on each group.

The Task Force's recommendations also address the transparency and fairness of NCA processes and provide guidance for proposals for new Canadian law schools.

INTERNATIONAL APPROACHES TO ENTRY INTO THE LEGAL PROFESSION

Each jurisdiction develops regulatory standards that suit its unique circumstances.

Appendix 4 provides a comparative international snapshot of a number of approaches to determining requirements to be met by candidates seeking to become lawyers. The Task Force has noted that many other jurisdictions are undergoing a re-examination of legal education and accreditation issues, in some cases making changes, in others commencing studies of possible models to pursue. As well, a number of Canadian law schools have made changes to their first year curricula, often raising issues similar to those the Task Force has discussed, sometimes from a different perspective.

The extent to which issues respecting appropriate approaches to legal education, standards and models for regulation are being actively considered illustrates the timeliness of the Task Force's work. A number of developments provide useful perspectives on a model that would best suit the Canadian legal education and regulatory context. In particular, the Task Force has noted the interplay of standards, outcome measurements and accreditation across a number of jurisdictions.

- In the United States the approved law school approach has tended to focus on the “bricks and mortar” features (input measures such as libraries, teaching staff, classroom space, etc.), rather than learning outcomes. The key output measures have traditionally been bar passage rates and job placement. In July 2008 an American Bar Association (“ABA”) Task Force on Outcome Measurements released its report in which it recommended what could amount to a sea change in accreditation approval processes. It recommended that current ABA Accreditation Standards be re-examined and reframed as needed “to reduce their reliance on input measures and instead adopt a greater and more overt reliance on outcome measures.”⁸ The report pays particular attention to the

⁸ American Bar Association. Section of Legal Education and Admissions to the Bar. Report of the Outcome Measures Committee. (Professor Randy Hertz, Chair). July 27, 2008, p.1 (“Outcome Measures Report”).

extent to which other professions have developed outcome measurement standards, reflecting the importance of a professional education that facilitates graduates' ability to practise their profession.

- The Australian model of regulation is somewhat similar to the current Canadian approach, with no national accreditation system. Australia does, however, have national curriculum requirements (Priestley 11) and the Council of Australian Law Deans has recently agreed in principle on overall national standards that could ultimately become accreditation standards.⁹ These address a wide range of matters, including academic autonomy, the law course, assessment, academic staff, the law library or collection, resources and infrastructure, course evaluation, nexus between teaching and research, governance and administration and continuous renewal and improvement. The standards are articulated at a broad level, leaving a great deal of flexibility for individual schools.
- The England and Wales model combines input and output measures, as well as defining, through the Joint Statement on Qualifying Law Degrees of the Law Society of England and Wales and the General Council of the Bar, the conditions a law degree course must meet to be termed a "qualifying law degree." The Law Society of England and Wales has recently revised requirements for its Legal Practice Course to describe learning outcomes for what a successful candidate should be able to *do* on conclusion of the course.

In considering what requirements graduates with Canadian LL.B./ J.D. degrees should have to meet to be eligible for entry to law society bar admission programs the Task Force has benefited from this comparative analysis and has fashioned an approach that reflects Canada's legal education and regulatory context.

DEVELOPING A CANADIAN NATIONAL REQUIREMENT FOR ENTRY TO BAR ADMISSION PROGRAMS

An examination of international approaches to entry to the legal profession reveals that Canada appears to be unique among comparable common law jurisdictions in not having national standards or requirements for the academic prerequisite for admission to the profession, beyond requiring an LL.B./J.D. degree. The final report of the Council of Australian Law Deans in describing international requirements accurately summarized the Canadian regulatory environment:

⁹ Council of Australian Law Deans. *Standards for Australian Law Schools-Final Report*. Prepared by Christopher Roper and the CALD Standing Committee on Standards and Accreditation. March 2008 ("the CALD Report 2008").

There are no Canadian national standards as such. It has been many years since standards for Canadian law schools have been evaluated. The setting of standards for Canadian law schools, or more accurately the requirements for call to the bar, is a responsibility of individual Canadian law societies, as they set entry requirements for the respective provincial or territorial bar admission process.¹⁰

For the reasons discussed earlier in this report and in its previous reports, the Task Force is satisfied that there should be a national academic requirement for entry to bar admission programs of the common law jurisdictions. The intent behind developing a requirement that applies equally to applicants educated in Canada and internationally is to ensure that all those seeking entry to bar admission programs in Canadian common law jurisdictions have demonstrated certain essential and pre-defined competencies in the academic portion of the legal education or its equivalent through the NCA.

Such a requirement would address the issues identified earlier in this report respecting transparent regulation, fair access to regulated professions, criteria to be applied for new law school applications, AIT and CCB considerations and government scrutiny of regulators.

Anything short of a national solution that addresses these issues in a comprehensive way will result in the continuation of a patchwork approach that is neither in the public interest nor adequately attuned to the external forces that are affecting self-regulation.

For a national approach to succeed, provincial and territorial law societies must think nationally, as they did when adopting the NMA, the anti-money laundering rules and client-identification rules. Although a commitment to a national approach will on occasion require compromise, law societies have enormous capacity to work together in the interests of the profession. The Federation's increasing commitment to national regulatory approaches is also reflected in a new Task Force the Federation has recently established to develop national standards for admission to the profession. Like this Task Force's work on a national requirement for entry to bar admission programs, the goal of that Task Force is to enhance transparent regulation, reflecting the common responsibilities law societies share.

¹⁰CALD Report 2008, p. 38.

In developing its recommendations the Task Force has been very aware of the potential effect of a national requirement for entry to bar admission programs on law school education.

The Council of Canadian Law Deans (“the Council”) has provided the Task Force with important assistance both through the participation of its working group of three Law Deans and through its reports and correspondence to the Task Force, most recently its letters of June 1 and June 29, 2009, set out at **Appendices 5 and 6**. The Task Force is encouraged by the Council's June 1, 2009 response to the general direction of the Task Force's approach. The Task Force has found the Council's perspective very helpful as it has finalized its recommendations.

Members of faculty at a number of law schools have also given the Task Force valuable insight into the pedagogical implications of the options it has been considering in the course of its work.

The Task Force believes that its recommendations balance law societies' regulatory responsibilities with the importance of academic freedom and learning in law schools.

THE TASK FORCE'S RECOMMENDED APPROACH

Examination and Course Listings Options

Accrediting bodies in jurisdictions similar to Canada commonly use two approaches to determine that an applicant for admission meets the necessary academic requirements: passage of a bar examination, without requiring that applicants take certain courses in law school, or successful completion of specified courses.

The tradition in the United States has been to test a candidate's academic qualifications in a state bar examination. The bar passage rate has been one of the main criteria the ABA accreditation process has examined in evaluating the success of law schools. While there is no suggestion that the United States is moving away from state bar examinations, the limitations of the approach are being examined, particularly in terms

of their value in accrediting law schools. The American system is different from Canada's in that law school is the only preparation for practice – there are no articling or bar admission programs.

In its September 2008 consultation paper the Task Force considered the examination option and noted the following:

This option appears to be transparent and objective, easily developed nationally and entirely within the control of law societies. Potentially it may apply to both domestically and internationally educated candidates. For those who currently question whether students graduating from law schools are adequately prepared to practise law there may be comfort that an examination system serves as a check and balance.

The Task Force is of the view, however, that there are a number of issues that arise with this option that require consideration. Criticisms of the American examination model, for example, include the view that the examinations come to “drive” the legal education process. It has been suggested that what examination passage denotes primarily is the ability to pass an examination, rather than proof of the acquisition of the knowledge, skills and abilities that a lawyer requires to practise law.

Another possible disadvantage of this approach is that it adds another layer to law students' education.

During the consultation process some input suggested that this approach is preferable to an approved law degree requirement since law societies would not be “dictating” curriculum to law schools. Other input agreed with the Task Force concern that as students become preoccupied with ensuring that they pass this additional hurdle they will demand that their law schools teach to the examinations.

The Task Force believes there is a better approach than prescribing a national entrance examination to bar admission programs. The focus of this approach is on education rather than testing. With cooperation and collaboration between law societies and law schools the goals and mandates of both groups can be achieved, benefiting students and ultimately the public.

The Task Force also considered whether to specify a list of law school courses that a graduate must have taken to be eligible for entry to a bar admission program. In

England and Wales, Australia and New Zealand law societies specify a compulsory course curriculum. The latter two jurisdictions each publishes a general course syllabus of required courses.¹¹ The Law Society of Upper Canada's 1957/1969 requirements took a similar approach, specifying both required courses an applicant must have taken and optional courses that law schools were required to offer.

This approach reflects what until recently has been a focus on the topic areas a student's education must address, rather than on what the student has learned and can do. Increasingly, however, this traditional approach is being replaced by consideration of those competencies a student should have acquired that reflect the knowledge, skills and attitudes necessary for an applicant seeking admission to the legal profession. The course based approach offers little guidance on the candidate's capabilities. From the public's perspective what matters is what lawyers are able to do.

Competency Requirements

The Task Force is satisfied that law school graduates seeking entry to bar admission courses should have acquired competencies in fundamental areas of substantive knowledge, legal skills and professionalism and ethics. This is the preferred approach for a national requirement.

Establishing requirements in all three categories reflects their equal importance in the development of lawyers who are competent to serve the public. The Law Society of Upper Canada's 1957/69 requirements considered only substantive law, reflecting the priorities of all regulators and law schools at that time. In the latter decades of the 20th-century both law schools and law societies have also delivered skills education and training, with law schools being particularly qualified to offer such instruction in legal research and writing. Many schools offer clinical programs, skills-based courses and pro bono opportunities that enable students to develop the skills that will serve them following graduation.

¹¹ See Appendix 4.

Relationships between individuals, the state, and societal and commercial entities are at the heart of law. A lawyer's fundamental role is to understand those relationships, to identify the legal issues and problems that arise from them and to craft solutions. The lawyer's role may arise in traditional private practice while serving the needs of a client, as corporate counsel, in government or clinic practice, or in myriad other contexts. Every context and every issue requires the lawyer to bring to bear a wide range of skills, knowledge and ability. The lawyer's development is never static and must evolve, adapt and expand wherever the lawyer works and in the face of a constantly changing legal landscape.

To perform their roles lawyers must know the law, whether common law or statute. This does not mean that lawyers will always know all the law applicable to a particular problem or issue, but does mean they must understand the basic legal concepts that will be applicable and will guide them in finding the law that is specific to the problem or issue at hand.

It is not reasonable to expect that law schools will graduate students who are fully capable of providing competent professional services to clients in all matters. Clearly, the profession must continue to play a role in bridging the gap between law school and formal licensing of lawyers. However, through the professional legal education students receive in law school, they should acquire foundational competencies necessary for the practice of law.

In the past decade several law societies have developed competency frameworks to support their bar admission requirements. The most detailed is the Law Society of Upper Canada's entry-level competencies, developed for its licensing process after a lengthy consultation with the profession, focusing on the early years of practice.¹² The Law Society of Upper Canada highlights competencies in ethical and professional responsibility, knowledge of the law, client relations, and issue identification.

¹² Law Society of Upper Canada. Licensing Process. Entry Level Solicitor Competences by Category; Entry Level Barrister Competencies by Category. www.lsuc.on.ca. (lawyer licensing)

The law societies of British Columbia, Alberta, Saskatchewan and Manitoba have taken a similar approach, identifying competencies in lawyering skills, practice and management skills, and ethics and professionalism that entry level lawyers require. British Columbia applies these competencies in its bar admission program, the Professional Legal Training Course.¹³ Alberta, Saskatchewan and Manitoba apply the competency framework in their common bar admission program through the Centre for Professional Legal Education (CPLED). Nova Scotia has adapted the framework for use in its bar admission course and New Brunswick will implement a similar competency framework in 2010.

In Australia admission to practice is governed by competency standards developed in 2000 by the Australasian Professional Legal Education Council (APLEC) and the Law Admissions Consultative Committee. These standards describe the performance required in three key areas: skills, practice areas and values (i.e. ethics and professional responsibility).

In the United States the University of Wisconsin Law School Assessment 2000 Report was one of the early detailed examinations considering a competency approach to education. It reviewed the skills and knowledge lawyers need in their first five years of practice.¹⁴ Most recently in 2008, the Legal Education Section of the ABA's Output Measures Committee has urged a reconsideration of that body's accreditation process in favour of an output-based process.¹⁵ In commenting on the Committee's interim report the Society of American Law Teachers noted,

In assessing whether law schools are providing students with quality legal education, the ABA should consider the wide range of competencies important to lawyers... the competencies that the ABA should evaluate are the skills, knowledge and values that are important to the profession and go far beyond what is currently valued and measured.¹⁶

¹³ Canadian Centre for Professional Legal Education 2004. *Competency Profile for Entry Level Lawyers*. Calgary, Alberta.

¹⁴ University of Wisconsin Law School. Assessment 2000 Summary Report. www.provost.wisc.edu/assessment/LawSchool2000_report.pdf

¹⁵ Outcome Measures Report. July 27, 2008.

¹⁶ Society of American Law Teachers Statements to the ABA Outcome Measures Committee, February 1, 2008, pp. 1, 5 and 6. See Also July 21, 2008.

In the Carnegie Foundation's report, *Educating Lawyers: Preparation for the Profession of Law* the authors consider the appropriate focus of academic preparation for the profession of law to be an integrated three part curriculum consisting of,

- (1) the teaching of legal doctrine and analysis, which provides the basis for professional growth;
- (2) introduction to the several facets of practice included under the rubric of lawyering, leading to acting with responsibility for clients; and
- (3) a theoretical and practical emphasis on inculcation of the identity, values and dispositions consonant with the fundamental purposes of the legal profession.¹⁷

Skills Competencies

In recommending competencies in certain skills the Task Force has focused on those skills areas that law students can reasonably be expected to acquire during the academic component of their education. This is not to suggest that the legal academy should be expected to provide the only education in this area, rather that the three years of the academic program are an appropriate period in which to begin to inculcate these skills.

The Task Force has developed the recommended skills competencies with reference to both the competency work that individual law societies have done and the significant learning that is currently being undertaken in Canadian law schools in these areas.

The three skills areas that the Task Force's recommendations address are problem-solving, legal research, and oral and written legal communication. In its view these skills are fundamental to any work a lawyer undertakes in the profession. In describing these competencies the Task Force has kept in mind that a national requirement is to address what an applicant must demonstrate for entry to a bar admission program not for entry to the profession. Competency development is a progressive process with law school being the first step in career long learning.

¹⁷ William M. Sullivan, et al. *Educating Lawyers: Preparation for the Practice of Law*. Carnegie Foundation for the Teaching of Law. 2007, p.194.

The Task Force believes that all 16 Canadian common law schools currently provide sufficient instruction in these recommended skills areas to meet the competency requirements.

By articulating these skills requirements the Task Force believes that law societies would make an important statement that lawyers should not only know the law, but should to have the capacity and skill to use what they know and be able to serve the public.

Ethics and Professionalism

The Task Force has concluded that law societies should require applicants seeking entry to a bar admission program to demonstrate that they have had instruction in ethics and professionalism in the Canadian legal context. During the Task Force's consultation no one suggested that studying ethics and professionalism should not form a fundamental component of an individual's legal education. Rather, the debate has centred on whether the Task Force should recommend that applicants must have taken a stand-alone course in the subject.

In general the Task Force has concluded that it should be left to the law schools to determine how their students satisfy the competency requirements. It has not recommended that regulators specify courses, number of credit hours, content, delivery method, or assessment. This allows law schools the flexibility to address these competencies in the manner that best meets their academic objectives, while at the same time meeting the regulators' requirements that will allow their graduates to enter bar admission programs.

The one exception to this recommended approach is ethics and professionalism. After careful consideration the Task Force recommends a stand-alone ethics and professionalism course for each student who seeks entry to a bar admission program.

The Law Society of Upper Canada's 1957/69 requirements said nothing about instruction in legal ethics or professional responsibility and as late as 1985, only two of the country's 16 law schools had a compulsory legal ethics course in their programs.

Approximately 18 years ago, the Federation and the Council of Canadian Law Deans jointly sponsored an important study by W. Brent Cotter, now Dean of the University of Saskatchewan College of Law, that emphasized the importance of professional responsibility instruction as a component of legal education and recommended a coordinated curriculum. This marked the opening of a national conversation that continues today.¹⁸

As an academic discipline, legal ethics has more recently become a significant area of scholarly pursuit. In an article written in 2007 entitled "Taking Responsibility: Mandatory Legal Ethics in Canadian Law Schools," authors Richard Devlin, Jocelyn Downie and Stephanie Lane begin by saying,

In an era when professionals, bar societies and judges are often heard lamenting the decline in legal professionalism, mandatory legal ethics and professional responsibility instruction in law schools would seem to be an obvious, and obviously appropriate, response.¹⁹

While the authors recognize institutional reluctance for any further mandatory courses to be added to the law school curriculum, they agree with the position that there is more evidence on the effectiveness of professional responsibility instruction than there is on the effectiveness of most professional education.²⁰

In the past decade, Canadian law schools have increased instruction in the subject. In a survey of law schools it has been reported that 11 of the 16 law schools have a compulsory course in legal ethics, though with various descriptions.²¹ The first

¹⁸ W. Brent Cotter. *Professional Responsibility Instruction in Canada: A Coordinated Curriculum for Legal Education*. Federation of Law Societies of Canada's Joint National Committee on Legal Education and the Council of Canadian Law Deans, 1992.

¹⁹ *The Advocate*. Vol. 65, part 6. November 2007, p.761 at 762.

²⁰ *Ibid.* p.766.

²¹ W. Brent Cotter and Eden Maher, "Legal Ethics Instruction in Canadian Law Schools: Laying the Foundation for Lifelong Learning in Professionalism." February 20, 2009 (publication pending). Originally prepared for the Chief Justice of Ontario's Advisory Committee on Professionalism – Symposium on Lifelong Learning in Professionalism ("Cotter and Maher").

casebook on Canadian legal ethics was published last year for use in law school education.

In a recent article on the subject, Dean Cotter and Eden Maher conclude that an exclusively pervasive method of instruction is not sufficiently effective to meet the educational objective.²²

The increasing importance of an understanding of ethical issues may be illustrated by the fact that the Supreme Court of Canada has decided more cases on the subject of solicitor-client privilege in the past decade than it had done previously in its entire history. It has also decided three significant conflict of interest cases in the past 15 years that have affected practice in all parts of Canada.²³

The Task Force is convinced that dedicated instruction on ethics and professionalism, beginning in law school is essential. It should address both the broad principles of professionalism and the ethical issues with which lawyers must contend throughout their careers, including conflicts of interest, solicitor-client privilege and the lawyer's relationship with the administration of justice.

With the exception of the Law Society of Upper Canada, all the law societies that provided input to the Task Force supported a stand-alone course in professional responsibility. The Task Force has reviewed the Law Society of Upper Canada's submission on this topic. One of the points that Law Society makes is that the Task Force's original characterization of the competency as "professional responsibility" was too narrow and could be restrictively interpreted to refer specifically and only to the Rules of Professional Conduct. It suggests that learning about the rules is better left to the law societies in bar admission programs, articling and professional development. The Task Force agrees that the better description of the competency it contemplates is "ethics and professionalism" and it has made that change to its final recommendations.

²² Cotter and Maher, 2008.

²³ This information was provided to the Task Force in a helpful submission from Dean W. Brent Cotter during the consultation process.

The focus of the competency is on understanding basic ethical principles. The Law Society of Upper Canada, like all law societies, agrees that law school is an appropriate stage at which to begin the process of identifying and applying ethical principles.

The Law Society of Upper Canada's submission raises the concern that there is no justification for deviating in the case of ethics and professionalism from the Task Force's general recommendations in favour of competencies, not courses. It also suggests that requiring a course could have the effect of segregating the topic, rendering it less likely that the topic will be addressed across the curriculum.

As suggested in Dean Cotter's article, which uses data from a law school survey, it would appear that increasingly more law schools are moving toward some form of stand-alone course in this area. The Task Force is encouraged by this development and believes that it highlights to law students the significance of the topic. This increasing focus may in fact engender more exposure throughout the curriculum as students gain greater insight into ethical principles.

Nothing in the Task Force's recommendation limits law schools from continuing pervasive approaches in addition to the stand-alone approach. A number of the schools currently follow both approaches.

Finally, in recognition of the unique nature of its recommendation in this area, the Task Force has specifically not recommended credit hours or teaching methodology, only that there be a course dedicated to the subjects of ethics and professionalism that addresses certain specified competencies. It believes that this strikes the appropriate balance.

The Task Force reiterates what it has said previously, that law societies must also take a greater role in inculcating in their members ethics and professionalism. Law school education can only address the issues in a preliminary way. The importance of lawyers being committed to ethics and professionalism throughout their careers makes it essential that law societies focus on this area in a variety of ways, including in bar

admission programs, continuing professional development programs and ongoing communications with the profession.

Ethics and professionalism lie at the core of the profession. The profession is both praised for adherence to ethical codes of conduct and vilified for egregious failures. Increasing evidence of external scrutiny of the profession in this area and internal professional debates about ethical failures point to the need for each lawyer to understand and reflect on the issues. In the Task Force's view, the earlier in a lawyer's education that inculcation in ethics and professionalism begins, the better.

The Task Force believes that more, not less, should be done in this area and that legal educators and law societies together should be identifying ways to ensure that law students, applicants for admission and lawyers engage in focused and frequent discussion of the issues. To ensure that law students receive this early, directed exposure the Task Force believes a stand-alone course is essential.

Substantive Legal Knowledge

The Task Force's recommendations on the appropriate areas of substantive knowledge that should be included in the entry requirements has engendered significant comment, particularly from members of law faculties. They have raised specific concern about (1) the basis for the substantive areas chosen; (2) the negative effect this "list" of mandatory requirements will have on innovation and flexibility in the law school curriculum; and (3) the danger of a one-size fits all approach.

Law school Deans and faculty understandably expressed concern that the profession may be seeking to dictate law school curriculum and by doing so may undermine the quality of law schools that have benefited from law societies' traditionally minimalist approach to articulating academic requirements for entry to their bar admission programs.

The concept of regulators requiring some degree of substantive legal knowledge of applicants for admission to the profession is a widespread requirement in common law

jurisdictions comparable to Canada. Australia, New Zealand and England and Wales all have required course content designated by the regulatory bodies. The United States does not have such requirements, except for legal ethics, but as the recent study for the Australian Law Deans points out,

it may be that this is explicable given that the state bar examinations have considerable influence on the curricula of the law schools, as most students intend to undertake those examinations.²⁴

In determining what substantive legal knowledge to require the Task Force considered the continued relevance of the current first year curriculum of the 16 law schools, the importance of students having foundational knowledge in both public and private law, the competency framework research undertaken by various law societies in Canada, the regulatory approaches in other comparable common law jurisdictions and the importance of ensuring that the requirements do not interfere with the flexibility and innovation in current law school education.

The Task Force recommends a national requirement that represents a balance between competing perspectives and imperatives. It recognizes that the requirement may represent a snapshot at a point in time. It has considered law school curriculum while at the same time addressing the framework of legal knowledge that its inquiries and consultations have led it to believe are foundational.

A law school graduate with a general understanding of the core legal concepts applicable to the practice of law in Canada, as set out in the Task Force's recommendations, will have the building blocks necessary to go forward into the bar admissions program. The Task Force's recommendations reflects its view that every graduate of a Canadian law school or recipient of an NCA Certificate of Qualification should understand,

- (a) the foundations of law, including principles of common law and equity; the process of statutory construction and analysis; and the administration of the law in Canada;
- (b) the constitutional law of Canada that frames the legal system; and
- (c) the principles of criminal, contract, tort, property and Canadian administrative law and legal and fiduciary principles in commercial relationships;

²⁴ CALD Report, 2008. p.37.

as set out in the Task Force's recommendations.

The Task Force is equally satisfied that nothing in its competency requirements, including in the area of substantive law knowledge, will interfere with flexibility or innovation in the law school curriculum. This is particularly the case because the Task Force has not, with the exception of ethics and professionalism, recommended courses in each competency or dictated credit hours, teaching methodology, or assessment.

The Task Force has received the most comment on the inclusion of the competency now described as "legal and fiduciary principles in commercial relationships." The concern has been raised that unlike the other requirements that simply restate current components of the curricula or are more generic in their description, this competency appears to reflect a more specific content choice. The suggestion has been that this opens up a potentially endless debate on why other areas such as family law, estates, or labour law have not been included.

Just as an understanding of principles of constitutional law, administrative law, contract or property and Canadian administrative law principles are foundational so too is an understanding of the legal concepts in commercial relationships. The Task Force's recommendation is based upon the pervasive nature of commercial relationships to wide ranging areas in which lawyers' advice is sought.

The Task Force received comments on its recommended competencies from the majority of law societies. All agree with the commitment that regulatory standards should not interfere with law school innovation. Some suggest adding or removing one or more competencies, but in general agree that the proposed competencies are acceptable. They are of the view that implementing the competencies should not result in substantial change to law school curricula. They agree that generally it should be left to law schools to determine how students will satisfy the competencies. Law societies also agree with the importance of a national requirement that would be applicable to NCA applicants.

THE APPROVED LAW DEGREE – ACADEMIC PROGRAM AND LEARNING RESOURCES

Comprehensive Legal Education – Institutional Requirements

In the Task Force's preliminary discussion paper of November 2007 it concentrated on the question of required competencies, but had not yet considered the setting within which students acquire those competencies.

One of the concerns expressed to the Task Force about the competencies approach was that a "list" cannot begin to capture the richness of a law school education - the community in which one begins to think like a lawyer and also to examine law critically and address deficiencies in legal systems and principles. The Council of Canadian Law Deans has emphasized to the Task Force that modern law schools provide a liberal legal education as well as a professional education. Law is an intellectual discipline and the practice of law requires rigorous academic training as well as the development of practice skills.²⁵

Law societies agree with this view of legal education. Accordingly, the Task Force has considered whether to articulate other institutional requirements that should form part of the requirements for entry to law society bar admission programs. In its consultation paper the Task Force sought comment in four areas, namely, law school admission requirements, length of the law school program, program delivery and joint degrees. The most significant comment the Task Force received on these issues was the June 29, 2009 letter from the Chair of the Council of Canadian Law Deans, referred to earlier in this report and set out at Appendix 6.

In that letter Dean Cotter states,

In general terms the CCLD is of the view that the current situation, where Canadian law schools enjoy a margin of manoeuvre to set those requirements, subject to general policies of their universities, produces satisfactory results. While the requirements imposed by each law school are broadly similar, we note that the liberty they currently enjoy is used to

²⁵ Council of Canadian Law Deans. An Overview of Canadian Common Law Legal Education (LL.B./J.D. Degrees) May 2008.

tailor their programs to specific situations or to implement initiatives that are designed to respond to the increasingly diverse needs of the legal profession. There is no evidence that this flexibility threatens the protection of the public in any way. Accordingly, we would urge the Task Force not to recommend the adoption of any stringent standards with respect to those issues.

The Task Force agrees that wherever possible the institutional requirements set out in the national requirement for entry to bar admission programs should reflect current practice in Canadian law schools. This balances the regulatory objectives with law schools' desire to maintain flexibility of approach. By stating current practices as much as possible the Task Force leaves open the door for law schools to advise the Federation if current practices are no longer appropriate. This is particularly true, for example, in the area of technology, as Dean Cotter has expressed in his letter.

Academic Program

Entry Requirements to Law Schools

Law school pre-admission requirements in Canada have historically represented a compromise between the American model, which treats law as a graduate degree and generally requires an undergraduate degree for admission, and the English model, which treats law as an undergraduate degree to which students may gain access from high school.

The Law Society of Upper Canada's 1957/69 requirements mandated a prerequisite of either two years of university education after "senior matriculation" (what was then grade 13 in Ontario) or three years of university education after "junior matriculation" (grade 12).²⁶

Law schools in Canada accept students with a wide range of post secondary education qualifications. A large number of law students hold undergraduate university degrees.

²⁶ It appears that the 2/3-year requirement in Ontario was a compromise between the universities' representatives who initially proposed an undergraduate degree as the prerequisite and the Law Society benchers, who felt that two years was sufficient. C. Ian Kyer and Jerome E. Bickenbach. *The Fiercest Debate*. Osgoode Society, 1987. pp. 250-261.

Some hold postgraduate degrees. At the same time universities accept students who have two years of an undergraduate university education. McGill University accepts approximately 15 to 20% of its first year students directly from CEGEP which is a two-year, postsecondary, pre-university program of study unique to Québec.

Most Canadian law schools make provision for mature students and Aboriginal students who do not have the minimum two years of post secondary education, but are admitted in a special category after individual consideration by admissions committees.

The Task Force sees no reason to interfere with that flexibility, which it considers part of the innovation in law schools that should be encouraged. At the same time, however, the Task Force is of the view that the national requirement should include some reference to admission requirements to law school so as to avoid the suggestion that direct admission out of high school is possible, something which is not currently the case at any of the Canadian law schools.

The Task Force recommends that subject to special circumstances, the prerequisite for entry to law schools will, at a minimum, include successful completion of two years of postsecondary instruction at a recognized university or CEGEP.

Duration of the Program and Joint Degrees

The general law school program encompasses three years of study. This is consistent with requirements throughout North America and in other jurisdictions. A three year program or its equivalent in course credits will allow students to study the core foundational subjects of law and also be exposed to areas of study, including multidisciplinary fields that will enhance their perspective on the role of law and lawyers in Canadian society. The Task Force recognizes that some law schools may prefer a course credit requirement that would enable the student to complete law studies in fewer than three years without reducing the content of the program. Typically the three-year law degree is 90 credits. Accordingly the Task Force recommends that the length of the course requirements be expressed as three years or the equivalent in course credits.

In recent decades many Canadian law schools have introduced joint degree programs with related, but separate disciplines. The Task Force recognizes that interdisciplinary education is a rich and valuable part of law school education. Nothing in its recommendations should be interpreted to interfere with the capacity of law schools to offer such degrees. So long as the student has been engaged in a study of law for three years or its equivalent in course credits, and has acquired the competency requirements in so doing, joint degree programs should satisfy the national requirement. Law schools introducing major changes in their academic program, such as the introduction of a joint degree, should be encouraged to discuss them with the Federation to ensure that their graduates will continue to meet the competency requirements.

Methods of Delivery

The Law Society of Upper Canada's 1957/69 requirements specified that the three-year law school program should consist of full time attendance at a law faculty. Forty years ago the only delivery method for education, short of correspondence courses, was in-person attendance. Today there are new learning and delivery methods. As Dean Cotter's June 29, 2009 letter sets out law schools currently employ a variety of learning methods, including "in class" lectures, seminars, independent research, exchange programs, internships, clinical education, video conferencing with other law schools and so on. Outside Canada there are law schools that offer the degree entirely by way of distance learning.

Technological advances for delivering information are moving rapidly. The Task Force does not wish to inhibit innovative delivery or experimentation in this area. At the same time, however, it is of the view that Canadian law school education should, as it does today, provide a *primarily* in-person educational experience and/or one in which there is direct interaction between instructor and students. The use of the term "primarily" in the Task Force's recommendation is intended to allow for innovation and experimentation.

Learning Resources

The Law Society of Upper Canada's 1957/69 requirements specified the form of an acceptable law school, including the number of faculty, the number of weeks of teaching in a term, the maximum number of hours faculty could teach and other "bricks and mortar" requirements. The ABA maintains detailed accreditation requirements, although this approach is being studied with a view to shifting emphasis to other more outcome based learning measurements.

The Task Force is reluctant to define in great detail the form law school must take, particularly given the role of provincial governments in approving degree granting institutions and the complex university-based decision making process that addresses many of the law schools' physical components. The Task Force does, however, recognize that there are certain necessities for an effective legal education whose graduates can serve the public. The assistance of the working group of the Council of Canadian Law Deans has been considerable in helping the Task Force to appreciate the current practices and their advantages for law student education.

In the Task Force's view the most important consideration is that the law school be adequately resourced to fulfill its educational mission. At a time when all public resources are subject to financial pressures, the Task Force is reluctant to be too prescriptive in its recommendations, but has concluded that there are certain irreducible minima that must be maintained if law societies are to accept the law degree as evidence that the competency requirements are being achieved. To that end it recommends that the law school must,

- be adequately resourced to enable it to meet its objectives;
- have appropriate numbers of properly qualified academic staff to meet the needs of the academic program;
- have adequate physical resources for both faculty and students to permit effective student learning;
- have adequate information and communication technology to support its academic program; and
- maintain a law library in electronic and/or paper form that provides services and collections sufficient in quality and quantity to permit the law school to foster and attain its teaching, learning and research objectives.

The Task Force recommends that the approved Canadian law degree requirements also be applied in considering new Canadian law school applications. The presence of adequate learning resources in new law schools is essential to ensure that the high quality of legal education in Canada is maintained. The provincial and territorial governments will also make decisions in this area. Any new Canadian law schools whose graduates are to be eligible to enter bar admission programs will be required to comply with all of the components of the approved Canadian law degree, set out in the Task Force's recommendations.

COMPLIANCE REQUIREMENTS

Law Schools

National requirements for the approved Canadian law degree will require a national compliance mechanism. This is the most efficient and appropriate way to ensure consistency across the country and transparent, fair and objective processes.

The requirement for a national compliance mechanism does not, however, necessitate an intrusive or onerous approach. Existing Canadian law schools offer a high standard of education and the Task Force is satisfied that compliance with the competency requirements will not pose difficulty for any of them. At the same time, however, the Task Force does recognize that the creation of requirements represents a change in current practices and any compliance mechanism, however modest, will require some adjustment. It also recognizes that the recommendation for a stand-alone course relating to ethics and professionalism and the requirements to address competencies may require adjustment by some law schools.

The Task Force recommends that the compliance mechanism for law schools should be a standardized annual report that each law school Dean completes and submits to the Federation or the body it designates to perform this function. In the annual report the Dean would confirm that the law school has conformed to the academic program and

the learning resources requirements and would explain how the program of study ensures that each graduate of the law school has met the competency requirements.

NCA Applicants

The Task Force recommends that, applying the national requirement, the NCA continue to assess applicants educated outside Canada to determine whether they have achieved the requirements and if not what additional requirements they will have to meet to obtain their certificate of qualification. The national requirement described in this report should provide appropriate guidance and result in NCA applicants being assessed in a manner consistent with graduates from Canadian law schools and in a transparent, objective, impartial and fair manner.

New Canadian Law Schools

The Task Force recommends that the national requirement for the approved Canadian law degree be applied when considering proposals for new law schools. Proposals would be required to demonstrate how graduates of the new law school would meet the requirements for the approved Canadian law degree, including the competency requirements. The Task Force recommends that the Federation's accrediting body be entitled to approve the new law degree with such conditions as it thinks appropriate, relevant to the national requirement.

Effective Date

The Task Force recommends that the Federation forthwith *adopt* the national requirement set out in these recommendations. Adopting the national requirement will make clear to existing law schools, to those making proposals for new law schools and to the NCA administrators and applicants the basis upon which applicants will be entitled to enter bar admission courses on a going forward basis.

It is essential, however, to ensure that the *implementation* of the adopted national requirement is completed in a fair manner that allows sufficient time for all those

affected by it to make the necessary adjustments and changes to their procedures. The Task Force's recommendation for an effective date specifically takes into account that,

- law societies and the Federation will need time to consider and approve the report and recommendations;
- law schools will need time to make any necessary curriculum changes, including in some cases the development of an ethics and professionalism course; and
- the timing of implementation must not prejudice students/applicants already engaged in their law school education or NCA processes.

The Task Force recommends that by no later than 2015, and thereafter, each applicant seeking to enter a bar admission program be required to meet the national requirement. Typically, as relates to applicants coming from law schools in Canadian common law jurisdictions, the requirements will apply to the class entering law school in September 2012, two academic years from now.

The Task Force is of the view that current law schools and the NCA should be encouraged to implement the national requirement before 2015 if they are capable of doing so. Moreover, any new law school proposals put forward before the date should address the national requirement since their own programs would likely be starting very close to or after 2012.

Implementation Issues

In addition to the effective date for the national requirement to apply, there are a number of other implementation issues that must be addressed. These include, but are by no means limited to,

- the form and substance of the standardized annual law school report;
- a mechanism to address non-compliance;
- the Federation's determination of the body to address compliance issues; and
- funding issues.

An implementation committee should begin working immediately to ensure a smooth transition period and the development of a transparent and flexible process that will effectively implement the national requirement.

The Task Force recommends that the Federation establish a committee to implement the recommendations.

CONCLUSION

Law societies have already demonstrated the ability to work together, adjust their individual approaches to embrace a national goal and maintain the necessary ongoing mechanisms to ensure that collaborative approaches remain relevant and meaningful in furtherance of the original goal.²⁷

A national requirement for entry of law school graduates to bar admission programs represents a continuation among law societies of a trend to foster and develop common approaches to regulation in the interest of the Canadian public in general, not limited by province or territory.

A national requirement for entry to bar admission programs addresses the issues raised in this report respecting the protection of the public interest, transparent regulation, fair access to regulated professions, criteria to be applied for new law school applications, AIT and CCB considerations and government scrutiny of regulators.

The requirement does this while at the same time respecting the high quality of legal education that Canadian law schools provide and the flexibility law schools should have to determine the most effective way to meet the requirements.

²⁷ For example, the NMA now provides for territorial mobility through The Territorial Mobility Agreement and work is currently underway on an agreement for mobility with the members of the Barreau du Québec.

Appendix 1

TASK FORCE MEMBERS AND PROCESS

The Task Force comprises eight benchers and three staff members from law societies across the country:

John J. L. Hunter, Q.C. (Chair) (British Columbia)
Susan Barber (Saskatchewan)
Babak Barin (Québec)
Vern Krishna, C.M., Q.C. FRSC (Ontario)
Brenda J. Lutz, Q.C. (New Brunswick)
Douglas A. McGillivray, Q.C. (Alberta)
Grant Mitchell, Q.C. (Manitoba)
Catherine S. Walker, Q.C. (Nova Scotia)
Sophia Sperdakos (Law Society of Upper Canada)
Donald F. Thompson, Q.C. (Law Society of Alberta)
Alan D. Treleaven (Law Society of British Columbia)

The Task Force has met 21 times and has issued three previous reports:

- Discussion Paper, November 2007
- Consultation Paper, September 2008
- Interim Report, March 2009

In 2007 the Task Force Chair met with the Council of Canadian Law Deans (“the Council”) and invited input from the Deans. The Task Force met twice with a working group that the Council established whose members were former Dean Patrick Monahan of Osgoode Hall Law School, former Dean Nicholas Kasirer of McGill University and Dean Brent Cotter of the University of Saskatchewan College of Law.

In March 2008 an ad hoc group of law faculty invited the Task Force to a question-and-answer session and provided the Task Force with a paper outlining its perspectives and suggestions outlined during the session.

In September 2008 the Federation authorized this Task Force to distribute its consultation paper to law societies, the legal academy, the profession and legal

organizations and to seek written submissions until December 15, 2008. The Federation distributed the paper to all law societies, the Canadian Association of Law Teachers, the Canadian Law and Society Association, the Canadian Bar Association, the Deputy Minister - Justice Canada, the Minister of Justice and Attorney General of Canada, the Ad Hoc Working Group of Law Faculty that had met with the Task Force at an earlier stage in its work, the Council of Canadian Law Deans, and the provincial Attorneys General. It invited law societies to consult with their own constituencies as they saw fit. A number of law societies issued invitations to their members and legal organizations to provide written submissions.

The Task Force received 37 responses from individuals, law societies, the legal academy, government, and organizations as follows:

Law Societies

Law Society of Alberta
Law Society of British Columbia
Law Society of Manitoba
Law Society of New Brunswick
Law Society of Saskatchewan
Law Society of Upper Canada
Law Society of Yukon

Canadian Law Faculties/Deans/Professors/Students

Professor H. W. Arthurs, Osgoode Hall Law School
Council of Canadian Law Deans
Queen's University Faculty of Law
Dean Mary Ann Bobinski, Dean University of British Columbia, Faculty of Law (Personal Capacity)
University of Calgary Faculty of Law
Bruce Feldthusen, Dean – University of Ottawa (Personal Capacity)
University of Saskatchewan, College of Law
Dean Brent Cotter, University of Saskatchewan, College of Law (Personal Capacity)
Dean Bruce P. Elman University of Windsor Faculty of Law (Personal Capacity)
Associate Professor Joanna Harrington –Faculty of Law, University of Alberta
Canadian Academic Law Library Directors Association (CALLDA)
Canadian Association of Law Teachers (CALT) and Canadian Law and Society Association (CLSA)

Other Law Schools

University of Huddersfield, West Yorkshire England
Lee Stuesser – Bond University

Universities

Wilfred Laurier University

Government

The Hon. Alison Redford, Minister of Justice, Alberta
The Hon. Jackson Lafferty, Minister of Justice, Northwest Territories
Department of Justice, John H. Sims
The Hon. Thomas J. Burke, Attorney General, New Brunswick

Organizations

Canadian Human Rights Commission
Canada Law from Abroad
Office of the Fairness Commissioner – Ontario

Individuals

George K. Bryce
Margaret N. Capes
D. Fox
Ersdale Knight
David Norman
Shaida Ratansi
Brittany Tofangsazan
John W. Whiteside (summary)¹

In June and July 2009 the Task Force received further helpful input from the Council on the issues raised in the Task Force's consultation paper, received a motion that Faculty Council of the University of Ottawa adopted in March 2009 and met with members of law faculties, including a meeting at the University of Toronto Faculty of Law and the Faculty of Law, University of Ottawa to further discuss the issues in the Task Force's consultation paper.

¹ All submissions are available on request.

Appendix 2

THE LAW SOCIETY OF UPPER CANADA

Office of the Secretary
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Osgoode Hall
Toronto, Canada
M5H 2N6

20th February 1984

David H. Jenkins, Esq.,
P.O. Box 2140,
Seventy Kent Street,
CHARLOTTETOWN, Prince Edward Island.
CIA 8B9

Dear David;

RE: APPROVED CANADIAN LL.B. DEGREES

Background

During the latter decades of the 19th century and the early decades of the present century a legal education in Ontario consisted of a mixture of service under articles in a law office and attendance at lectures in Osgoode Hall.

For the purpose of this letter it is unnecessary to go into detail, but it should be noted that the earliest records indicate a recognition that the substantive law could best be learned in a different way from the techniques involved in the practical application of it. In the period which included the First World War matriculant students were enrolled in Osgoode Hall Law School, entered into articles of clerkship and served in that capacity for five years during which time they also attended lectures at Osgoode Hall, normally, one lecture first thing in the morning and another late in the afternoon. This arrangement made it necessary for all articling to be done in Toronto. Students with a University degree could complete the course in three years.

In 1949 the curriculum changed. Students were required to have a first degree before entering Osgoode Hall Law School and then attended two years full time lectures in Osgoode Hall followed by a third year of full time articling. The fourth and final year harked back to the earlier system and involved half a day's lectures with the remainder of the day devoted to work under articles in the office.

A Time of Ferment

The arrangements just described continued into the second half of the century but were subjected to increasing criticism. Dr. Cecil Wright, a dean of Osgoode Hall Law School and later dean of the University of Toronto Faculty of Law, articulated the dissatisfaction which was growing within the profession with what was called a trade school approach to the teaching of law. It was no longer considered appropriate for law students simply to learn the law and the techniques of applying it. At the University of Toronto Law School they were led to approach existing law critically, to regard the law as a developing organism which should be subjected to critical analysis and which would benefit from imaginative reform. The so-called case method which had developed in the United States became the foundation of an innovative approach to the teaching of law particularly at the University of Toronto Law School. The differences between that school and Osgoode Hall Law School became focused on the requirement that university law school graduates must complete the fourth year of the Osgoode curriculum before being called to the Bar. There was no dispute that the university graduates needed to serve the third year under articles but they resented being required to attend lectures during the fourth year which largely duplicated coverage of subjects they had already studied during their university law course.

During the late 1950's and early 1960's the pendulum attained its furthest swing toward an academic as distinct from a practical approach to the teaching of law.

The Problem of Increasing Enrolment

The average number of students attending Osgoode Hall Law School in the years 1937 to 1940 was about 325. Enrolment fell during the war years to a low of 109 in 1944 but with the end of the war it began to rise. In the Fall of 1945 it had climbed to 445, in 1946 to 700, and in 1947 it reached 801. Between 1948 and 1952 there was a drop to 624 but the following year showed a return to increasing enrolments which were not expected to decline again.

It was clear that the physical facilities at Osgoode Hall had become inadequate to cope with an enrolment of double the number of students it had been designed to accommodate in the pre war years. A special committee of Benchers under the chairmanship of the then Treasurer,

Cyril Carson, Q.C., was formed to address the problem and quickly concluded that two new lecture halls were needed together with accessory rooms for study and instruction as well as increased library facilities.

The committee recognized that the extent of the new accommodation that would be needed was linked to the question of the role that Osgoode Hall would play in legal education in the future and whether or not the Society would continue to assume the increasingly costly bulk of responsibility for legal education. To explore this question the committee invited representatives of eight universities and colleges in Ontario to meet with them to discuss the future of legal education in Ontario. Meanwhile, the need for improved facilities at Osgoode Hall had become so acute that the committee recommended that the building project could no longer be delayed and in October 1955 Convocation approved an immediate start on the construction of an addition to the law school wing.

A New Approach to Legal Education

Approved LL.B. Degree — Bar Admission Course

During a lengthy series of meetings the general form of a new system of legal education began to emerge. The first outlines were sketched in a letter from Dr. W. A. Mackintosh, principal and Vice-Chancellor of Queen's University, Kingston, to the Treasurer, Cyril Carson, Q.C. Later the committee agreed to place the development of the plan in the hands of a small group consisting of D. Park Jamieson, Q.C., John D. Arnup, Q.C. and Professor Corry of Queen's University.

From their meetings emerged a memorandum proposing that for anyone desiring to practise law in Ontario legal education would be divided into three stages: pre law study, law school course and Bar Admission Course. For those wishing to take legal training as preliminary to a business, governmental or a similar career only the first two stages would apply. The memorandum described the three stages as follows:

"A. ADMISSION TO LAW SCHOOL COURSE

1. The minimum requirement for admission to a law school course should be
 - (a) Successful completion of two years in an approved course in an approved University after senior matriculation;
 - or
 - (b) Successful completion of three years in an approved course in an approved University after junior matriculation.

Note: No opinion was reached as to whether a minimum standing in any such course should be required.

2. Of course, a degree in an approved course in an approved University would satisfy the minimum requirement.

B. LAW SCHOOL COURSES

1. The Length of the law school course should be not less than three years. Under the proposals being considered by the Special Committee of the Benchers, the present Osgoode Hall Law School course would be divided into a full-time academic course of three years and a Bar Admission Course in which the practical training would be given. Thus the two functions which the Law Society now performs as a teaching institution for Legal Education and as part of the accrediting mechanism of the Law Society would be separated.
2. A law school course should contain certain basic subjects which would be compulsory for all students in all schools.
3. Additional subjects to complete the regular course should be at the discretion of each law school.
4. It is also recognized that some law schools may desire to specialize in particular fields.
5. Successful completion of a law school course should entitle the student to a law degree.

C. A BAR ADMISSION COURSE

1. Graduates from the Osgoode Hall Law School academic course or from an approved law course in an approved University in Ontario would be eligible for admission to the Law Society and entrance to the Bar Admission Course at

Osgoode Hall provided they also satisfied the further requirements prescribed by the Benchers such as citizenship, good character and fitness, and payment of fees.

2. Under the proposals being considered by the Special Committee of the Benchers, the Bar Admission Course would consist of a period of service under articles of not more than 15 months (June 1st to August 31st of the succeeding year) and a further period of practical and clinical training at Osgoode Hall, supervised by members of the Law School Staff and practising members of the profession, of not more than 6 months (September 1st to February 28th).
3. Upon proof of the required service under articles and the passing of such oral and written examinations as may be prescribed, the staff of the Bar Admission Course would certify to the Benchers that the student in question had successfully completed such course.
4. Call to the Bar would then follow in the usual way, which under these proposals, would take place not later than March in each year."

Because of the importance of understanding the full scope of the discussions which took place at that time I have attached as an appendage to this letter excerpts from the Report of the Special Committee on Law School of the 14th of February, 1957 in which the three stages of legal education are particularly described; a copy of a letter written in 1957 by D. Park Jamieson, who was then chairman of the Legal Education Committee, to the principals or deans of law schools interested in establishing approved law courses; a summary of the 1957 Regulations of the Law Society respecting approved law courses which set out the courses each approved law school was required to offer.

The new shape of legal education received the support of practitioners and teachers throughout Ontario but also commended itself to the profession in other parts of Canada. It preserved and indeed emphasized the distinction between the substantive and the practical components of a legal training and vested full authority in the law schools to teach the prescribed academic courses without in any way limiting their freedom to teach other courses which might not have direct relevance to a training for the traditional practice of law.

It is clear from the reports of 1957 that the original intention was simply to reshape legal education for Ontario. It soon became obvious, however, that universities in other parts of Canada expected that some of their graduates would want to be able to qualify to practise in Ontario. Also they approved of the direction in which Ontario was moving and were ready to move in the same direction themselves. Accordingly, the Law Society of Upper Canada made it clear that any university law faculty in Canada that was prepared to follow the format which had been adopted in Ontario could be approved for the purpose of having its graduates enter the Bar Admission Course in Ontario. The following is a list of the approved law schools in the order in which they received approval:

Osgoode Hall Law School — 1957
 University of Toronto — 1957
 Queen's University — 1957
 University of Ottawa — 1957
 Dalhousie University — 1957
 University of Western Ontario — 1958
 University of New Brunswick — 1958
 University of British Columbia — 1959
 University of Saskatchewan — 1961
 University of Alberta — 1964
 University of Manitoba — 1965
 McGill University — 1969
 University of Windsor — 1968
 University of Victoria — 1975
 University of Calgary — 1979
 University of Moncton — 1979

In each case the same routine was followed in granting approval: the university law faculty would enquire what standards were to be met, they would receive the information from the Law Society of Upper Canada and after a period of planning would submit a detailed plan to bring themselves within the requirements. Their submission would then be circulated to all

the then existing approved law faculties and any comments received would be sent back to the applicant faculty and if necessary adjustments would be made. Ultimately, with the approval of all the existing faculties, the legal education committee in Ontario recommended to Convocation that the application for approval of the new law faculty be approved. When this was communicated to the faculty concerned they would put the first year's operation into effect followed by the second and third years until full approved status had been reached with the graduation of their first graduates.

There are at present sixteen universities across Canada which confer the approved LL.B. degree. It should be noted that until 1957 Osgoode Hall did not grant an LL.B. degree but rather the degree of Barrister at Law which was done at the same time the candidate was called to the Bar of Ontario. By a change in statute in 1957 Osgoode Hall Law School became empowered to grant academic degrees in law.

The first Bar Admission Course in Ontario began in 1958 composed of about thirty students. As transitional arrangements worked themselves through, the numbers began rapidly to increase as the graduates of the expanding number of approved schools reached the Bar Admission Course stage of their education.

Evolution

Within a few years a number of pressures began to develop within Osgoode Hall which were to have far reaching effects on the new system of legal education.

The physical addition to Osgoode Hall of two large lecture rooms and a series of seminar rooms and additional library facilities were again becoming overcrowded. They had originally been planned to accommodate a larger law school. By the early 1960's they were trying to house both a law faculty and LL.B. program and the Bar Admission Course teaching term. It became obvious that there was not enough room and that the two organizations had quite different needs which could only with difficulty be accommodated in the same space.

A second change was growing in significance. Osgoode Hall Law School had altered its essential nature by relinquishing to the Bar Admission Course the practical component of the legal education spectrum. It began more and more to take on the characteristics of a university law faculty and to lose the characteristics that it had shown during the many years that it had been the only professional law school in Ontario governed directly by the Benchers.

A third pressure came from government. The Law Society received some financial assistance from the government to help defray the costs of running the Bar Admission Course and also to help meet the expense of the new LL.B. program at Osgoode Hall Law School. The government made it clear that they would prefer Osgoode Hall Law School to be affiliated with a university for the purpose of receiving government assistance.

Coincidentally with these developments a new university to be called York was taking shape on the outskirts of Toronto and wished to have a law faculty. It was judged that there was no need for an additional law faculty in Ontario and so the suggestion was made that Osgoode Hall Law School quit Osgoode Hall and move to York University to form the basis of its law faculty. This was done in 1968.

The real significance of the move was that the Benchers no longer were in direct control of an approved law school and the first hand detailed knowledge they had had of the LL.B. course began to slip away from them. They retained the power of approval of law courses for the purpose of having their graduates enter the Bar Admission Course but they lost the intimate connection with one such course which had formed the basis of their control of the development of the courses taught in the approved law schools.

Another important change came about in 1968. The law deans in Ontario felt that the prescribed core courses provided too little flexibility and that if the various approved faculties were to be able to evolve better teaching methods they needed more freedom to decide on the contents of their curricula. They negotiated with the Society with the result that the number of so-called core subjects was reduced from eleven to seven by the deletion of evidence, agency, company law, and wills and trusts from the list of required core subjects.

The Ontario deans made the point that the law itself was evolving quickly and that law school curricula needed to be able to evolve as well and that in addition new teaching methods and techniques made it imperative that the Society evidence their faith in the ability of the law faculties to teach appropriately and well by trusting them to give their students a good legal education.

Traditionally almost every student that embarked on a legal education intended to be called to the Bar and engage in some form of practice. During this period, however, a small but

slowly increasing number of students entered law school intending to use the training in fields outside the traditional practice of law. The situation in this regard had been quite different from the experience in the United States where almost half the students entered law school without intending to practise law. In responding to this development the law faculties particularly in Ontario wanted to broaden the scope of their courses by offering an increased number of elective subjects to accommodate those who intended to enter fields on the periphery of practice or unconnected with practice altogether.

The change from eleven core subjects to seven had been accepted in Ontario without reference to the approved law schools outside Ontario. A number of other provinces deeply resented this unilateral action and proposed that graduates from Ontario would no longer be eligible to enter their Bar Admission Courses. Through several meetings of the Federation of Law Societies the position of the provinces which had been most critical of the change softened first to propose accepting Ontario graduates who had in fact covered the eleven core subjects and finally to accept an Ontario LL.B. on the original basis of equality. It was at this time that the approved Canadian LL.B. began to be known as the "portable" degree.

Role of the Federation of Law Societies of Canada

In view of the history of the development of the portable LL.B. degree in Canada it is understandable how Ontario became the approving authority for the Canadian approved LL.B. degree. It is less clear that it should continue to discharge this responsibility.

At the Federation's meeting in Quebec City in 1983, Ontario suggested that the responsibility be assumed by the Federation.

The development of the approved LL.B. degree in Ontario in 1957 had the effect of introducing a degree of uniformity of approach and content in legal education across the whole of Canada. This in turn has ensured a high degree of mobility for graduates seeking to enter practice in the various provinces and as well has provided a common basis from which LL.B. courses across Canada have developed while maintaining a standard which has remained acceptable nation-wide.

Inevitably as personnel within the various university law faculties change and new Benchers assume responsibility within the various law societies, stresses develop within the framework of the portable LL.B. degree. Individual law faculties wish to introduce innovations to improve both the content of their courses and the teaching techniques being used and it is important that these evolutionary changes do not endanger the portability of the degree. To accomplish this it is suggested that the same degree of consultation among the various law schools as characterized the initial approval of their program should be maintained to evaluate changes a faculty may wish to make which might bear on the basis of its approval or be of interest and assistance to other approved faculties. At present there is no formal reference to the Law Society of Upper Canada by approved law schools when changes in their curriculum or teaching methods are made. It may be that no significant changes have taken place which bear upon the basis for the approval of the degree given by any particular law school but it is not known with certainty whether or not this is the case. This situation must be remedied or the cumulative differences among the various law schools will continue until the very basis of portability is threatened which, once destroyed, might prove extremely difficult or even impossible to re-establish.

There are some indications that some graduates of approved LL.B. courses are coming to the Bar Admission Course in Ontario without adequate grounding in some areas of substantive law. This is occurring notwithstanding that law school faculties have undertaken to counsel students with respect to the courses they should take if they intend to go on to the Bar Admission Course. The extent of the problem is not precisely known, but it has become necessary for the Society to consider means of remedying the defects at the Bar Admission Course stage.

The scheme of legal education which was put in place in 1957 has served well for over a quarter of a century. It is not surprising, however, that it should now be subject to fresh evaluation in the light of circumstances which have been changing rapidly during those years. This letter is not the place to attempt such an evaluation but one or two matters might be identified for the sake of illustration.

It was probably never true that a newly called lawyer was omni-competent and fully capable of practising in any field of law. It is certainly true that the tremendous expansion in the number and complexity of fields of law has rendered such omni-competence quite impossible. It has always been difficult for a practitioner accustomed to handling certain types of matters

to switch the nature of his practice to another field of law. Some assistance can be gained by Continuing Education programs but often such programs do not provide adequate basic grounding for a person attempting to become adept at a new field but rather have been aimed at maintaining and enhancing the competence of those who continue to practise in fields familiar to them.

There is at present considerable discussion of specialization within the practice of law and it is suggested that there should be discussion as well of the possibility of recognizing clusters of related subjects which have in common their relationship to a recognizable area of legal practice. Such discussions might lead to the development of an alternative to true specialization which would involve the co-operation of law schools, governing bodies, and voluntary associations such as the Canadian Bar Association all of which organizations are in varying degrees involved in the initial education and training of lawyers and their continuing education. There is a bedrock of basic law which every lawyer must know and at the other end of the scale there are recognizable areas or fields of legal practice which can clearly be distinguished from other fields of practice each of which fields involves detailed mastery of skills and knowledge peculiar to that field of law. These clusters of knowledge may overlap with the clusters appropriate to another field but the fields themselves are more or less distinct as for example a real estate practice as distinguished from the practice of a criminal advocate.

Many law students recognize at the outset that their talents lie within certain broad limits and at an earlier stage than is now the case. As the conditions of practice change due to economic and other circumstances lawyers who have engaged in practice for some years may wish to change to engage in practice in another field. It is at present difficult for them to obtain the appropriate continuing legal education to enable them to do so.

The rapid expansion in the numbers serving in the legal profession has resulted in a dilution of the experience of the profession as a whole and this has made it more difficult for newly called lawyers to obtain the informal but invaluable counsel and advice of senior practitioners. Terms of articling are often served with quite junior members of the Bar and newly graduated practitioners form firms in which no senior experienced practitioners are included. It may be that some form of conditional licencing is indicated which would require junior lawyers to spend some minimum period of their early practice in association with members experienced in their chosen field of law before being permitted to practise alone or with others as junior as themselves.

These possibilities have been mentioned here to illustrate that after 25 years the present scheme can be expected to undergo re-examination and change. It is important, therefore, that appropriate steps be taken to ensure that these developments proceed if possible without the loss of the portability of the basic legal education.

The anomaly of one province discharging the necessary responsibility of co-ordination and control should be ended. The time appears to be ripe for the Federation of Law Societies to accept that responsibility and to play a central role in the orderly evolution of legal education in Canada. I should like to add a further thought respecting the role of the Federation in the future.

The development of a Federal Court System resembling the organization of a Provincial Court System and the rapid development of matters of national significance such as decisions on the Charter of Rights and Freedoms and the growth of inter-provincial or national commerce and industry which favours professional mobility all point to the desirability of the strengthening of the role of the Federation of Law Societies. In recent years through the auspices of the Federation the cohesion of the law societies across Canada has been greatly enhanced and questions of importance to all provincial governing bodies have been resolved through discussion and co-operation in a way which has bound them more closely together without in any way threatening the autonomy of the individual societies in their respective provinces.

I suggest that the governing bodies across Canada through the Federation of Law Societies not only keep pace with these developments but provide leadership in the consideration of the question of the formation of a Law Society of Canada which would accept responsibility for governing the national aspects of practice without impairing the status or the traditional roles of the individual provincial licencing bodies.

Yours very truly,
Kenneth Jarvis,
Secretary.

Copies for all returning members of the Section marked for your attention for the particular of the Committee
16/4/69 T.G.F.

THE LAW SOCIETY OF UPPER CANADA
OFFICE OF THE SECRETARY



OSGOODE HALL
TORONTO 1

15th April, 1969.

Professor Thomas G. Feeney,
Dean,
Faculty of Law,
University of Ottawa,
Ottawa 2, Ontario.

Dear Dean Feeney:

As you know, the Society's requirements for approval of law courses for the purpose of having their graduates enter the Bar Admission Course in Ontario have been in existence unchanged since 1957. The Legal Education Committee and Convocation have given careful consideration to these Regulations, particularly in the light of the changing conditions of legal education generally. They consider it desirable to introduce a greater measure of flexibility into the stipulated requirements. This will facilitate a greater diversity of emphasis among the approved courses and allow the individual schools to develop along the lines of their special interests.

I am pleased to enclose a copy of the requirements embodying amendments which have the support of the Legal Education Committee and the approval of Convocation.

Yours very truly,

Kenneth Jarvis,
Secretary

J:R

Encl.

LAW SOCIETY OF UPPER CANADA

The requirements of the Law Society of Upper Canada pertaining to the approval of Law Faculties for the purpose of the admission of their graduates to the Bar Admission Course as amended on March 21, 1969 are as follows:

1. Admission Requirements

The admission regulations for an approved law school are as follows:

- (a) Successful completion of two years in full-time attendance in an approved course in an approved Canadian university after senior matriculation; or
- (b) Successful completion of three years in full-time attendance in an approved course in an approved Canadian university after junior matriculation; or
- (c) A degree in an approved course in an approved university.

2. Academic Programme

The course for an approved law school is three years in full-time attendance leading to the degree of Bachelor of Laws (LL.B.) or its equivalent.

3. Curriculum

- (a) An approved law school shall offer instruction regularly in the following subject areas:

Agency
Banking and Bills of Exchange
Civil Procedure

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Company Law
Conflict of Laws
Constitutional Law
Contracts
Criminal Law and Procedure
Equity
Evidence
Family Law
Jurisprudence or one subject of a
jurisprudential nature
Labour Law
Legal History
Legislation and Administrative Law
Municipal Law
Partnership
Personal Property
Real Estate Transactions
Real Property
Sale of Goods
Taxation
Torts
Trusts
Wills and Administration of Estates

(b) It is understood that the different subject areas may be variously combined or subdivided at the different law schools, hence the above list should be regarded as indicating areas of the law in which instruction will be regularly offered. The list should not be regarded as necessarily establishing courses that must be taught separately or in combination under these specific labels. For example, 'Legislation' and 'Administrative Law' might be two separate courses under those names, whereas 'Personal Property' and 'Real Property' might be combined into a single course entitled 'Property'. Or, under a heading like 'Remedies', substantial parts of 'Civil Procedure', 'Contracts' and 'Property' might be combined.

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The same sort of thing could be done under the heading
'Commercial Law'.

(c) Every student shall be required to take the major
basic course offered in each of the following subject areas:

Civil Procedure
Constitutional Law of Canada
Contracts
Criminal Law and Procedure
Personal Property
Real Property
Torts.

(d) It is understood that subject to subparagraph 3 (c),
the academic planning authority of each approved Law School
may provide any or all courses to its students on a required
or an optional basis; may require students to elect between
alternative courses or groups of courses to attain either
diversification or specialization to an extent deemed desir-
able and may add courses to its curriculum on a required or
an optional basis in subject areas other than those listed
in subsection 3 (a).

4. Sequence of Courses

The academic planning authority of each approved law
school may determine the sequence in which courses are taught.

5. Annual Session and Hours of Lectures

(a) The academic year shall extend for approximately thirty
effective teaching weeks exclusive of examination periods.

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Each student shall be under instruction or supervision by the teaching staff for approximately fifteen hours per week in class sessions, seminars, tutorials and legal writing or research projects.

(b) The academic planning authority of each approved law school may determine the hours allotted to the various courses offered.

6. Teaching Staff

Chiefly for the benefit of universities considering setting up new law faculties, the Law Society has prescribed certain basic requirements with regard to full-time teaching staff. Thus, the minimum number for the instruction of the first year is three, including the Dean. One additional full-time member must be appointed to the staff for each additional year so that in the result the basic full-time staff will be five when all three years are being taught.

7. Teaching Hours

The maximum teaching load recommended by the Law Society for each member of the full-time staff is six lecture hours per week.

8. Library

The Law Society requires to be assured that adequate

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facilities, including library books and reading space, are available to the students and the faculty.

April 1st, 1969.

Appendix 4

ENTRY TO THE LEGAL PROFESSION – A COMPARATIVE SNAPSHOT**APPROACHES TO REGULATORY/ACCREDITATION STANDARDS IN OTHER JURISDICTIONS****UNITED STATES**

There are hundreds of law schools in the United States and a wide range of quality from superlative to those that operate entirely on-line and are not associated with any university. To address this wide range of quality the American Bar Association (“ABA”) has developed and administers a rigorous law school accreditation process, including a period under provisional accreditation.² As of June 2008 there were 200 ABA accredited law schools in the United States. This is in contrast to Canada’s 16 law faculties that offer a common law degree and six that offer a civil law degree.

There are U.S. law schools that do not have ABA accreditation. In most jurisdictions graduates may only write the state bar examination if they have graduated from an ABA accredited school. A few jurisdictions, such as California, have a separate accreditation system for non-ABA school graduates who may be entitled to write the bar examination. Thus, generally speaking the ABA requirements dictate minimum standards to which the “approved” American law school must conform.

The preamble to the ABA Standards for Approval of Law Schools states that they are founded primarily on the fact that law schools are the gateway to the legal profession. They are minimum standards, designed, developed and implemented for the purpose of advancing the basic goal of providing a sound program of legal education. The preamble goes on to state that an approved law school must provide an opportunity for its students to study in a diverse educational environment, and in order to protect the interests of the public, law students and the profession, it must provide an education program that ensures that its graduates:

- (1) understand their ethical responsibilities as representatives of clients, officers of the courts, and public citizens responsible for the quality and availability of justice;
- (2) receive basic education through a curriculum that develops:
 - (i) understanding of the theory, philosophy, role and ramifications of the law and its institutions;

² The American Association of Law Schools also maintains an accreditation system, which operates with a slightly different perspective from the ABA. Member schools must meet its accreditation requirements for membership, but it is not recognized by the Department of Education as an accrediting agency and no jurisdiction requires that a student have graduated from an AALS school in order to gain admission to the bar.

(ii) skills of legal analysis, reasoning and problem solving; oral and written communications; legal research; and other fundamental skills necessary to participate effectively in the legal profession;

(iii) understanding of the basic principles of public and private law; and

(3) understand the law as a public profession calling for performance of pro bono legal services.

The ABA standards then go on for eight chapters setting out the minimum requirements for the organization and administration of a school, the program of legal education, the qualifications, size, instructional role, responsibilities of and professional environment for its faculty, admissions and student services, its library and information resources including personnel and the collection, and its minimum physical facilities.

In addressing the program of legal education the ABA standards state:

Standard 301. OBJECTIVES

(a) A law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession.

(b) A law school shall ensure that all students have reasonably comparable opportunities to take advantage of the school's educational program, co-curricular programs, and other educational benefits.

Standard 302. CURRICULUM

(a) A law school shall require that each student receive substantial instruction in:

(1) The substantive law generally regarded as necessary to effective and responsible participation in the legal profession;

(2) Legal analysis and reasoning, legal research, problem solving, and oral communication;

(3) Writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after first year;

(4) Other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and

- (5) The history, goals, structure, values, rules and responsibilities of the legal profession and its members.
- (b) A law school shall offer substantial opportunities for:
 - (1) Live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one's ability to assess his or her performance and level of competence;
 - (2) Student participation in pro bono activities; and
 - (3) Small group work through seminars, directed research, small classes, or collaborative work.

In the American context, this approach provides a consistent template against which to measure schools. In an environment of hundreds of schools it provides a highly structured measurement tool to ensure minimum quality. It provides law schools with arguments for funding within their university environments to meet the standards. It recognizes that quality education is about both program content and learning environment.

In September 2008 the Council of the ABA Section of Legal Education and Admissions to the bar began a comprehensive review of the ABA Standards for the Approval of Law Schools. It is expected to take two years. Among the issues under discussion is the proposal to shift the focus of the Standards from input measurement to outcome measurement. The interim report of the ABA's Outcome Measures Committee notes that the proposal flows from a shift in thinking among legal educators in the United States and elsewhere, with particular emphasis on two reports published in the U.S.: WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (Carnegie Foundation for the Advancement of Teaching 2007); and ROY STUCKEY AND OTHERS, *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* (Clinical Legal Education Association 2007). The Outcome Measures Report places a great deal of importance on the Carnegie study's analysis of how schools should prepare students to become competent professionals. The Report notes that the Carnegie study,

...ascribes three apprenticeships that should make up their education. The first apprenticeship is the cognitive or intellectual, which provides students with the academic knowledge base. The second apprenticeship is the forms of expert practice shared by practitioners. The third is the apprenticeship of identity and purposes, which introduces the student to the values required of the professional community. ... In shorthand, CF describes these three apprenticeships as "knowledge, skills, and attitude."(p.7)

The ABA has also recently announced the establishment of a “Special Committee on the Professional Education Continuum” to consider the implications of a number of studies and changing theories of pedagogy on the legal education continuum. The goal and approach of the Committee has been described in a memorandum from Randy Hertz, Chair, Section of Legal Education and Admissions to the Bar, as follows:

Using the MacCrate Task Force's conception of legal education and preparation for practice as a continuum that begins prior to law school and continues after law school, the Special Committee will consider the pedagogical innovations stimulated by the Carnegie Foundation's report on legal education, the follow-up work by the Legal Education Analysis and Reform Network (LEARN), and the CLEA "Best Practices" report, and will examine the implications of these developments for all stages of the professional education continuum.

The committee's central purposes will be to (1) contribute to the ongoing national discussion of legal education, bringing to bear the Section's unique perspective as an organization composed of academics, practitioners, judges, and bar examiners; and (2) serve as a resource for and consultant to Section committees that are concerned with one or more of the segments of the professional education continuum. The committee will gather information, write reports or papers as appropriate, and propose conferences and/or workshops as appropriate.

It will be some time before either of these reviews results in any changes to standards or accreditation, but it is clear that there is momentum gaining in the United States for a shift in the approach to both legal education and law school accreditation.

COMMONWEALTH JURISDICTIONS

Australia, England and Wales, and New Zealand focus their attention on curriculum-based requirements.

In both Australia and England and Wales the law degree can be a true undergraduate degree, namely that students may enter it right out of high school. Often the law degree is taken at the same time as another liberal arts or science degree. In some schools it may also be taken following completion of an undergraduate degree.

Australia

Typically the Australian jurisdictions provide that a degree will be accredited if it requires completion of the equivalent of at least three years full-time study of law and a satisfactory level of understanding and competence in the following areas of knowledge:

Criminal Law & Procedure
Torts

Contracts
Property
Equity
Company Law
Administrative Law
Federal & State Constitutional Law
Civil Procedure
Evidence
Professional Conduct.³

In respect of each of these areas of knowledge, the rules in each jurisdiction include a synopsis of the subject area in a schedule, which specifies a range of topics for each area or, as an alternative, requires that topics, of such breadth to satisfy a more general guideline, are taught. So, for example, under criminal law and procedure the academic requirements might be stated as follows:

Criminal Law and Procedure

1. The definition of crime
2. Elements of crime
3. Aims of the criminal law
4. Homicide and defences
5. Non-fatal offences against the person and defences
6. Offences against property
7. General doctrines
8. Selected topics chosen from:
 - attempts
 - participation in crime
 - drunkenness
 - mistake
 - strict responsibility.
9. Elements of criminal procedure. Selected topics chosen from:
 - classification of offences
 - process to compel appearance
 - bail
 - preliminary examination
 - trial of indictable offences.

OR

Topics of such breadth and depth as to satisfy the following guidelines.

The topics should provide knowledge of the general doctrines of the criminal law and in particular examination of both offences against the person and against property. Selective

³ These are commonly known as the Priestley 11, named for the Chairman of the Committee that drafted them.

treatment should also be given to various defences and to elements of criminal procedure.⁴

Although there is currently no formal national accreditation system the uniform adoption of the Priestley 11 in every law school in Australia has meant that there is a strong degree of uniformity to the accreditation process that happens at the State level.

In 2008 the Australian Council of Law Deans (CALD) unanimously approved in principle a national standards model for application to law schools. The issue of a national accreditation system based on the standards is also under discussion. In considering the standards for the law course some outcome measurement language is used as follows:

2.1 Educational Outcome

2.11 The law school has identified, defined and disseminated the attributes that law students should exhibit on graduation.

At the same time, however, the standards speak to “curriculum content.” The standards also address “bricks and mortar” requirements somewhat along the lines of the ABA Standards.

England and Wales

The Law Society of England and Wales and the General Council of the Bar are authorised to prescribe qualification regulations for those seeking to qualify as solicitors or barristers. They have indicated that they will “recognise a course of study leading to the award of an undergraduate degree” if it satisfies the requirements as set out in their 2002 *Joint Statement issued by the Law Society and the General Council of the Bar on the Completion of the Initial or Academic Stage of Training by Obtaining of an Undergraduate Degree* (Joint Statement).

The statement includes both resource and program of instruction components, addressing learning resources (includes human resources, physical resources, and student supports), the requirement that the institution granting the degree has such authority granted by the Privy Council, the length and structure of the course of study, standards of achievement expected of students (knowledge and skills), the knowledge and general transferable skills (there is significant overlap between the standards and the knowledge and transferable skills) and the content or coverage of the course of study.

The content or coverage, referred to as the Foundations of Legal Knowledge, is

- a. Public law, including Constitutional Law, Administrative Law and Human Rights
- b. Law of the European Union

⁴ CALD Report 2008. p.78.

- c. Criminal Law
- d. Obligations, including Contracts, Restitution and Tort
- e. Property Law
- f. Equity and the Law of Trusts
- g. In addition, training in legal research.
- h. The remaining half-year in law must be achieved by the study of legal subjects. A legal subject means the study of law broadly interpreted.

The required knowledge and general transferable skills are articulated as

Knowledge

Students should have acquired –

- 1 Knowledge and understanding of the fundamental doctrines and principles which underpin the law of England and Wales particularly in the Foundations of Legal Knowledge.
- 2 A basic knowledge of the sources of that law, and how it is made and developed; of the institutions within which that law is administered and the personnel who practise law.
- 3 The ability to demonstrate knowledge and understanding of a wide range of legal concepts, values, principles and rules of English law and to explain the relationship between them in a number of particular areas.
- 4 The intellectual and practical skills needed to research and analyse the law from primary resources on specific matters; and to apply the findings of such work to the solution of legal problems.
- 5 The ability to communicate these, both orally and in writing, appropriately to the needs of a variety of audiences.

General Transferable Skills

Students should be able –

- 1 To apply knowledge to complex situations.
- 2 To recognise potential alternative conclusions for particular situations, and provide supporting reasons for them.
- 3 To select key relevant issues for research and to formulate them with clarity.
- 4 To use standard paper and electronic resources to produce up-to-date information.
- 5 To make a personal and reasoned judgement based on an informed understanding of standard arguments in the area of law in question.
- 6 To use the English language and legal terminology with care and accuracy.
- 7 To conduct efficient searches of websites to local relevant information; to exchange documents by email and manage information exchanges by email.
- 8 To produce word-processed text and to present it in an appropriate form.

The Solicitors Regulation Authority has recently revised the rules and approaches for the Legal Practice Course (LPC), which is a required step in the process of becoming a solicitor. It follows and builds upon the academic training. The new LPC focuses on outcomes that the successful students should be capable of doing at the end of the

course. They are described as the “irreducible minimums” that all students need to demonstrate to pass.

New Zealand

Legal education regulation in New Zealand is governed by the New Zealand Council of Legal Education. It is an independent statutory body that defines and prescribes courses of study for those seeking admission as barristers and solicitors and for general legal education.

The Council's 2008 report sets out the role of the Council in setting standards:

The general activities of the Council are public interest, regulatory concerns and centre on the Council's responsibilities for the quality and provision of legal training prior to admission as barristers and solicitors.

These activities include -

- setting courses of study for the examination and practical legal training of persons wishing to be admitted as barristers and solicitors in New Zealand;
- providing, or arranging for the provision of those courses of study;
- arranging for the moderation and assessment of those courses of study;
- assessment of qualifications particularly those of overseas law graduates and legal practitioners wishing to practise in New Zealand;
- arranging for the provision of research as necessary, and tendering advice on legal education;
- administering and conducting certain examinations.

To carry out its tasks in discharge of its functions set out in Lawyers and Conveyancers Act 2006, the Council has maintained its general liaison with the Judiciary, the legal profession, the universities and law students, and has specifically undertaken the activities detailed below.

PROVISION OF COURSES

Compulsory Law Subjects

The Council prescribes the core curriculum for the bachelor of laws degree and monitors these subjects through a moderation system. The five compulsory subjects that are moderated are –

Law of Contracts

Law of Torts

Criminal Law

Public Law

Property Law (or Land Law and Equity and Succession where Property Law is not offered.)

In respect of the above subjects the examination papers are settled by a university teacher and a moderator appointed by the Council of Legal Education. Moderation is also required for Legal Ethics which is a compulsory course for admission to the profession. A sixth Council prescribed core degree subject (Legal System) is not moderated owing to the introductory nature of the course and variations between courses.

Subjects Compulsory for Admission

During 1997 the Council introduced a requirement for all law students who completed their bachelor of laws, or bachelor of laws with Honours degrees after July 31, 2000 to pass a university course in Legal Ethics as a further requirement for admission. On August 1, 2008 the requirement was extended to all applicants for admission regardless of the completion date of their degree.

The course which was prescribed and moderated by the Council, has as its broad principles -

- an introduction to ethical analysis including an examination of various theories of ethics
- the applicability of ethical analysis to legal practice
- the concept of a profession and the ethical professional duties of practitioners (which includes, among other topics, conflicts of interest, confidentiality, duties to the Court, duties of loyalty and fidelity)
- the wider responsibilities of lawyers in the community.

The course was introduced in response to a report which had recommended that courses in Legal Ethics be required at three levels of legal education: academic, vocational training and continuing education after admission to the Profession. In New Zealand this was implemented by the Council by the introduction of the undergraduate university course in Legal Ethics which, while not a compulsory degree subject, is required for those students wishing to be admitted to the profession. The requirement was further implemented by the introduction of Ethics and Professional Responsibility components into the Council's Professional Legal Studies Course.

The Council also has responsibility for accreditation of professional legal studies courses.

Scotland

At present, the Scottish legal education and training framework consists of three stages leading to qualification, followed by a Continuing Professional Development regime post-qualification.

Academic stage

The first stage in the route to qualification is the academic stage which, in Scotland, can be undertaken either by way of an Exempting Scottish LL.B. Degree accredited by the Law Society of Scotland, or by way of the Society's own Professional Exams.

Exempting Scottish LL.B. Degree

The Society prescribes the program content and structure for degree programs to be accredited as Exempting Scottish LL.B. Degrees, which, together with other training, will provide entry to the Scottish solicitors' profession. The content and structure is equivalent to the curriculum for the Society's Professional Exams ('the Examination Syllabus').

The Society's current "Accreditation Guidelines for Applicants" for the Exempting Scottish LL.B. Degree state:

The professional subjects taught within the wider context of the LL.B. allow students exiting from an LL.B. to have acquired the requisite knowledge, understanding and generic skills of those subjects that form the foundation of subsequent professional training.

Specifically, those requirements are for:

Subject-specific abilities of:

- knowledge
- legal and ethical values
- application and problem-solving
- sources and research

General Transferable Intellectual Skills of:

- analysis, synthesis, critical judgement and evaluation
- independence and ability to learn

Key Personal Skills of:

- communication and literacy
- personal management
- numeracy, information technology and teamwork

And the following Professional Subjects:

- public law and the legal system
- conveyancing
- Scots private law
- evidence
- Scots criminal law
- Taxation
- European Community law
- Scots commercial law

The Society does not specify the number of credits to be attached to particular courses or, indeed, the overall number of credits to be allocated to the core subjects. What the Society's LLB accreditation guidelines do specify is that the program of study for an accredited LLB must include the study of the Professional Subjects for the equivalent of not less than two years.

Professional Exams

Unlike the Exempting Scottish LL.B. Degree accredited by the Society, the Society's Professional Exams require the individual to be in a pre-Diploma training contract under the supervision of a practising solicitor. The Professional Exams may also be taken by an individual who has graduated or is eligible to graduate with an Exempting Scottish LL.B. Degree but who lacks passes in all of the Professional Subjects. Although there is no validation or authorisation by the Society of firms offering pre-Diploma 'traineeships', the Society requires the pre-Diploma 'traineeship' to cover experience in Conveyancing, Litigation and either Trusts and Executries, or where the training solicitor is not engaged in private practice, the legal work of the training solicitor.

In 2006 the Law Society of Scotland launched a significant project to review all components of legal education from pre-call to post-call requirements. A project plan was introduced at the Annual General meeting in 2009 and is progressing forward. Among other features the proposals focus on learning outcomes. The report on the project notes:

Changing trends in professional education: Increasingly, the trend in professional education has been to move away from prescription of 'process' (ie specifying the length of the course, the curriculum, class sizes, tutor ratios, library holdings, and the like), to description of outcomes which need to be demonstrated. These are often referred to as "competencies", and are, increasingly, being adopted by firms in their use of 'competence frameworks' in order to measure or assess staff performance in a more objective and meaningful way. Jurisdictions in Australia, and England and Wales, as well as other professions, have adopted an outcomes-based approach, an approach which is also supported and encouraged by the UK Quality Assurance Agency for higher education.

Appendix 5



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June 1, 2009

Mr. John Hunter, Q.C.
Hunter Voith
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Suite 2100
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Dear John:

**Re: Federation of Law Societies of Canada
Task Force on Accreditation of the Common Law Degree**

I am writing on behalf of the Council of Canadian Law Deans (CCLD) to offer our perspective on the March 2009 Interim Report of the Task Force on the Canadian Common Law Degree. We note the Task Force's plans for continued engagement with the legal education community regarding its work, and we believe it helpful to share with you our most recent thinking regarding the Task Force's Interim Report.

As I am sure you appreciate, the CCLD has come to regard the Task Force's mandate and activities as one of the most significant developments in many years in relation to legal education in Canada. We have given the issues extensive consideration in our law schools and within our own Council, virtually from the time of our first meeting with you in November of 2007. We have also carefully considered the Reports from the Task Force and the views of others in their submissions to the Task Force. We have appreciated having had this material shared with us.

In this letter we wish to communicate two perspectives or positions related to the Task Force's work. One relates to "competencies". The other relates to "compliance". (We are also preparing a separate response on "Institutional Requirements", which I will send to you in the coming few weeks.). We think that the perspectives we share in this letter are important to the work of the Task Force, and also of long term importance to legal education in Canada, the legal profession and the public that lawyers serve.

We advance them in the context of what we understand to be two acknowledged realities of your work. The first reality is that the legal profession in Canada presently faces the challenge of i) ensuring that a system is in place to ensure that fair consideration is given to foreign-trained lawyers who seek to become qualified to practice law in Canada, and ii) ensuring that a sound process, with sound criteria, is in place to assess applications for

new law schools in Canada. The Canadian law deans see this reality as an acknowledgment that there is a growing need for opportunities to be made available so that more people may take up the study and practice of law in Canada. We fully support this objective.

The second reality is that it is critical that these objectives - captured in the Task Force's mandate - be achieved in ways that do not diminish the quality of legal education presently provided in Canada. Our understanding is that this reality is widely shared within the Canadian legal profession and within the Task Force itself. We note with appreciation the Task Force's recognition of this in the Introduction in your March 2009 Interim Report:

"In varying degrees the submissions raise, directly or indirectly, the question of whether the Task Force intends some fundamental change to Canadian law schools. That is neither our intention nor what we consider to be our mandate. The Task Force fully appreciates the richness of legal education offered in Canadian law schools and the importance to the law schools of preserving their ability to deliver a rich and diverse legal education to students. "

We agree with this observation. It is in this spirit that we express the following perspectives.

With respect to the Task Force's work on the delineation of "competencies", we welcome the acknowledgment that "competencies" does not mean "courses", and that it is within the purview and mandate of a law school to identify the most suitable ways to satisfy "competencies" requirements of its students. We have given careful consideration to the Task Force's perspective on "competencies", as well as the suggestions and proposals of other commentators on this question. It is our considered judgment that if the Task Force continues to contemplate a "competencies" approach, the recommendations of the Law Society of Upper Canada (see attached) in this regard should be adopted by the Task Force. We are of the opinion that they reflect a modernized, relevant and contextual approach to legal education in Canada and that they meet the legal profession's expectations and requirements. Given that the issues leading to the formation of the Task Force are liable to have the greatest influence in Ontario, we are of the view that the Law Society of Upper Canada's perspectives on this question should be given special consideration in your deliberations. It is a framework that the law deans, including the law deans from Ontario, could accept.

Our second perspective is associated with the Task Force's expressed confidence in the quality of legal education in Canada at the present time. It is our view that the Task Force should recommend only those requirements for law school compliance that are necessary for fulfillment of law societies' mandated public interest responsibilities. Indeed these articulated standards are not only met, but exceeded, by our law schools today. It would be unfortunate in the extreme and contrary to the best interests of legal education, the legal profession and the public interest if substantial resources were required to be dedicated to compliance in circumstances where less intrusive alternatives are available to confirm that a high quality of legal education continues to be delivered at our law schools.

As you may know, Deans Monahan and Kasirer are leaving their positions in the near future. The CCLD intends to continue the Working Group of Law Deans, as a liaison group to your Task Force, but with the addition of Dean William Flanagan of Queen's Law School and Interim Dean Daniel Jutras of McGill University, along with myself. We would be pleased to continue our engagement with the Task Force, either through the Working

Group or through the CCLD as a whole, to address any issues related to your work or related to our submissions to the Task Force. We would be available to meet at your convenience.

Sincerely,

W. Brent Cotter
President
Council of Canadian Law Deans

APPENDIX

LAW SOCIETY OF UPPER CANADA
SUBMISSION
TO
THE FEDERATION OF LAW SOCIETIES OF CANADA
TASK FORCE ON THE APPROVED COMMON LAW DEGREE
(NOVEMBER 2008)
EXCERPT (p.6-7)

The Law Society [of Upper Canada] suggest the following as the competences that should be required for entry to law society bar admission/licensing programs in common law jurisdictions in Canada:

- a. Foundations of Canadian common law, including,
 - the doctrines, principles and sources of the common law, how it is made and developed and the institutions within which law is administered in Canada;
 - Contracts, torts and property law; and
 - Criminal Law
- b. The constitutional law of Canada, including principles of human rights and Charter values and Canadian law as it applies to Aboriginal peoples.
- c. Principles of statutory analysis.
- d. Principles of Canadian administrative law.
- e. Legal research skills.
- f. Oral and written communication skills specific to law.
- g. Professionalism and ethical principles.

In listing these competencies the Law Society,

- supports the Federation Task Force's views that these are *competencies*, not *courses*, and that law students should be able to satisfy them in a number of ways that may differ from competency to competency and law school to law school;
- has deleted civil procedure as a required competency. It is important for law students to understand the principles that govern the resolution of disputes in the Canadian common law system; it is not essential for them to learn specific practice rules in law school. Students should be exposed to the principles while learning the foundations of common law;
- has specified which competencies should be acquired in the Canadian legal context, rather than requiring this of every competency;
- has expanded the competency related to constitutional law principles to include specific mention of Canadian law as it is applied to Aboriginal peoples;

- emphasizes “principles” of administrative law to ensure that there is no confusion that a course is being required. It also suggests that the word “regulatory” is unnecessary;
- has substituted the term “professionalism and ethical principles” for the Federation Task Force’s “professional responsibility”.

Appendix 6



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June 29, 2009

Mr. John Hunter, Q.C.
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Dear John:

**Re: Federation of Law Societies of Canada
Task Force on Accreditation of the Common Law Degree**

I am writing on behalf of the Council of Canadian Law Deans to follow up on my previous letter of June 3, 2009 in order to provide, as promised, the CCLD's perspective on the Approved Common Law Degree described as "Institutional Requirements" in the March 2009 Interim Report by the Task Force. We have tried to respond to the Task Force's "Institutional Requirements" questions as presented in the Interim Report, but have also added a few comments on some aspects of Canadian law schools' present commitment to our 'institutional infrastructure' that we urge the Task Force to incorporate into its final report.

In general terms, CCLD is of the view that the current situation, where Canadian law schools enjoy a margin of manoeuvre to set those requirements, subject to the general policies of their universities, produces satisfactory results. While the requirements imposed by each law school are broadly similar, we note that the liberty they currently enjoy is used to tailor their programs to specific situations or to implement initiatives that are designed to respond to the increasingly diverse needs of the legal profession. There is no evidence that this flexibility threatens the protection of the public in any way. Accordingly, we would urge the Task Force not to recommend the adoption of any stringent standards with respect to those issues.

1. Entry Requirements

The Task Force Interim Report asks whether the current entry requirement of two years of university education should be maintained or whether the "*de facto* requirement of an undergraduate university degree" should be adopted.

We think it is inaccurate to speak of a "*de facto* requirement" of a prior university degree. While it is true that a large number of law school entrants do hold such a degree, and

sometimes even a masters or a doctorate, some Canadian law schools have, in circumstances including but not limited to mature students and Aboriginal students, felt entitled to admit students with less than a university degree.

Moreover, it is well-known that at McGill University about 15%-20% of the first year students arrive directly from CEGEP (*i.e.*, a two-year, post-secondary, pre-university program of study). McGill has decided that the level of achievement of this small group of CEGEP candidates is so outstanding that these students deserve admission. As a matter of fact, this group regularly produces some of McGill's best students: gold medalists, Supreme Court clerks, Trudeau Foundation scholars. Many of them go on to careers of high achievement as lawyers in Canada or elsewhere around the world. There is every reason to believe that these students are no less equipped to practice law than others. Moreover, Québec universities, including McGill, cannot require more than a CEGEP degree for entry into any undergraduate degree, including law.

There are other programs for the joint study of the civil law and the common law, including the University of Ottawa's National Program and Programme de droit canadien, the exchange programs between Université de Montréal and Osgoode Hall Law School and between Université Laval and the University of Western Ontario, and the graduate common law programs at Université de Montréal and Université de Sherbrooke, and finally the Université de Sherbrooke and Queen's University program. A number of graduates from those programs entered law school directly from CEGEP. Again, there is no reason to believe that they are less equipped to practice law. To take the University of Ottawa's National Program as an example, evidence has shown that outstanding CEGEP students perform equally well in law school as students who hold a prior university degree, and graduates of the National Program have led successful careers throughout Canada.

We would also point out that Canadian law schools participate in a number of joint programs where law is studied concurrently with another discipline. In some circumstances, this may result in a student beginning to study law before completing the requirements of the other degree. Yet, those students are held to the same standards for their law courses and there is no evidence to suggest that they perform differently than students who completed their undergraduate degree before the commencement of their law degree.

Therefore, in the absence of cogent evidence that the current situation is problematic in terms of the protection of the public, we would recommend that the flexibility currently enjoyed by each law school with respect to entry requirements be maintained.

2. Duration of the Program

We believe that it is more appropriate, and more in line with university practice, to express the duration of university studies in terms of credits rather than years. Increasingly, universities are recognizing that teaching takes place during summers, on exchange with other universities, through internships, on a part-time basis and subject to other temporal modalities. These days, it is more reliable to speak about the academic program by reference to credit requirements.

In this regard, the usual duration of a common law degree is 90 credits. This amounts to three years of study, excluding summer terms. However, we would suggest that this need not be a strict requirement, in order to take into account situations including, but not limited to courses followed in other faculties, exchange programs abroad, joint common law and civil law degrees, a common law degree undertaken after a Canadian civil law degree and joint degrees involving law and another discipline.

3. Methods of Delivery

The Task Force asks whether “in-person” learning should be a requirement for all or part of the common law degree, or whether other delivery systems should be taken into account. We understand the expression “in person” to mean direct interaction with an instructor.

Canadian law schools employ a variety of learning methods, including “in-class” lectures, seminars, independent research, exchange programs, internships, clinical education, and so forth. Some of those methods may not constitute “in-person” learning strictly speaking. The benefits of employing a variety of learning methods within a curriculum are widely acknowledged. Law professors retain a substantial discretion over the choice of learning methods, and CCLD members recognize the value of academic freedom in this regard. On the whole, Canadian law schools have strived to provide their students with the best learning methods.

Canadian law schools have begun to explore the possibilities offered by technological advances to embrace new methods of learning that would enrich the students’ learning experience. We would point out that technology allows forms of direct interaction between student and instructor that may be as beneficial as classical “in-person” interaction. To some extent, technology may help to make legal education more accessible to persons with disabilities, or to persons living in remote areas.

CCLD is of the view that it is too early in the adaptation of law teaching to technology to set precise standards concerning learning methods. We are concerned that precise standards could stifle creativity and prevent law schools and law professors from embracing technological advances to improve their students’ learning experience. Nevertheless, we do believe in the value of currently employed learning methods that may loosely be described as “in-person” and we do not support their replacement with technology-based learning. We believe that substantial “in-person” learning, with the opportunities for significant formal and informal engagement between the students and the instructor, and among the students themselves, provides important learning opportunities that are not able to be achieved in other ways.

4. Joint Degrees

Joint degrees, involving the study of law and another discipline, are common among Canadian law schools and are increasingly popular. These programs are designed to train professionals who will be able to successfully integrate another discipline in their legal practice. Law schools have been uniformly vigilant about preserving the law-specific character of their degrees so that the interdisciplinary experience complements legal training rather than acts as a substitute for the law. There is no indication that graduates of these programs fail to meet the regulatory standard of protecting the public.

CCLD is of the view that joint programs do not require a monitoring procedure distinct from the one envisaged for the regular common law degree.

5. Research and Scholarship

The importance of research and scholarship was not raised in the most recent Interim Report of the Task Force. Nevertheless, it is one of the features of Canadian legal education that has introduced into Canadian law schools a degree of vibrancy and relevance unparalleled in prior generations. We are strongly of the view that a law school without a commitment to research and scholarship is doing a disservice to its students, to the law, to the legal profession and to society itself. While we appreciate that the legal profession is not directly mandated to promote legal research and scholarship, we think it would be a serious mistake to fail to appreciate the ways in which faculty members committed to the scholarly enterprise of legal education, enrich the learning experience for students and prepare them for professional careers. The work of law teachers who are also legal scholars gives students the tools to see the law in imaginative ways, to give them the confidence to search for new perspectives in law, to approach legal problems and issues in a new light and to search out innovative solutions for their clients. This contribution to legal education is one of the most dynamic features of Canadian law schools, and contributes to an enriching legal education for students. In our view a commitment to research and scholarship is a critical 'institutional feature' of a modern, high quality law school.

6. Institutional Infrastructure

Though the Task Force did not identify the following institutional requirements of a modern, high quality law school in Canada in its most recent Interim Report, we wish to emphasize that other features of Canadian law school infrastructure are critical to the maintenance of quality. We urge you to address in your final report the essential nature of a well equipped law library, of appropriate faculty-student ratios, of law school investments in financial aid for students to ensure access to legal education, and related features of a legal education that have helped to maintain and improve the quality of Canadian law schools to date. Absent a recognition of these requirements, the Task Force risks inviting a minimal framework for the establishment of law schools in Canada and invites a 'race to the bottom' regarding legal education in Canada. This is surely in direct opposition to the mandate of the Task Force, is a set of potential outcomes that the Task Force itself would oppose and, most importantly, is the opposite of what Canadians rightfully expect of a high quality of legal education intended to protect and advance the public interest.

We appreciate the opportunity to share these perspectives with you and your Task Force, and welcome the opportunity to continue the dialogue on legal education with you and your colleagues.

Sincerely,

A handwritten signature in dark ink, appearing to read "Brent Cotter". The signature is fluid and cursive, with the first name "Brent" and last name "Cotter" clearly distinguishable.

W. Brent Cotter, Q.C.

Professor and Dean
College of Law
University of Saskatchewan

President
Council of Canadian Law Deans

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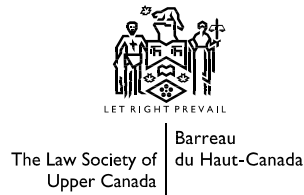
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Report to Convocation February 25, 2010

LICENSING & ACCREDITATION TASK FORCE

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Purpose of Report: Decision

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TASK FORCE PROCESS

1. The Task Force met on October 26, 2009, November 5, 2009, November 27, 2009 and February 8, 2010 to consider the final report of the Federation of Law Societies of Canada's Task Force on the Canadian Common Law Degree and to make recommendations to Convocation.

MOTION

2. That Convocation approve the October 2009 final report of the Federation Task Force on the Canadian Common Law Degree.
3. That Convocation recommend that the Federation committee responsible for implementation,
 - a. include appropriate representation from Canadian law schools, and
 - b. seek approval of law societies for the Federation implementation committee's proposed recommendations for implementation and compliance policies, procedures or provisions.

BACKGROUND

4. The Federation of Law Societies of Canada established the Task Force on the Canadian Common Law Degree in June 2007 ("the Federation Task Force") to review the criteria in place establishing the approved LL.B/ J.D. law degree for the purposes of entrance to law societies' bar admission/ licensing programs. The Federation Task Force submitted its final report ("the final report") to Federation Council in October 2009, a copy of which is set out at **Appendix 1**.
5. Federation Council has referred the final report to law societies for approval and requested that law societies consider it by March 2010. As of February 11, 2010 seven (7) law societies have considered the final report and all have approved it.
6. Earlier, in September 2008 the Federation Task Force distributed a consultation report to law societies for comment. The Law Society's Licensing & Accreditation Task Force ("the L&A Task Force") proposed a submission to Convocation, which was approved and provided to the Federation Task Force. A copy of the Law Society's November 2008 submission is set out at **Appendix 2**.
7. The L&A Task Force has reviewed the final report and makes the recommendations set out in the motion at paragraphs 2 and 3 of this report. In developing these

recommendations the L&A Task Force considered how the final report differs from the Law Society's November 2008 submission and in this report addresses its views on those differences. In reaching its recommendations it has also considered a number of letters and articles it has received that comment on the Federation Task Force Report. These are set out at **Appendix 3**.

8. This report and recommendations represent the views of all the Task Force members, with the exception of one member whose minority view follows this report.

THE FEDERATION TASK FORCE FINAL REPORT

9. The L&A Task Force recommends that Convocation approve the Federation Task Force's final report ("the final report") set out at **Appendix 1**.
10. The final report's recommendations reflect an approach that balances law societies' regulatory responsibilities with continued respect for the academic freedom so important to law schools and the profession. This balance is reflected throughout the final report, including in the proposed national competency requirement, approved law degree and compliance regime.
11. There are some differences between the recommendations in the final report and the Law Society's November 2008 submission. The Task Force has discussed these differences and has concluded that any such differences are best addressed through the implementation process, as discussed below. Moreover, any differences between the Law Society's November 2008 submission and the final report are not so significant as to undermine the overall balanced approach recommended in the final report.
12. In its November 2008 submission the Law Society supported the proposition that law school graduates seeking to enter law society bar admission programs/licensing processes should have acquired certain "foundational competencies" in law school.
13. The final report builds on this competencies approach and recommends that law societies in common law jurisdictions establish a uniform national requirement for entry to their

bar admission programs/licensing processes “to be expressed in terms of competencies in basic skills, awareness of appropriate ethical values and core legal knowledge that law students can reasonably be expected to have acquired during the academic component of their education.” The final report then goes on to set out the basis of an “approved law degree” for the purposes of entry into bar admission/licensing processes, outlining the qualifying academic program and the necessary learning resources that must be present.¹ This approach is reasonable and balanced and should be approved as the national requirement.

14. The Federation Task Force has accurately expressed why law societies must establish a national requirement for entry to their bar admission programs/licensing processes. Greater government scrutiny of regulators across Canada has resulted in increasing demand for transparency, fairness, objectivity and consistency in regulatory decision making. The passage of fair access to professions legislation in Ontario, Manitoba and Nova Scotia, the recent amendments to the Agreement on Internal Trade guaranteeing full national labour mobility and the 2009 agreement of the federal government and provincial and territorial premiers to develop a pan-Canadian framework for the recognition of foreign qualifications are clear examples of this governmental scrutiny and priorities.²
15. Equally importantly, law societies across the country share the same values and responsibilities to regulate in the public interest. Increasingly they are addressing their responsibilities through national approaches. The Federation Task Force’s recommendations reflect this. Its recommendations will not only enhance the approach to entry to bar admission programs/licensing processes in all common law jurisdictions, but will apply as well to the accreditation process for those with international law degrees and will guide schools seeking to establish new law faculties.
16. Despite its concentration on the regulatory perspective, the final report is replete with references to the importance of ensuring a regulatory approach that respects the role of

¹ Federation Task Force Final Report. Executive Summary, Recommendation 4. (“Final Report”).

² The scrutiny is directed at all professions.

flexibility and innovation in law school curricula, does not overly interfere with law schools' ability to design their curricula to meet their institutions' mandates, and recognizes that law schools are only one part of the legal educational process.

17. The Federation Task Force states,

Law societies respect the academic freedom that law schools vigorously defend. There is a strong tradition within the legal education system, particularly in North America, to view law school education as not simply a forum for training individuals to become practitioners of a profession, but also as an intellectual pursuit that positions its graduates to play myriad roles in and make valuable contributions to society.³

18. It is clear throughout the final report that the recommendations are intended to support this approach. With one exception, which is discussed below, the Federation Task Force recommends that it be left “to law schools to determine how their graduates accomplish the required competencies.” The required competencies proposed by the Federation Task Force are by and large already within law schools' curricula, leaving ample room for them to pursue innovative programming, delivery methods and area specialization as they deem fit. Further, the Federation Task Force's recommended compliance component makes it clear that “an intrusive or onerous approach” is not necessary. Finally, in articulating what will constitute an “approved Canadian law degree” the Federation Task Force has largely confirmed criteria that are currently in place.
19. During consultations,⁴ the L&A Task Force heard the concerns of some members of the legal academy that the competencies are rigid and over-inclusive. Some believe the approach will fundamentally alter the relationship between law schools and law societies. Some are concerned that the approach will undermine law school independence and innovation.
20. The L&A Task Force has borne these comments in mind as it reviewed the final report. It believes that the final report and recommendations have addressed a number of these concerns and that the implementation process can largely alleviate the rest. While the

³ Final Report, p.18.

⁴ And repeated in some of the correspondence in Appendix 3.

recommendations are an articulation of national requirements, they do not represent a sea change in legal education and should not be viewed as such. While the Council of Canadian Law Deans disagrees with certain specific components of the Federation Task Force's recommendations, it endorses the general competencies approach.

21. The final report notes that "for a national approach to succeed, provincial and territorial law societies must think nationally, as they did when adopting the NMA [National Mobility Agreement], the anti-money laundering rules and client-identification rules."⁵ The Federation Task Force also notes that such a commitment will on occasion require compromise, but it believes law societies have enormous capacity to work together. The L&A Task Force agrees.
22. The L&A Task Force has reflected on those few areas in which the Law Society's November 2008 submission differs from the final report. It has reviewed the rationale behind the Federation Task Force's final recommendations in these areas. It has also considered the Federation Task Force's recognition that an implementation committee should be established to address a number of issues.
23. For the reasons set out in the final report and here, national requirements for entry to bar admission programs/licensing processes are an important enhancement to law society processes. The first step to moving forward is passage of the final report. From there the implementation process can reasonably and fairly be used to refine the requirements. In moving from principle to practice the implementation process can address areas of concern.
24. In furtherance of this belief, the L&A Task Force's recommendation of approval of the Federation's final report is accompanied by two other recommendations. It recommends appropriate representation from Canadian law schools on the Federation implementation committee. It also recommends that the Federation implementation committee seek the approval of law societies for its proposed recommendations for implementation and compliance policies, procedures or provisions.

⁵Final Report, p.24.

25. Both these recommendations will contribute to effective implementation. The law schools' perspective and contribution would be an important part of the process and law societies would have the ability to ensure that the implementation reflects the principles underlying the report and addresses any areas that require clarification.
26. The Federation's goal will be to establish an implementation committee with a well-balanced membership of law society representatives, appropriate representation from Canadian law schools and any other members it may consider helpful to the implementation process. The Task Force is confident that in considering appropriate Ontario representation on the implementation committee the Federation will give consideration to the fact that Ontario has over one third of the law schools in the country offering a common law degree, receives the majority of the NCA Certificate holders and has the longest history with fair access to professions legislation and its implementation. The Task Force also expresses its recommendation that the implementation committee of the Federation provide regular reports to law societies during the course of its work to keep law societies apprised of its progress. This is important to ensure law societies remain connected to the issue.

CONSIDERATION OF ISSUES RAISED IN THE LAW SOCIETY'S NOVEMBER 2008 SUBMISSION

27. The final report's recommendations differ from Law Society's November 2008 submission in three areas:
 - a. The recommendation for a stand-alone course in ethics and professionalism.
 - b. The inclusion of a competency known as "legal and fiduciary concepts in commercial relationships."
 - c. The compliance mechanism.⁶

⁶ It is important to note that in a number of areas where the Law Society's November 2008 submission differed from the Federation Task Force's consultation paper the Federation Task Force's final report reflects the Law Society's perspective, as follows:

- a. The Law Society suggested the removal of civil procedure as a separate competency. The final report adopts this.
- b. The Law Society recommended adoption of the term "ethics and professionalism," rather than "professional responsibility" to identify the competency. The final report adopts this.
- c. The Law Society recommended the removal of a number of separate competencies, two of which the Federation Task Force accepted.

28. There is one additional area on which the L&A Task Force provides comment in this report. It addresses an issue concerning Canadian law as it applies to Aboriginal peoples that the L&A Task Force believes is worth exploring at the implementation level.

(i) Stand-Alone Course in Ethics and Professionalism

29. In its consultation report the Federation Task Force sought comment on the requirement of a stand-alone course in what it then called “professional responsibility.” It stated as follows:

Such a course should address both the broad principles of professionalism and the ethical issues with which lawyers must contend throughout their careers, including in areas such as conflicts, solicitor client privilege, and the lawyer’s relationship with the administration of justice.⁷

30. The Law Society of Upper Canada was the only law society that raised concern about a stand-alone course. It felt that the Task Force’s consultation document did not provide a justification for an exception from the “competencies” approach for an ethics and professional course requirement. It commented that a stand-alone course ran the danger of segregating the topic and rendering it less likely to be addressed across the curriculum. It agreed that law students should be taught principles of ethics and professionalism, but was concerned about mandating a course.
31. The L&A Task Force has re-examined the Law Society’s comments in the face of a number of factors. Eleven of the 16 law schools have indicated that they already offer a mandatory “course” in professionalism and ethics. The law school argument against a regulatory requirement does not appear to be based on the merits of the approach, but rather on the interference with a law school’s ability to allocate its resources and determine its pedagogical approaches as it sees fit. The L&A Task Force notes, however, that there is precedent for the regulator mandating specific courses, at least in Ontario where the 1957/69 requirements mandated seven courses.⁸ These mandated courses have not stifled creativity and innovation within law schools.

⁷ Consultation Report (September 2008). p. 22.

⁸ Civil procedure, constitutional law of Canada, contracts, criminal law and procedure, personal property, real property and torts

32. A mandated ethics and professionalism course does not undermine the Federation Task Force's competencies based approach. The Federation Task Force has recognized the need for flexibility in law school education, through its general approach to competencies versus courses. It has made an exception for ethics and professionalism, based on its view of the fundamental nature of this topic in the development of lawyers. While the "embedded" approach to ethics and professionalism is seen by some as a viable alternative to the stand-alone course, the Federation Task Force has concluded that more is needed in an area that underpins the profession. It does not view the law school as the only place for this learning, but considers the need for focus on the topic as properly within legal education from the outset. Moreover, the stand-alone course can better lay the groundwork for successfully embedding the topic in other substantive courses.
33. The L&A Task Force has carefully considered the following principle that the Federation Task Force emphasizes in proposing a stand-alone course:
- ...in recognition of the unique nature of its recommendation in this area, the Task Force has specifically not recommended credit hours or teaching methodology...⁹
34. The Federation Task Force was interested in law schools "spotlighting" the topic. It did not circumscribe the course's length or the teaching methodology. This provides enormous latitude to the law schools in the development of the course. In the L&A Task Force's view this recommendation is a balanced approach to the issue and the Task Force endorses it.

(ii) Legal and Fiduciary Concepts in Commercial Relationships.

35. In its consultation paper the Federation Task Force indicated its view that,
- ...business organization concepts affect a multitude of legal relationships in the Canadian legal system. Competency in these principles and concepts is fundamental.¹⁰

⁹ Final Report, p. 34.

¹⁰ Consultation Report. (September 2008), p. 20.

36. The Law Society's November 2008 submission considered this an important competency, but was of the view that it did not need to be acquired in law school. The Law Society's submission expressed the concern that this competency,
- ...open[s] up a potentially endless debate of what else should be included, with proponents of different components each advocating strongly for their particular area of law. This could result in law school curricula being largely mandated, a development that is neither necessary nor in the interest of quality education.¹¹
37. By renaming the competency "legal and fiduciary concepts in commercial relationships" the Federation Task Force sought to minimize the concern that some expressed to the Federation Task Force that, "unlike the other requirements that simply restate current components of the curricula or are more generic in their description, this competency appears to reflect a more specific content choice." The Federation Task Force noted that,
- the suggestion has been that this opens up a potentially endless debate on why other areas such as family law, estates, or labour law have not been included. Just as an understanding of principles of constitutional law, administrative law, contract or property...are foundational so too is an understanding of the legal concepts in commercial relations.¹²
38. There is nothing in the final report to suggest that there was in fact pressure on the Task Force to add additional areas because "business" was in the mix. Moreover, although it has been suggested to the L&A Task Force that the inclusion of this competency would send the message that business law is more important than other areas such as poverty law, the L&A Task Force does not agree with this interpretation.
39. The recommendation in this area is not any different than the approach taken to administrative, contract, property and other competencies. Like the other competencies, it refers to principles, not courses, and denotes no special emphasis that distinguishes it from the other competencies. The Federation Task Force's only special emphasis is in ethics and professionalism, where it recommended a course.

¹¹ L&A Task Force submission, p. 7.

¹² Final Report, p. 37.

40. The listing of a competency in this area is not directed at training Bay Street corporate lawyers. It simply recognizes that it is important for law students to understand the principles underlying legal structures and relationships. Lawyers are called to the bar as generalists. They may choose to specialize, but their education and training must be broadly based, to accommodate sole and small firm practice. The L&A Task Force has been told that over 95% of law students currently obtain some exposure to this competency. It is likely they do so not because they plan to become corporate lawyers, but because they must understand these principles in whatever area they practise.
41. The renaming of this competency may confuse law schools about what will satisfy the competency. The most effective way to resolve this is through the implementation process. In fact, it may be possible to satisfy the competency in commercial relationships within other included competencies of contracts, property, torts and principles of common law and equity.

(iii) Compliance Mechanism

42. In its November 2008 submission the Law Society expressed concern about the introduction of a national monitoring body to address compliance with the requirements. It suggested that while it makes sense in the American context where there are hundreds of law schools of differing quality, it may not be necessary in Canada. It assumed that a national body would be “expensive, time consuming and controversial and difficult to implement because of the need for unanimity among all law societies.” The Law Society’s November 2008 submission noted that the consultation document provided little information on the nature of any monitoring regime.
43. The Law Society’s submission preferred an approach somewhere between the status quo and the approved law degree models the Federation Task Force described in the consultation document.¹³ National requirements would be articulated, but with no law

¹³ Under the “status quo” law societies have, in effect, not monitored law school curricula. They have accepted that students with a degree from one of the 16 Canadian common law faculties are automatically eligible for admission into law society bar admission programs. Under the approved law degree option a required standard would be established and law faculties would demonstrate what they are doing to ensure that their graduates have achieved the required competencies.

society monitoring. The Law Society's November 2008 submission noted that nothing "in law societies' relationship with the current 16 common law schools suggests that a [monitoring regime] is necessary."

44. The final report recommends a compliance mechanism on the basis that "this is the most efficient and appropriate way to ensure consistency across the country and transparent, effective and objective processes."¹⁴ However it emphasizes that an intrusive or onerous approach is not necessary, thereby addressing some of the concerns in the Law Society's November 2008 submission.
45. The Federation Task Force recommends a standardized annual report that each law school Dean completes, confirming that the law school has conformed to the academic program and the learning resources requirements, and explaining how the program of study (of the school) ensures that each graduate has met the competency requirements. The Federation Task Force recommends that the form and substance of the report should be developed as part of the implementation process.
46. This recommendation represents an appropriate compromise between the approach suggested in the Law Society's November 2008 submission and a highly bureaucratic and intrusive approach about which the submission was concerned.
47. In this recommended model it is the Dean who certifies compliance rather than an outside third party, an important indication that the Federation respects the role of law schools. Moreover, the monitoring system does not require the Dean to certify each graduate, rather it relies on the Dean confirming that the curriculum is such that the competencies are addressed and the law school has met the academic program and learning resources requirements. Finally, the Federation Task Force has recommended a long period for implementation until 2015, giving ample opportunity to ensure an effective process and compliance with the national requirements.
48. It is the L&A Task Force's view that once the implementation process is defined, the monitoring process will be simple and inexpensive. Having addressed what, if anything,

¹⁴ Final Report, p. 43.

the school must do to meet the criteria, the Dean will then be in a good position to continue to certify compliance from year to year. At the same time, with a monitoring process implemented across the country, there will be consistency upon which regulators can rely when admitting graduates from any common law school to their bar admission/licensing programs. Monitoring is an integral part of law societies' roles in the United States, Australia and England and Wales. The processes there are far more intrusive and detailed than the Federation Task Force recommends. The L&A Task Force is now satisfied with the reasonableness of the proposed approach.

CANADIAN LAW AS IT APPLIES TO ABORIGINAL PEOPLES

49. In its November 2008 submission the Law Society suggested expanding the Federation Task Force's proposed competency "constitutional law of Canada, including principles of human rights and Charter values" to read "the constitutional law of Canada, including principles of human rights and Charter values and *Canadian law as it applies to Aboriginal peoples.*"
50. In its final report the Federation Task Force refined the competency to read,
The constitutional law of Canada, including federalism and the distribution of legislative powers, the Charter of Rights and Freedoms, human rights principles and *the rights of Aboriginal peoples of Canada.*
51. In discussing the difference in the wording of the two proposed approaches, the L&A Task Force has realized that there was some ambiguity in what was intended by the language used in the Law Society's November 2008 submission. Most members of the L&A Task Force assumed that the additional language, inserted as part of the Canadian constitutional law competency, simply expanded on what should be addressed within that competency. On that basis there is little difference between the Law Society's November 2008 submission and the Federation Task Force's final report.
52. Another view has been expressed, however, that the addition was not limited to constitutional law, but rather was intended to incorporate, throughout the law school curriculum, education on the ways in which Canadian law applies to and affects

Aboriginal peoples. This would be done by embedding in each course, where relevant, consideration of these issues.

53. The L&A Task Force recommends that the issue be considered in the implementation process. It represents an important perspective in the education of law students and is likely already part of many law school courses. In considering the issue it would be essential to seek input from those with expertise on the issue.

CONCLUSION

54. In its November 2008 submission on the Federation Task Force consultation process the Law Society agreed with the main principle of a national requirement for entry to bar admission/licensing programs in common law jurisdictions and with most of the competencies proposed. Its submission reflected some concerns with three aspects of the consultation paper.
55. It has carefully reviewed the Federation Task Force's final report and is satisfied that the report represents a balanced approach to national regulatory requirements for entry to bar admission programs /licensing processes that respects and supports innovation and creativity in law school education.
56. It strongly recommends Convocation approval of the October 2009 final report of the Federation Task Force. It believes that the final report has addressed the concerns the Law Society raised in its November 2008 submissions, and that the implementation process is the most appropriate forum to resolve any outstanding issues.

MINORITY VIEW

1. One LSUC Task Force member, Professor Constance Backhouse, had a dissenting opinion. This minority view can be summarized as follows.
2. An approval of the above motion will constitute a major and detrimental departure from an historic partnership between the Law Society and the university law schools in Canada. The Law Society first formulated a regulatory framework with respect to university legal education in 1957. It revised its standard in 1969. In both cases, the framework was based on consensual agreement between the Law Society and the legal academy.
3. In 2008, the Law Society of Upper Canada's Licensing & Accreditation Task Force ("the L&A Task Force") set forth a recommendation for a newly revised set of standards. Its position, set out at **Appendix 2**, was approved by Convocation in November 2008. This position received the unanimous approval of the Council of Canadian Law Deans, representing all sixteen common law schools and six civil law schools in Canada.
4. The Federation's Task Force on the Approved Law Degree chose to depart from the recommendations of the L&A Task Force and the unanimous recommendations of the Council of Canadian Law Deans. Contrary to what the majority of our L&A Task Force indicates above, there are many who believe that the distinctions between the Federation's Report and the original Law Society Report are significant and highly destructive of the future of legal education.
5. The six Ontario law deans have unanimously requested that our Law Society not approve the Federation's Report at this time. All six appeared before our Task Force on 28 October 2009 to request that the Law Society hold to its original position, and not endorse the Federation Report.

6. Writing on 25 November 2009, the Chair of the Ontario Law Deans, Western's Dean Ian Holloway stated that "the step that we are about to take is one that will forever alter the course of legal education in Ontario." He continued:

I can't help but note that two previous agreements of 1957 and 1969 – which together have served the cause of legal education in Canada well – were the product of the process of agreement with the Ontario Law Deans. I don't mean to belabour the point that I made at the close of our meeting, but we really have come a long way in the past decade or so in terms of our engagement with one another. I completely agree that we should strive for a consistency in the standards of quality of legal education across the country. But I continue to believe – as past experience has shown – that we are much more likely to achieve positive outcomes if we worked together, than if a report is imposed upon us from the outside.

7. On 20 November 2009, the Chair of the Council of Canadian Law Deans Brent Cotter wrote to Treasurer Derry Millar, to express the unanimous concern of all the law deans in Canada over the recommendations of the Federation's Task Force. He emphasized that there had not been sufficient consultation with the law deans.
8. The Council of Canadian Law Deans stated that the mandating of the "stand-alone" course on Legal Ethics and Professionalism is an approach that is "unprecedented and inappropriate." It questioned the description of some of the competencies – "whose meaning we have struggled to understand." It indicated that the university law schools had not been consulted on the recommendations concerning compliance. And it added that "a variety of technical or 'institutional' matters" were left unresolved, "where implementation could jeopardize various aspects of our existing programs."
9. The Council of Canadian Law Deans requested that the Law Society of Upper Canada not approve the Federation's Report without further clarification and resolution. Dean Cotter's letter concluded:

We recommend that you defer any decisions in relation to the Report and its Recommendations. We recommend that a dialogue be undertaken between the law societies and the Law Deans to work out the difficulties presented by the Task Force's Report and Recommendations and to put in place the necessary refinements and clarifications to optimize the Task Force's work and make it meaningful, effective and beneficial for legal education, for the legal profession and for the public interest.

10. The Council of Canadian Law Deans recommended the following process instead of a premature approval of the Federation Report:

There are many unresolved issues related to the Report, and we believe that these must be resolved before law societies give their imprimatur to the features of any new regulatory regime. This is again a responsibility to ensure that the model you approve best serves the public interest.

11. The Council of Canadian Law Deans recommends that "the best process to address the unresolved issues would be a joint committee of the legal profession and the Council of Canadian Law Deans, co-chaired, with equal representation from these two communities of interest."
12. The majority of the Law Society L&A Task Force has suggested that the Federation's recommendations reflect a continued respect for academic freedom of the law schools. The law deans unanimously disagree.
13. In the Law Society's L&A November 2008 Report, Professor Constance Backhouse took the position that there were fundamental weaknesses with the approach of the Federation Task Force. All of these concerns listed below continue with respect to the final Report:

This is a "static" approach that fails to recognize that the practice of law is multi-directional, fluid, and that the pace of change has never been so fast.

The Federation Task Force failed to conduct sufficient or detailed research into the current educational offerings of law schools or to consult fully with experts in legal education prior to making its recommendations.

The proposed list of “foundational competencies” is not based upon historical or current evidence of what lawyers actually know or do, nor is the list defended by evidence-based speculation about what they will have to know or do in the future.

This approach fails to recognize the important distinctions between *pre-entry* foundations needed to register for a bar admission/licensing process, and foundations that will be acquired during the opportunities presented throughout the articling period, the bar admission/licensing process, the professional licensing exams, and the life-long continuing legal education that we know is necessary in today’s changing world.

The approach has the potential to stifle innovation, experimentation, and diversity amongst Canadian law schools.

The Federation Task Force failed to consider the resource implications of mandating new “foundational competencies.” It also failed to consider the diverse objectives of legal education, or to develop reliable measures to test the present or proposed education practices.

14. The implications of the imposition of this new regulatory regime are extremely serious. The unintended result of the new mandatory competencies is that the social justice curriculum will suffer. Elective courses in poverty law, access to justice, feminist legal issues, critical race theory, disability law, and others already face difficult battles for student enrolment. These important public interest areas of the curriculum will be further impoverished to make way for the growth in the list of mandatory competencies.
15. It is possible to create a new regulatory regime in a consensual, consultative manner. The law schools have expressed their willingness to move forward as partners in developing this important new framework. The Federation’s Report will create totally unnecessary rifts between the profession and the law schools.

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

TASK FORCE ON THE CANADIAN COMMON LAW DEGREE

FINAL REPORT

October 2009

The Task Force presents this report and recommendations for consideration and discussion. The report and recommendations have not been endorsed by the governing body of the Federation and do not represent the official position of the Federation or its member law societies.

EXECUTIVE SUMMARY

The provincial and territorial law societies of Canada have the statutory responsibility to regulate the legal profession in the public interest. This responsibility includes the task of admitting lawyers to the profession. In all common law provinces and territories there are three requirements for admission to the bar: a Canadian law degree or its equivalent, successful completion of a bar admission or licensing program and completion of an apprenticeship known as articling. For applicants who receive their legal training outside Canada the determination of what constitutes qualifications “equivalent to” a Canadian law degree is made by the National Committee on Accreditation (“NCA”), a committee of the Federation of Law Societies of Canada (“the Federation”).

Unlike other common law jurisdictions, Canada has never had a national standard for academic requirements of a Canadian law degree. The closest *de facto* standard has been a set of requirements the Law Society of Upper Canada approved in 1957 and revised in 1969. These have not been reviewed in 40 years and in any event have never been explicitly accepted by other law societies.

The regulatory landscape has changed greatly since 1969. Public scrutiny of regulated professions has increased. Recent events have converged to focus particular attention on the need for transparent regulatory processes and on the implications of government initiatives to harmonize regulatory requirements across the country:

- Three provinces have enacted legislation respecting access to regulated professions that require regulators to ensure that admission processes for domestic and internationally trained applicants are transparent, objective, impartial and fair.
- The number of internationally trained applicants for entry to bar admission programs has greatly increased and the requirement for equivalency has created a need to articulate what law societies regard as the essential features of a lawyer's academic preparation.
- New law schools are being proposed for the first time in more than 25 years and recognition of their degrees as meeting the academic requirements for entry to bar admission programs requires a more explicit statement of what is required.
- Federal and provincial governments have made clear their commitment to national labour mobility and harmonized standards. A 2007 Canadian Competition Bureau (“CCB”) Study on regulated professions questioned the rationale behind the different admissions requirements of various law societies. Recent amendments to the Agreement on Internal Trade (“AIT”) have made it clear that all levels of government view professions as national entities that must have the same admission standards. Anyone certified for an occupation by a regulator in one province or territory must be recognized to practise that occupation in all other provinces and territories. The legal profession has had national mobility for a number of years, beginning with the negotiation of the

National Mobility Agreement in 2002. A national academic requirement would further enhance national mobility by providing a common, transparent method for entry to any of the common law bar admission programs in Canada.

The Federation appointed this Task Force in June 2007 to review the existing academic requirements for entry to bar admission programs and to recommend any modifications that might be necessary.

The Task Force's recommendations follow this Executive Summary. The Task Force recommends that the Federation adopt a national academic requirement for entry to the bar admission programs of the common law jurisdictions. The intent behind developing a requirement that applies equally to applicants educated in Canada and internationally is to ensure that all those seeking to enter bar admission programs in Canadian common law jurisdictions have demonstrated certain essential and predefined competencies in the academic portion of their legal education.

In developing the recommended content of this national requirement the Task Force has had the benefit of input from the legal academy, the profession and other interested parties. In particular, the Council of Canadian Law Deans has been of considerable assistance as the Task Force has addressed the difficult challenge of creating a national requirement while at the same time preserving the flexibility Canadian law schools require to continue the innovation in legal education that positions graduates for valuable and diverse roles in society.

Accrediting bodies in jurisdictions similar to Canada commonly use one of two approaches to determine that an applicant for admission meets the necessary academic requirements: successful completion of specified courses or passage of a substantive law bar examination. In recent years, however, there has been increasing focus on learning outcomes, rather than prescriptive input requirements. The Task Force is of the view that this focus represents the appropriate regulatory approach.

Accordingly, the Task Force proposes a national requirement expressed in terms of competencies in basic skills, awareness of appropriate ethical values and core legal knowledge that law students can reasonably be expected to have acquired during the academic component of their education.

The skills competencies the Task Force recommends are in problem solving, legal research and oral and written communication skills. These skills are fundamental to any work a lawyer undertakes in the profession.

In general the Task Force recommends that the Federation leave it to law schools to determine how their graduates accomplish the required competencies. It has concluded, however, that the Federation should require applicants seeking entry to bar admission programs to demonstrate that they have had specific instruction in ethics and professionalism, in a stand-alone course dedicated to the subject. Ethics and professionalism lie at the core of the legal profession. It is important that students begin to appreciate this early in their legal education.

In determining the required substantive legal knowledge, the Task Force considered the continued relevance of the current first-year curriculum of the 16 law schools offering a common law degree, the importance of students having foundational knowledge in both public and private law, the competency research undertaken by various law societies in Canada, the regulatory approach in other comparable common law jurisdictions and the importance of ensuring that the requirements do not interfere with the flexibility and innovation in current law school education.

The Task Force's recommendations reflect its view that every Canadian law school graduate entering a bar admission program or a recipient of an NCA Certificate of Qualification should understand,

- the foundations of law, including principles of common law and equity, the process of statutory construction and analysis and the administration of the law in Canada;
- the constitutional law of Canada that frames the legal system; and
- the principles of criminal, contract, tort, property and Canadian administrative law and legal and fiduciary principles in commercial relationships.

In addition to the competencies set out in the national requirement the Task Force recommends that law schools meet certain institutional requirements, as follows:

- The prerequisite for entry to law school must at a minimum include successful completion of two years of postsecondary education at a recognized university or CEGEP, subject to special circumstances.
- The law school's program for the study of law must consist of three academic years or its equivalent in course credits.
- The program of study must consist primarily of in-person instruction and learning and/or instruction and learning that involves direct interaction between instructor and students.
- The law school must be adequately resourced to meet its objectives.
- The law school must have appropriate numbers of qualified academic staff to meet the needs of the academic program.
- The law school must have adequate physical resources for both faculty and students to permit effective student learning.
- The law school must have adequate information and communication technology to support its academic program.
- The law school must maintain a law library in electronic and/or paper form that permits it to foster and attain its teaching, learning and research objectives.

The national requirement will be applied to all applicants for entry to bar admission programs whether educated in Canada or internationally.

Where a Canadian law school offers an academic and professional legal education that meets the national requirement, its graduates will have met the requirements for entry to bar admission programs.

For applicants trained outside Canada the Task Force recommends that the NCA continue to assess them individually. The national requirement will provide appropriate guidance and result in NCA applicants being assessed in a manner consistent with the requirements for graduates from Canadian law schools.

The Task Force also recommends that the Federation apply the national requirement when considering proposals for new Canadian law schools.

The Task Force recommends that Canadian law school compliance with the national requirement, including the competencies, be determined by a standardized annual report. Each law school Dean will complete the report confirming that the law school has conformed to the academic program and learning resources requirements and explaining how the program of study ensures that each graduate of the law school has met the competency requirements.

If the law societies of Canada approve these recommendations, the Task Force recommends that the Federation establish a committee to implement them.

The Task Force recommends that by no later than 2015, and thereafter, all applicants seeking to enter a bar admission program must meet the national requirement. This transition period accommodates students who have already begun their studies, applicants currently in the NCA process and law schools that will require modifications to their programs.

The proposed national requirements and the Task Force's more detailed discussion of the issues follow this Executive Summary.

THE TASK FORCE'S RECOMMENDATIONS

1. The Task Force recommends that the law societies in common law jurisdictions in Canada adopt forthwith a uniform national requirement for entry to their bar admission programs ("national requirement").
2. The Task Force recommends that the National Committee on Accreditation ("NCA") apply this national requirement in assessing the credentials of applicants educated outside Canada.
3. The Task Force recommends that this national requirement be applied in considering applications for new Canadian law schools.
4. The Task Force recommends that the following constitute the national requirement:

A. Statement of Standard

1. Definitions

In this standard,

- a. "bar admission program" refers to any bar admission program or licensing process operated under the auspices of a provincial or territorial law society leading to admission as a lawyer in a Canadian common law jurisdiction;*
- b. "competency requirements" refers to the competency requirements, more fully described in section B, that each student must possess for entry to a bar admission program; and*
- c. "law school" refers to any educational institution in Canada that has been granted the power to award an LL.B. or J.D. degree by the appropriate provincial or territorial educational authority.*

2. General Standard

An applicant for entry to a bar admission program ("the applicant") must satisfy the competency requirements by either,

- a. successful completion of an LL.B. or J.D. degree that has been accepted by the Federation of Law Societies of Canada ("the Federation"); or*

- b. *possessing a Certificate of Qualification from the Federation's National Committee on Accreditation.*

B. Competency Requirements

1. Skills Competencies

The applicant must have demonstrated the following competencies:

1.1 Problem-Solving

In solving legal problems, the applicant must have demonstrated the ability to,

- a. identify relevant facts;*
- b. identify legal, practical, and policy issues and conduct the necessary research arising from those issues;*
- c. analyze the results of research;*
- d. apply the law to the facts; and*
- e. identify and evaluate the appropriateness of alternatives for resolution of the issue or dispute.*

1.2 Legal Research

The applicant must have demonstrated the ability to,

- a. identify legal issues;*
- b. select sources and methods and conduct legal research relevant to Canadian law;*
- c. use techniques of legal reasoning and argument, such as case analysis and statutory interpretation, to analyze legal issues;*
- d. identify, interpret and apply results of research; and*
- e. effectively communicate the results of research.*

1.3 Oral and Written Legal Communication

The applicant must have demonstrated the ability to,

- a. communicate clearly in the English or French language;*

- b. identify the purpose of the proposed communication;*
- c. use correct grammar, spelling and language suitable to the purpose of the communication and for its intended audience; and*
- d. effectively formulate and present well reasoned and accurate legal argument, analysis, advice or submissions.*

2. *Ethics and Professionalism*

The applicant must have demonstrated an awareness and understanding of the ethical requirements for the practice of law in Canada, including,

- a. the duty to communicate with civility;*
- b. the ability to identify and address ethical dilemmas in a legal context;*
- c. familiarity with the general principles of ethics and professionalism applying to the practice of law in Canada, including those related to,*
 - i. circumstances that give rise to ethical problems;*
 - ii. the fiduciary nature of the lawyer's relationship with the client;*
 - iii. conflicts of interest;*
 - iv. duties to the administration of justice;*
 - v. duties relating to confidentiality and disclosure;*
 - vi. an awareness of the importance of professionalism in dealing with clients, other counsel, judges, court staff and members of the public; and*
 - vii. the importance and value of serving and promoting the public interest in the administration of justice.*

3. *Substantive Legal Knowledge*

The applicant must have undertaken a sufficiently comprehensive program of study to obtain an understanding of the complexity of

the law and the interrelationship between different areas of legal knowledge. In the course of this program of study the applicant must have demonstrated a general understanding of the core legal concepts applicable to the practice of law in Canada, including as a minimum the following areas:

3.1 Foundations of Law

The applicant must have an understanding of the foundations of law, including,

- a. principles of common law and equity;*
- b. the process of statutory construction and analysis; and*
- c. the administration of the law in Canada.*

3.2 Public Law of Canada

The applicant must have an understanding of the core principles of public law in Canada, including,

- a. the constitutional law of Canada, including federalism and the distribution of legislative powers, the Charter of Rights and Freedoms, human rights principles and the rights of Aboriginal peoples of Canada;*
- b. Canadian criminal law; and*
- c. the principles of Canadian administrative law.*

3.3 Private Law Principles

The applicant must demonstrate an understanding of the foundational legal principles that apply to private relationships, including,

- a. contracts, torts and property law; and*
- b. legal and fiduciary concepts in commercial relationships.*

C. Approved Canadian Law Degree

The Federation will accept an LL.B. or J.D. degree from a Canadian law school as meeting the competency requirements if the law school offers an academic

and professional legal education that will prepare the student for entry to a bar admission program and the law school meets the following criteria:

1. *Academic Program:*
 - 1.1 *The law school's academic program for the study of law consists of three academic years or its equivalent in course credits.*
 - 1.2 *The course of study consists primarily of in-person instruction and learning and/or instruction and learning that involves direct interaction between instructor and students.*
 - 1.3 *Holders of the degree have met the competency requirements.*
 - 1.4 *The academic program includes instruction in ethics and professionalism in a course dedicated to those subjects and addressing the required competencies.*
 - 1.5 *Subject to special circumstances, the admission requirements for the law school include, at a minimum, successful completion of two years of postsecondary education at a recognized university or CEGEP.*
2. *Learning Resources:*
 - 2.1 *The law school is adequately resourced to enable it to meet its objectives, and in particular, has appropriate numbers of properly qualified academic staff to meet the needs of the academic program.*
 - 2.2 *The law school has adequate physical resources for both faculty and students to permit effective student learning.*
 - 2.3 *The law school has adequate information and communication technology to support its academic program.*
 - 2.4 *The law school maintains a law library in electronic and/or paper form that provides services and collections sufficient in quality and quantity to permit the law school to foster and attain its teaching, learning and research objectives.*
5. The Task Force recommends that the compliance mechanism for law schools be a standardized annual report that each law school Dean completes and submits to the

Federation or the body it designates to perform this function. In the annual report the Dean will confirm that the law school has conformed to the academic program and learning resources requirements and will explain how the program of study ensures that each graduate of the law school has met the competency requirements.

6. The Task Force recommends that the Federation, or the body it designates to consider proposals for new Canadian law schools, be entitled to approve a proposal with such conditions as it thinks appropriate, relevant to the national requirement.
7. The Task Force recommends that by no later than 2015, and thereafter, all applicants seeking entry to a bar admission program must meet the national requirement.
8. The Task Force recommends that the Federation establish a committee to implement the Task Force's recommendations.

THE REPORT

INTRODUCTION

The legal profession in Canada is self-regulating. Provincial and territorial legislation has for decades and in some cases centuries granted law societies responsibility to admit applicants to the profession, establish codes of professional conduct and standards of competence, and discipline lawyers when they fall below acceptable standards.

Law societies regulate lawyers “in the public interest.” In the 21st century self-regulation is neither a static concept, nor one that can or should be taken for granted. The context within which the legal profession operates has changed significantly since the days when the members of the profession were homogeneous in make-up and relatively few in number, the profession’s monopoly was not challenged and consumer awareness had not become an important factor in the provision of legal services. Today, regulators must pay attention to the internal and external pressures on self-regulation that will affect its future operation.

The legal profession in Canada remains virtually the last in the common law world to be self-regulating.¹ Across Canada regulators are under greater government scrutiny than ever before. The heightened scrutiny is not directed specifically at the legal profession, but to all professions as governments determine their own public interest priorities and consider ways to create a more seamless pan-Canadian approach to governance.

Governments are increasingly responding to public demands for transparency, fairness, objectivity and consistency in decision making whether it be at the government level or by statutory authorities. The passage of fair access to professions legislation by three provincial governments, the 2008 national amendments to the Agreement on Internal

¹ The nature of self-regulation of the legal profession in Canada has evolved over a long period. It is now commonplace for law society benchers (directors) to include public representatives, often referred to as “lay benchers” who participate as full voting members. Nevertheless, in all provinces and territories the majority of benchers are lawyers that the profession elects to regulate lawyers in the public interest, independent of government control, to ensure that the public continues to be served by an independent bar.

Trade (“AIT”) with a commitment to full labour mobility across Canada by August 2009, and the recently undertaken provincial and territorial agreement to develop a pan-Canadian framework for foreign qualification recognition demonstrate the commitment to transparent and accessible process that governments have made and expect regulators to meet. Moreover, while regulators have been consulted on these developments, their influence has been limited to discussing details, not to influencing the policy direction underlying the initiatives.

Today and in the future, self-regulation requires regulators to anticipate areas of government and public scrutiny and changing societal priorities and ensure that their processes withstand that scrutiny. The Federation’s 2002 National Mobility Agreement (“the NMA”) is a good example of what can be achieved by changing the understanding of the public interest and developing policy to address it. Because of the NMA, law societies were already compliant with the amendments to the AIT.

The establishment of this Task Force to consider the development of a national requirement for the entry of applicants to provincial and territorial law society bar admission programs is in large part a response to the heightened government scrutiny of regulators. It also arises from a realization that there are areas of regulation in which law societies have done little recent policy work to reflect the changing regulatory landscape. In part this inactivity has been reflective of the historic isolation of law societies from one another. National regulatory projects were for decades quite limited.

Yet law societies in common law jurisdictions in Canada share the same values and responsibilities.² All law societies regulate their members in the public interest, which includes responsibility for the competence, integrity, standards of learning and professional ethics of those they admit to the profession and a commitment to access to legal services. Their codes of professional conduct reflect similar duties and responsibilities to the court, to clients and to the public. Every law society requires new lawyers to complete a pre-call program, including articling, prior to admission. Despite

² Law societies in common law jurisdictions also share many of these same values with the Barreau du Québec; however because of somewhat different legal systems, this Task Force’s mandate is to address requirements only as they apply to entry into the law societies of common law jurisdictions.

features that reflect their unique provincial or territorial circumstances all law societies regulate on the basis of these shared values, which render lawyers from common law jurisdictions more similar than not. Increasingly, law societies recognize the need to address the shared nature of their responsibilities in formal ways to ensure that the profession keeps ahead of a constantly changing landscape and regulation continues to reflect the public interest.

The enhancement of the Federation's role and the advent of national mobility have engendered greater interaction and cooperation across the country. There are now good reasons to reflect a national perspective whenever possible and to articulate it in a transparent, fair and objective manner.

In June 2007 the Federation appointed this Task Force with a mandate to review the criteria currently in place establishing the approved LL.B/ J.D. law degree for the purposes of entry to law societies' bar admission/ licensing programs and, if appropriate, to recommend changes. The mandate includes considering the implications of any changes for the National Committee on Accreditation ("the NCA") requirements for granting a certificate of qualification to internationally educated applicants.

The Task Force has met over the last two and a half years, has provided three reports and has undertaken a consultation process. It reported on the results of the consultation process in March 2009 and has taken the comments it received both in writing and in meetings into account in reaching its recommendations. The information on its process is set out at **Appendix 1**.

This is the Task Force's final report, with its recommendations, which it presents to Federation Council for its consideration.

THE ROLE OF LAW SOCIETIES IN REGULATING ENTRY TO THE PROFESSION

Law societies in Canada are responsible for determining who is admitted to the profession. The responsibility is a significant one, because each decision to admit an

applicant tells the public that the newly licensed lawyer has met high standards of learning, competence and professional ethics. In the context of lawyer mobility and the AIT, the admission of a lawyer in one common law jurisdiction in Canada is effectively admission in every other common law jurisdiction.

Law societies in the common law provinces carry out their responsibility by requiring candidates for admission to earn a Canadian common law degree or its equivalent, to successfully complete a law society bar admission program³ and to complete a period of apprenticeship, known as articling. Currently, the successful attainment of a Canadian common law degree⁴ satisfies the regulators' academic requirement. The bar admission and articling stages provide practical training for the practice of law.

To assess the qualifications of persons who receive their legal training outside Canada, the Federation established the NCA. The NCA determines what additional requirements the applicant must meet to achieve equivalency with the Canadian LL.B./J.D. degree. When satisfied that equivalency has been achieved, the NCA issues a Certificate of Qualification that law societies generally use to determine whether an applicant meets the academic requirements for entry to a bar admission program.

The concept of an approved Canadian law degree developed in large part as a result of the debate in Ontario in the 1940's and 1950's over control of legal education. In 1957 the benchers of the Law Society of Upper Canada agreed that graduates "from an approved law course in an approved university in Ontario" would meet the academic requirements for entry to the bar admission course. This resulted in the relatively quick development of law schools at Queen's, Western, Ottawa and Windsor, the further development of the law faculty at the University of Toronto, and ultimately the relocation

³ The term "bar admission program" refers to and includes all the pre-licensing processes leading to admission to the profession in the common law provinces and territories.

⁴ In some provinces, the academic requirement is expressed simply as "a Canadian common law degree" (e.g. Law Society of Alberta - Rule 50.2; Law Society of British Columbia, Rule 2-27(4)(a): "successful completion for the requirements for a bachelor of laws or the equivalent degree from a common law faculty of law in a Canadian university"); in others, the degree must be from a "recognized school of law" (e.g. Saskatchewan – www.lawsociety.sk.ca/newlook/Programs/admission.htm) or from an "accredited law school" (e.g. Ontario - Law Society of Upper Canada By-Law 4, section 9.).

of the original Osgoode Hall Law School to a university setting at York University in 1969. The Law Society of Upper Canada subsequently expanded the scope of acceptable law programs to include law schools throughout Canada and, over the next two decades, proceeded to approve the law degrees of all 16 Canadian common law faculties for entry to its bar admission program. In 1984, Kenneth Jarvis, while Secretary of the Law Society of Upper Canada, described this process in a letter to the Federation, set out at **Appendix 2**.

The Law Society of Upper Canada's 1957/69 requirements defined an approved law faculty for the purpose of entry of their graduates to the bar admission course. The Law Society originally prescribed eleven mandatory courses that every student was required to take and a number of additional courses that the schools were required to offer. In 1969, as a result of a request by the Ontario Law Deans for greater flexibility in program development, the Law Society amended the standards, reducing the number of required courses from eleven to seven ("the 1957/69 requirements".) The 1957/69 requirements are set out at **Appendix 3**.

There has never been a national requirement for approval of law programs or law schools in Canada. For a half century no law societies in common law jurisdictions have analyzed the criteria governing entry of a graduate from a Canadian common law school to their bar admission programs. Moreover, neither the Law Society of Upper Canada nor any other law society appears to have updated the 1957/1969 requirements.

In 1976, 1979 and 1980 three new law schools opened their doors at Victoria, Calgary and Moncton. Because there was no national law program approval body, each provincial law society had to consider whether to recognize law degrees from these institutions as meeting the academic requirements for entry to their respective bar admission programs.

It is perhaps not surprising that law societies have never established national requirements for entry to their bar admission programs. Until recently law societies operated in relative isolation from one another, preoccupied with internal regulatory

issues. They spent little time developing national approaches despite their common responsibilities. Further, unlike the United States where there are hundreds of law schools, there are only 16 in Canada that grant common law degrees. There has not been a new school approved in 29 years. While the existing law faculties were established under differing circumstances and vary in their missions, objectives, size, access to resources and other features, law societies have been satisfied that they all provide quality programs. This remains the case today.

Law societies respect the academic freedom that law schools vigorously defend. There is a strong tradition within the legal education system, particularly in North America, to view law school education as not simply a forum for training individuals to become practitioners of a profession, but also as an intellectual pursuit that positions its graduates to play myriad roles in and make valuable contributions to society.

Why in the face of this respect for law schools' missions and the quality of law schools and their faculties would the Federation establish a national requirement that graduates of these law schools will be required to meet to enter bar admission programs? Why not assume that the status quo continues to be sufficient?

The regulatory landscape has changed greatly since law societies last addressed this issue in 1969. Public scrutiny has increased, with recent events converging to focus particular attention on the need for transparent processes and national regulatory requirements.

Fair Access Legislation and National Committee on Accreditation

Three provinces have enacted legislation respecting fair access to regulated professions that require regulatory authorities to ensure that their admission processes for domestic and internationally trained candidates are transparent, objective, impartial and fair.⁵ The legislation includes provisions for ongoing monitoring of regulators' compliance with the requirements. To the extent a regulator has delegated the

⁵ *Fair Access to Regulated Professions Act*, S.O. 2006, c.31 (Ontario); *The Fair Registration Practices in Regulated Professions Act*, S.M. 2002, c.21 (Manitoba); and *Fair Registration Practices Act*, S.N.S. 2008, .38 (Nova Scotia – to be proclaimed.)

assessment of international qualifications to a third party it must ensure that the third party complies with the requirements of the fair access legislation.

Law societies have delegated the responsibility for evaluation of international credentials to the NCA. It evaluates the credentials to determine the scope and extent of any further legal education that in its opinion an applicant must complete *to equal the standard of those who have earned a Canadian LL.B./ J.D. degree*. The difficulty with this test is that there is no articulated national standard or requirement for the Canadian LL.B./J.D. degree against which the NCA requirements can be measured.

Given the need to meet the fair access standards of transparency, objectivity, impartiality and fairness a national requirement is necessary for the regulation of entry to bar admission programs for both domestic and international candidates.

Proposals for New Canadian Law Faculties and Law Degree Granting Institutions

Until 2007 there had been no proposals for new faculties of law in Canada for over 25 years. Within established faculties of law there has been only a limited increase in the number of law school places. As the number of applicants to law schools has continued to increase, some unsuccessful applicants have attended law schools elsewhere in the world. Applicants who earn law degrees outside Canada and wish to return to Canada must go through the NCA process for an assessment of their credentials.

The increased number of law school applications has given rise to at least two developments. The first, as described above, is the increase and change in the nature of some of the candidates seeking evaluation through the NCA. To address the NCA requirements for these students some international law schools have begun tailoring their curriculum to teach Canadian law.

The second development is the renewed interest in Canada in the establishment of new law schools, either as part of a university or within a private, degree granting institution. The first proposals came from Ontario in 2007 from at least two universities, with a number of other universities expressing interest. The government of Ontario announced

in 2008 that it would not fund new schools at this time, but the issue has not receded. British Columbia recently approved the creation of a law school at Thompson Rivers University in partnership with the Faculty of Law at the University of Calgary. In addition, a private provincially approved degree granting institution in British Columbia has recently submitted an application for authority to offer a J.D. degree.⁶

New law schools will want to ensure that their graduates are eligible to enter bar admission programs in any common law jurisdiction in Canada. The adequacy and portability of their law degree for this purpose will be as essential to them and their students as it is to the already established law faculties. A clearly articulated national requirement is necessary to ensure that new Canadian law schools know what they must do to enable their graduates to enter bar admission programs.

National Mobility of Lawyers and Government Harmonization Initiatives

The legal profession in Canada has had open and transparent national mobility for a number of years, beginning with the negotiation of the NMA in August 2002.⁷ In addition, national labour mobility is now a clear governmental objective, both federally and provincially.

At the Council of the Federation meeting in July 2008 provincial and territorial premiers emphasized the critical importance of full labour mobility for all Canadians and the need to amend the AIT by January 2009. The premiers stated that the proposed amendments should provide that any worker certified for an occupation by a regulatory authority of one province or territory be recognized as qualified to practise that occupation in all other provinces and territories. The premiers directed that any exceptions to full labour mobility would have to be clearly identified and justified as necessary to achieve a “legitimate objective,” a term defined in the AIT. Governments would share their list and post these on a public website. Full labour mobility was to have been achieved by August 2009.

⁶ Learning Wise Inc. doing business as University Canada West.

⁷ Federation of Law Societies of Canada. National Mobility Agreement, August 16, 2002. www.flsc.ca/en/pdf/mobility_agreement_aug02.pdf

Despite provincial and territorial regulation of professions, the amendments to Chapter 7 of the AIT have made it clear that all levels of government view the professions as national entities that must have the same admission standards. Any differences in provincial approach must be harmonized to permit seamless mobility. Establishment of a national requirement for entry to bar admission programs is in keeping with this harmonized approach.

Canadian Competition Bureau (“CCB”)

In a 2007 study of a number of professions, the CCB pointed to a number of areas in which it believed the legal profession’s practices were restrictive. It noted, for example, variations in the length of bar admission and articling requirements across the country and could not see a justification for the differences. The CCB study is a further example of an external pressure for a national approach to professional regulation that is uniform, transparent and clear.

Law societies stand between law schools that seek autonomy to fulfill their academic objectives unimpeded and governments that seek accountability, transparency and consistency in the regulation of the profession. Law societies must seek a balance that addresses both these imperatives, always keeping the public interest in mind.

The development of regulatory requirements for entry to bar admission programs involves a balancing of considerations, because what regulators prescribe as a prerequisite for those seeking entry to bar admission programs will also *de facto* be part of the “exit” requirements for those graduating from law schools. Accordingly, the Task Force’s recommendations reflect its understanding of why requirements are necessary and what those requirements should be, while paying attention to the legitimate concerns of the legal academy that the requirements support quality, innovation and excellence in Canadian law schools.

This balancing is a complex process because while law societies and the legal academy have overlapping interests, they also have, in part, different priorities and requirements.

These include statutory obligations in the case of regulators, academic imperatives in the case of the schools and different external pressures on each group.

The Task Force's recommendations also address the transparency and fairness of NCA processes and provide guidance for proposals for new Canadian law schools.

INTERNATIONAL APPROACHES TO ENTRY INTO THE LEGAL PROFESSION

Each jurisdiction develops regulatory standards that suit its unique circumstances.

Appendix 4 provides a comparative international snapshot of a number of approaches to determining requirements to be met by candidates seeking to become lawyers. The Task Force has noted that many other jurisdictions are undergoing a re-examination of legal education and accreditation issues, in some cases making changes, in others commencing studies of possible models to pursue. As well, a number of Canadian law schools have made changes to their first year curricula, often raising issues similar to those the Task Force has discussed, sometimes from a different perspective.

The extent to which issues respecting appropriate approaches to legal education, standards and models for regulation are being actively considered illustrates the timeliness of the Task Force's work. A number of developments provide useful perspectives on a model that would best suit the Canadian legal education and regulatory context. In particular, the Task Force has noted the interplay of standards, outcome measurements and accreditation across a number of jurisdictions.

- In the United States the approved law school approach has tended to focus on the “bricks and mortar” features (input measures such as libraries, teaching staff, classroom space, etc.), rather than learning outcomes. The key output measures have traditionally been bar passage rates and job placement. In July 2008 an American Bar Association (“ABA”) Task Force on Outcome Measurements released its report in which it recommended what could amount to a sea change in accreditation approval processes. It recommended that current ABA Accreditation Standards be re-examined and reframed as needed “to reduce their reliance on input measures and instead adopt a greater and more overt reliance on outcome measures.”⁸ The report pays particular attention to the

⁸ American Bar Association. Section of Legal Education and Admissions to the Bar. Report of the Outcome Measures Committee. (Professor Randy Hertz, Chair). July 27, 2008, p.1 (“Outcome Measures Report”).

extent to which other professions have developed outcome measurement standards, reflecting the importance of a professional education that facilitates graduates' ability to practise their profession.

- The Australian model of regulation is somewhat similar to the current Canadian approach, with no national accreditation system. Australia does, however, have national curriculum requirements (Priestley 11) and the Council of Australian Law Deans has recently agreed in principle on overall national standards that could ultimately become accreditation standards.⁹ These address a wide range of matters, including academic autonomy, the law course, assessment, academic staff, the law library or collection, resources and infrastructure, course evaluation, nexus between teaching and research, governance and administration and continuous renewal and improvement. The standards are articulated at a broad level, leaving a great deal of flexibility for individual schools.
- The England and Wales model combines input and output measures, as well as defining, through the Joint Statement on Qualifying Law Degrees of the Law Society of England and Wales and the General Council of the Bar, the conditions a law degree course must meet to be termed a "qualifying law degree." The Law Society of England and Wales has recently revised requirements for its Legal Practice Course to describe learning outcomes for what a successful candidate should be able to *do* on conclusion of the course.

In considering what requirements graduates with Canadian LL.B./ J.D. degrees should have to meet to be eligible for entry to law society bar admission programs the Task Force has benefited from this comparative analysis and has fashioned an approach that reflects Canada's legal education and regulatory context.

DEVELOPING A CANADIAN NATIONAL REQUIREMENT FOR ENTRY TO BAR ADMISSION PROGRAMS

An examination of international approaches to entry to the legal profession reveals that Canada appears to be unique among comparable common law jurisdictions in not having national standards or requirements for the academic prerequisite for admission to the profession, beyond requiring an LL.B./J.D. degree. The final report of the Council of Australian Law Deans in describing international requirements accurately summarized the Canadian regulatory environment:

⁹ Council of Australian Law Deans. *Standards for Australian Law Schools-Final Report*. Prepared by Christopher Roper and the CALD Standing Committee on Standards and Accreditation. March 2008 ("the CALD Report 2008").

There are no Canadian national standards as such. It has been many years since standards for Canadian law schools have been evaluated. The setting of standards for Canadian law schools, or more accurately the requirements for call to the bar, is a responsibility of individual Canadian law societies, as they set entry requirements for the respective provincial or territorial bar admission process.¹⁰

For the reasons discussed earlier in this report and in its previous reports, the Task Force is satisfied that there should be a national academic requirement for entry to bar admission programs of the common law jurisdictions. The intent behind developing a requirement that applies equally to applicants educated in Canada and internationally is to ensure that all those seeking entry to bar admission programs in Canadian common law jurisdictions have demonstrated certain essential and pre-defined competencies in the academic portion of the legal education or its equivalent through the NCA.

Such a requirement would address the issues identified earlier in this report respecting transparent regulation, fair access to regulated professions, criteria to be applied for new law school applications, AIT and CCB considerations and government scrutiny of regulators.

Anything short of a national solution that addresses these issues in a comprehensive way will result in the continuation of a patchwork approach that is neither in the public interest nor adequately attuned to the external forces that are affecting self-regulation.

For a national approach to succeed, provincial and territorial law societies must think nationally, as they did when adopting the NMA, the anti-money laundering rules and client-identification rules. Although a commitment to a national approach will on occasion require compromise, law societies have enormous capacity to work together in the interests of the profession. The Federation's increasing commitment to national regulatory approaches is also reflected in a new Task Force the Federation has recently established to develop national standards for admission to the profession. Like this Task Force's work on a national requirement for entry to bar admission programs, the goal of that Task Force is to enhance transparent regulation, reflecting the common responsibilities law societies share.

¹⁰CALD Report 2008, p. 38.

In developing its recommendations the Task Force has been very aware of the potential effect of a national requirement for entry to bar admission programs on law school education.

The Council of Canadian Law Deans (“the Council”) has provided the Task Force with important assistance both through the participation of its working group of three Law Deans and through its reports and correspondence to the Task Force, most recently its letters of June 1 and June 29, 2009, set out at **Appendices 5 and 6**. The Task Force is encouraged by the Council's June 1, 2009 response to the general direction of the Task Force's approach. The Task Force has found the Council's perspective very helpful as it has finalized its recommendations.

Members of faculty at a number of law schools have also given the Task Force valuable insight into the pedagogical implications of the options it has been considering in the course of its work.

The Task Force believes that its recommendations balance law societies' regulatory responsibilities with the importance of academic freedom and learning in law schools.

THE TASK FORCE'S RECOMMENDED APPROACH

Examination and Course Listings Options

Accrediting bodies in jurisdictions similar to Canada commonly use two approaches to determine that an applicant for admission meets the necessary academic requirements: passage of a bar examination, without requiring that applicants take certain courses in law school, or successful completion of specified courses.

The tradition in the United States has been to test a candidate's academic qualifications in a state bar examination. The bar passage rate has been one of the main criteria the ABA accreditation process has examined in evaluating the success of law schools. While there is no suggestion that the United States is moving away from state bar examinations, the limitations of the approach are being examined, particularly in terms

of their value in accrediting law schools. The American system is different from Canada's in that law school is the only preparation for practice – there are no articling or bar admission programs.

In its September 2008 consultation paper the Task Force considered the examination option and noted the following:

This option appears to be transparent and objective, easily developed nationally and entirely within the control of law societies. Potentially it may apply to both domestically and internationally educated candidates. For those who currently question whether students graduating from law schools are adequately prepared to practise law there may be comfort that an examination system serves as a check and balance.

The Task Force is of the view, however, that there are a number of issues that arise with this option that require consideration. Criticisms of the American examination model, for example, include the view that the examinations come to “drive” the legal education process. It has been suggested that what examination passage denotes primarily is the ability to pass an examination, rather than proof of the acquisition of the knowledge, skills and abilities that a lawyer requires to practise law.

Another possible disadvantage of this approach is that it adds another layer to law students' education.

During the consultation process some input suggested that this approach is preferable to an approved law degree requirement since law societies would not be “dictating” curriculum to law schools. Other input agreed with the Task Force concern that as students become preoccupied with ensuring that they pass this additional hurdle they will demand that their law schools teach to the examinations.

The Task Force believes there is a better approach than prescribing a national entrance examination to bar admission programs. The focus of this approach is on education rather than testing. With cooperation and collaboration between law societies and law schools the goals and mandates of both groups can be achieved, benefiting students and ultimately the public.

The Task Force also considered whether to specify a list of law school courses that a graduate must have taken to be eligible for entry to a bar admission program. In

England and Wales, Australia and New Zealand law societies specify a compulsory course curriculum. The latter two jurisdictions each publishes a general course syllabus of required courses.¹¹ The Law Society of Upper Canada's 1957/1969 requirements took a similar approach, specifying both required courses an applicant must have taken and optional courses that law schools were required to offer.

This approach reflects what until recently has been a focus on the topic areas a student's education must address, rather than on what the student has learned and can do. Increasingly, however, this traditional approach is being replaced by consideration of those competencies a student should have acquired that reflect the knowledge, skills and attitudes necessary for an applicant seeking admission to the legal profession. The course based approach offers little guidance on the candidate's capabilities. From the public's perspective what matters is what lawyers are able to do.

Competency Requirements

The Task Force is satisfied that law school graduates seeking entry to bar admission courses should have acquired competencies in fundamental areas of substantive knowledge, legal skills and professionalism and ethics. This is the preferred approach for a national requirement.

Establishing requirements in all three categories reflects their equal importance in the development of lawyers who are competent to serve the public. The Law Society of Upper Canada's 1957/69 requirements considered only substantive law, reflecting the priorities of all regulators and law schools at that time. In the latter decades of the 20th-century both law schools and law societies have also delivered skills education and training, with law schools being particularly qualified to offer such instruction in legal research and writing. Many schools offer clinical programs, skills-based courses and pro bono opportunities that enable students to develop the skills that will serve them following graduation.

¹¹ See Appendix 4.

Relationships between individuals, the state, and societal and commercial entities are at the heart of law. A lawyer's fundamental role is to understand those relationships, to identify the legal issues and problems that arise from them and to craft solutions. The lawyer's role may arise in traditional private practice while serving the needs of a client, as corporate counsel, in government or clinic practice, or in myriad other contexts. Every context and every issue requires the lawyer to bring to bear a wide range of skills, knowledge and ability. The lawyer's development is never static and must evolve, adapt and expand wherever the lawyer works and in the face of a constantly changing legal landscape.

To perform their roles lawyers must know the law, whether common law or statute. This does not mean that lawyers will always know all the law applicable to a particular problem or issue, but does mean they must understand the basic legal concepts that will be applicable and will guide them in finding the law that is specific to the problem or issue at hand.

It is not reasonable to expect that law schools will graduate students who are fully capable of providing competent professional services to clients in all matters. Clearly, the profession must continue to play a role in bridging the gap between law school and formal licensing of lawyers. However, through the professional legal education students receive in law school, they should acquire foundational competencies necessary for the practice of law.

In the past decade several law societies have developed competency frameworks to support their bar admission requirements. The most detailed is the Law Society of Upper Canada's entry-level competencies, developed for its licensing process after a lengthy consultation with the profession, focusing on the early years of practice.¹² The Law Society of Upper Canada highlights competencies in ethical and professional responsibility, knowledge of the law, client relations, and issue identification.

¹² Law Society of Upper Canada. Licensing Process. Entry Level Solicitor Competences by Category; Entry Level Barrister Competencies by Category. www.lsuc.on.ca. (lawyer licensing)

The law societies of British Columbia, Alberta, Saskatchewan and Manitoba have taken a similar approach, identifying competencies in lawyering skills, practice and management skills, and ethics and professionalism that entry level lawyers require. British Columbia applies these competencies in its bar admission program, the Professional Legal Training Course.¹³ Alberta, Saskatchewan and Manitoba apply the competency framework in their common bar admission program through the Centre for Professional Legal Education (CPLED). Nova Scotia has adapted the framework for use in its bar admission course and New Brunswick will implement a similar competency framework in 2010.

In Australia admission to practice is governed by competency standards developed in 2000 by the Australasian Professional Legal Education Council (APLEC) and the Law Admissions Consultative Committee. These standards describe the performance required in three key areas: skills, practice areas and values (i.e. ethics and professional responsibility).

In the United States the University of Wisconsin Law School Assessment 2000 Report was one of the early detailed examinations considering a competency approach to education. It reviewed the skills and knowledge lawyers need in their first five years of practice.¹⁴ Most recently in 2008, the Legal Education Section of the ABA's Output Measures Committee has urged a reconsideration of that body's accreditation process in favour of an output-based process.¹⁵ In commenting on the Committee's interim report the Society of American Law Teachers noted,

In assessing whether law schools are providing students with quality legal education, the ABA should consider the wide range of competencies important to lawyers... the competencies that the ABA should evaluate are the skills, knowledge and values that are important to the profession and go far beyond what is currently valued and measured.¹⁶

¹³ Canadian Centre for Professional Legal Education 2004. *Competency Profile for Entry Level Lawyers*. Calgary, Alberta.

¹⁴ University of Wisconsin Law School. Assessment 2000 Summary Report. www.provost.wisc.edu/assessment/LawSchool2000_report.pdf

¹⁵ Outcome Measures Report. July 27, 2008.

¹⁶ Society of American Law Teachers Statements to the ABA Outcome Measures Committee, February 1, 2008, pp. 1, 5 and 6. See Also July 21, 2008.

In the Carnegie Foundation's report, *Educating Lawyers: Preparation for the Profession of Law* the authors consider the appropriate focus of academic preparation for the profession of law to be an integrated three part curriculum consisting of,

- (1) the teaching of legal doctrine and analysis, which provides the basis for professional growth;
- (2) introduction to the several facets of practice included under the rubric of lawyering, leading to acting with responsibility for clients; and
- (3) a theoretical and practical emphasis on inculcation of the identity, values and dispositions consonant with the fundamental purposes of the legal profession.¹⁷

Skills Competencies

In recommending competencies in certain skills the Task Force has focused on those skills areas that law students can reasonably be expected to acquire during the academic component of their education. This is not to suggest that the legal academy should be expected to provide the only education in this area, rather that the three years of the academic program are an appropriate period in which to begin to inculcate these skills.

The Task Force has developed the recommended skills competencies with reference to both the competency work that individual law societies have done and the significant learning that is currently being undertaken in Canadian law schools in these areas.

The three skills areas that the Task Force's recommendations address are problem-solving, legal research, and oral and written legal communication. In its view these skills are fundamental to any work a lawyer undertakes in the profession. In describing these competencies the Task Force has kept in mind that a national requirement is to address what an applicant must demonstrate for entry to a bar admission program not for entry to the profession. Competency development is a progressive process with law school being the first step in career long learning.

¹⁷ William M. Sullivan, et al. *Educating Lawyers: Preparation for the Practice of Law*. Carnegie Foundation for the Teaching of Law. 2007, p.194.

The Task Force believes that all 16 Canadian common law schools currently provide sufficient instruction in these recommended skills areas to meet the competency requirements.

By articulating these skills requirements the Task Force believes that law societies would make an important statement that lawyers should not only know the law, but should to have the capacity and skill to use what they know and be able to serve the public.

Ethics and Professionalism

The Task Force has concluded that law societies should require applicants seeking entry to a bar admission program to demonstrate that they have had instruction in ethics and professionalism in the Canadian legal context. During the Task Force's consultation no one suggested that studying ethics and professionalism should not form a fundamental component of an individual's legal education. Rather, the debate has centred on whether the Task Force should recommend that applicants must have taken a stand-alone course in the subject.

In general the Task Force has concluded that it should be left to the law schools to determine how their students satisfy the competency requirements. It has not recommended that regulators specify courses, number of credit hours, content, delivery method, or assessment. This allows law schools the flexibility to address these competencies in the manner that best meets their academic objectives, while at the same time meeting the regulators' requirements that will allow their graduates to enter bar admission programs.

The one exception to this recommended approach is ethics and professionalism. After careful consideration the Task Force recommends a stand-alone ethics and professionalism course for each student who seeks entry to a bar admission program.

The Law Society of Upper Canada's 1957/69 requirements said nothing about instruction in legal ethics or professional responsibility and as late as 1985, only two of the country's 16 law schools had a compulsory legal ethics course in their programs.

Approximately 18 years ago, the Federation and the Council of Canadian Law Deans jointly sponsored an important study by W. Brent Cotter, now Dean of the University of Saskatchewan College of Law, that emphasized the importance of professional responsibility instruction as a component of legal education and recommended a coordinated curriculum. This marked the opening of a national conversation that continues today.¹⁸

As an academic discipline, legal ethics has more recently become a significant area of scholarly pursuit. In an article written in 2007 entitled "Taking Responsibility: Mandatory Legal Ethics in Canadian Law Schools," authors Richard Devlin, Jocelyn Downie and Stephanie Lane begin by saying,

In an era when professionals, bar societies and judges are often heard lamenting the decline in legal professionalism, mandatory legal ethics and professional responsibility instruction in law schools would seem to be an obvious, and obviously appropriate, response.¹⁹

While the authors recognize institutional reluctance for any further mandatory courses to be added to the law school curriculum, they agree with the position that there is more evidence on the effectiveness of professional responsibility instruction than there is on the effectiveness of most professional education.²⁰

In the past decade, Canadian law schools have increased instruction in the subject. In a survey of law schools it has been reported that 11 of the 16 law schools have a compulsory course in legal ethics, though with various descriptions.²¹ The first

¹⁸ W. Brent Cotter. *Professional Responsibility Instruction in Canada: A Coordinated Curriculum for Legal Education*. Federation of Law Societies of Canada's Joint National Committee on Legal Education and the Council of Canadian Law Deans, 1992.

¹⁹ *The Advocate*. Vol. 65, part 6. November 2007, p.761 at 762.

²⁰ *Ibid.* p.766.

²¹ W. Brent Cotter and Eden Maher, "Legal Ethics Instruction in Canadian Law Schools: Laying the Foundation for Lifelong Learning in Professionalism." February 20, 2009 (publication pending). Originally prepared for the Chief Justice of Ontario's Advisory Committee on Professionalism – Symposium on Lifelong Learning in Professionalism ("Cotter and Maher").

casebook on Canadian legal ethics was published last year for use in law school education.

In a recent article on the subject, Dean Cotter and Eden Maher conclude that an exclusively pervasive method of instruction is not sufficiently effective to meet the educational objective.²²

The increasing importance of an understanding of ethical issues may be illustrated by the fact that the Supreme Court of Canada has decided more cases on the subject of solicitor-client privilege in the past decade than it had done previously in its entire history. It has also decided three significant conflict of interest cases in the past 15 years that have affected practice in all parts of Canada.²³

The Task Force is convinced that dedicated instruction on ethics and professionalism, beginning in law school is essential. It should address both the broad principles of professionalism and the ethical issues with which lawyers must contend throughout their careers, including conflicts of interest, solicitor-client privilege and the lawyer's relationship with the administration of justice.

With the exception of the Law Society of Upper Canada, all the law societies that provided input to the Task Force supported a stand-alone course in professional responsibility. The Task Force has reviewed the Law Society of Upper Canada's submission on this topic. One of the points that Law Society makes is that the Task Force's original characterization of the competency as "professional responsibility" was too narrow and could be restrictively interpreted to refer specifically and only to the Rules of Professional Conduct. It suggests that learning about the rules is better left to the law societies in bar admission programs, articling and professional development. The Task Force agrees that the better description of the competency it contemplates is "ethics and professionalism" and it has made that change to its final recommendations.

²² Cotter and Maher, 2008.

²³ This information was provided to the Task Force in a helpful submission from Dean W. Brent Cotter during the consultation process.

The focus of the competency is on understanding basic ethical principles. The Law Society of Upper Canada, like all law societies, agrees that law school is an appropriate stage at which to begin the process of identifying and applying ethical principles.

The Law Society of Upper Canada's submission raises the concern that there is no justification for deviating in the case of ethics and professionalism from the Task Force's general recommendations in favour of competencies, not courses. It also suggests that requiring a course could have the effect of segregating the topic, rendering it less likely that the topic will be addressed across the curriculum.

As suggested in Dean Cotter's article, which uses data from a law school survey, it would appear that increasingly more law schools are moving toward some form of stand-alone course in this area. The Task Force is encouraged by this development and believes that it highlights to law students the significance of the topic. This increasing focus may in fact engender more exposure throughout the curriculum as students gain greater insight into ethical principles.

Nothing in the Task Force's recommendation limits law schools from continuing pervasive approaches in addition to the stand-alone approach. A number of the schools currently follow both approaches.

Finally, in recognition of the unique nature of its recommendation in this area, the Task Force has specifically not recommended credit hours or teaching methodology, only that there be a course dedicated to the subjects of ethics and professionalism that addresses certain specified competencies. It believes that this strikes the appropriate balance.

The Task Force reiterates what it has said previously, that law societies must also take a greater role in inculcating in their members ethics and professionalism. Law school education can only address the issues in a preliminary way. The importance of lawyers being committed to ethics and professionalism throughout their careers makes it essential that law societies focus on this area in a variety of ways, including in bar

admission programs, continuing professional development programs and ongoing communications with the profession.

Ethics and professionalism lie at the core of the profession. The profession is both praised for adherence to ethical codes of conduct and vilified for egregious failures. Increasing evidence of external scrutiny of the profession in this area and internal professional debates about ethical failures point to the need for each lawyer to understand and reflect on the issues. In the Task Force's view, the earlier in a lawyer's education that inculcation in ethics and professionalism begins, the better.

The Task Force believes that more, not less, should be done in this area and that legal educators and law societies together should be identifying ways to ensure that law students, applicants for admission and lawyers engage in focused and frequent discussion of the issues. To ensure that law students receive this early, directed exposure the Task Force believes a stand-alone course is essential.

Substantive Legal Knowledge

The Task Force's recommendations on the appropriate areas of substantive knowledge that should be included in the entry requirements has engendered significant comment, particularly from members of law faculties. They have raised specific concern about (1) the basis for the substantive areas chosen; (2) the negative effect this "list" of mandatory requirements will have on innovation and flexibility in the law school curriculum; and (3) the danger of a one-size fits all approach.

Law school Deans and faculty understandably expressed concern that the profession may be seeking to dictate law school curriculum and by doing so may undermine the quality of law schools that have benefited from law societies' traditionally minimalist approach to articulating academic requirements for entry to their bar admission programs.

The concept of regulators requiring some degree of substantive legal knowledge of applicants for admission to the profession is a widespread requirement in common law

jurisdictions comparable to Canada. Australia, New Zealand and England and Wales all have required course content designated by the regulatory bodies. The United States does not have such requirements, except for legal ethics, but as the recent study for the Australian Law Deans points out,

it may be that this is explicable given that the state bar examinations have considerable influence on the curricula of the law schools, as most students intend to undertake those examinations.²⁴

In determining what substantive legal knowledge to require the Task Force considered the continued relevance of the current first year curriculum of the 16 law schools, the importance of students having foundational knowledge in both public and private law, the competency framework research undertaken by various law societies in Canada, the regulatory approaches in other comparable common law jurisdictions and the importance of ensuring that the requirements do not interfere with the flexibility and innovation in current law school education.

The Task Force recommends a national requirement that represents a balance between competing perspectives and imperatives. It recognizes that the requirement may represent a snapshot at a point in time. It has considered law school curriculum while at the same time addressing the framework of legal knowledge that its inquiries and consultations have led it to believe are foundational.

A law school graduate with a general understanding of the core legal concepts applicable to the practice of law in Canada, as set out in the Task Force's recommendations, will have the building blocks necessary to go forward into the bar admissions program. The Task Force's recommendations reflects its view that every graduate of a Canadian law school or recipient of an NCA Certificate of Qualification should understand,

- (a) the foundations of law, including principles of common law and equity; the process of statutory construction and analysis; and the administration of the law in Canada;
- (b) the constitutional law of Canada that frames the legal system; and
- (c) the principles of criminal, contract, tort, property and Canadian administrative law and legal and fiduciary principles in commercial relationships;

²⁴ CALD Report, 2008. p.37.

as set out in the Task Force's recommendations.

The Task Force is equally satisfied that nothing in its competency requirements, including in the area of substantive law knowledge, will interfere with flexibility or innovation in the law school curriculum. This is particularly the case because the Task Force has not, with the exception of ethics and professionalism, recommended courses in each competency or dictated credit hours, teaching methodology, or assessment.

The Task Force has received the most comment on the inclusion of the competency now described as "legal and fiduciary principles in commercial relationships." The concern has been raised that unlike the other requirements that simply restate current components of the curricula or are more generic in their description, this competency appears to reflect a more specific content choice. The suggestion has been that this opens up a potentially endless debate on why other areas such as family law, estates, or labour law have not been included.

Just as an understanding of principles of constitutional law, administrative law, contract or property and Canadian administrative law principles are foundational so too is an understanding of the legal concepts in commercial relationships. The Task Force's recommendation is based upon the pervasive nature of commercial relationships to wide ranging areas in which lawyers' advice is sought.

The Task Force received comments on its recommended competencies from the majority of law societies. All agree with the commitment that regulatory standards should not interfere with law school innovation. Some suggest adding or removing one or more competencies, but in general agree that the proposed competencies are acceptable. They are of the view that implementing the competencies should not result in substantial change to law school curricula. They agree that generally it should be left to law schools to determine how students will satisfy the competencies. Law societies also agree with the importance of a national requirement that would be applicable to NCA applicants.

THE APPROVED LAW DEGREE – ACADEMIC PROGRAM AND LEARNING RESOURCES

Comprehensive Legal Education – Institutional Requirements

In the Task Force's preliminary discussion paper of November 2007 it concentrated on the question of required competencies, but had not yet considered the setting within which students acquire those competencies.

One of the concerns expressed to the Task Force about the competencies approach was that a "list" cannot begin to capture the richness of a law school education - the community in which one begins to think like a lawyer and also to examine law critically and address deficiencies in legal systems and principles. The Council of Canadian Law Deans has emphasized to the Task Force that modern law schools provide a liberal legal education as well as a professional education. Law is an intellectual discipline and the practice of law requires rigorous academic training as well as the development of practice skills.²⁵

Law societies agree with this view of legal education. Accordingly, the Task Force has considered whether to articulate other institutional requirements that should form part of the requirements for entry to law society bar admission programs. In its consultation paper the Task Force sought comment in four areas, namely, law school admission requirements, length of the law school program, program delivery and joint degrees. The most significant comment the Task Force received on these issues was the June 29, 2009 letter from the Chair of the Council of Canadian Law Deans, referred to earlier in this report and set out at Appendix 6.

In that letter Dean Cotter states,

In general terms the CCLD is of the view that the current situation, where Canadian law schools enjoy a margin of manoeuvre to set those requirements, subject to general policies of their universities, produces satisfactory results. While the requirements imposed by each law school are broadly similar, we note that the liberty they currently enjoy is used to

²⁵ Council of Canadian Law Deans. An Overview of Canadian Common Law Legal Education (LL.B./J.D. Degrees) May 2008.

tailor their programs to specific situations or to implement initiatives that are designed to respond to the increasingly diverse needs of the legal profession. There is no evidence that this flexibility threatens the protection of the public in any way. Accordingly, we would urge the Task Force not to recommend the adoption of any stringent standards with respect to those issues.

The Task Force agrees that wherever possible the institutional requirements set out in the national requirement for entry to bar admission programs should reflect current practice in Canadian law schools. This balances the regulatory objectives with law schools' desire to maintain flexibility of approach. By stating current practices as much as possible the Task Force leaves open the door for law schools to advise the Federation if current practices are no longer appropriate. This is particularly true, for example, in the area of technology, as Dean Cotter has expressed in his letter.

Academic Program

Entry Requirements to Law Schools

Law school pre-admission requirements in Canada have historically represented a compromise between the American model, which treats law as a graduate degree and generally requires an undergraduate degree for admission, and the English model, which treats law as an undergraduate degree to which students may gain access from high school.

The Law Society of Upper Canada's 1957/69 requirements mandated a prerequisite of either two years of university education after "senior matriculation" (what was then grade 13 in Ontario) or three years of university education after "junior matriculation" (grade 12).²⁶

Law schools in Canada accept students with a wide range of post secondary education qualifications. A large number of law students hold undergraduate university degrees.

²⁶ It appears that the 2/3-year requirement in Ontario was a compromise between the universities' representatives who initially proposed an undergraduate degree as the prerequisite and the Law Society benchers, who felt that two years was sufficient. C. Ian Kyer and Jerome E. Bickenbach. *The Fiercest Debate*. Osgoode Society, 1987. pp. 250-261.

Some hold postgraduate degrees. At the same time universities accept students who have two years of an undergraduate university education. McGill University accepts approximately 15 to 20% of its first year students directly from CEGEP which is a two-year, postsecondary, pre-university program of study unique to Québec.

Most Canadian law schools make provision for mature students and Aboriginal students who do not have the minimum two years of post secondary education, but are admitted in a special category after individual consideration by admissions committees.

The Task Force sees no reason to interfere with that flexibility, which it considers part of the innovation in law schools that should be encouraged. At the same time, however, the Task Force is of the view that the national requirement should include some reference to admission requirements to law school so as to avoid the suggestion that direct admission out of high school is possible, something which is not currently the case at any of the Canadian law schools.

The Task Force recommends that subject to special circumstances, the prerequisite for entry to law schools will, at a minimum, include successful completion of two years of postsecondary instruction at a recognized university or CEGEP.

Duration of the Program and Joint Degrees

The general law school program encompasses three years of study. This is consistent with requirements throughout North America and in other jurisdictions. A three year program or its equivalent in course credits will allow students to study the core foundational subjects of law and also be exposed to areas of study, including multidisciplinary fields that will enhance their perspective on the role of law and lawyers in Canadian society. The Task Force recognizes that some law schools may prefer a course credit requirement that would enable the student to complete law studies in fewer than three years without reducing the content of the program. Typically the three-year law degree is 90 credits. Accordingly the Task Force recommends that the length of the course requirements be expressed as three years or the equivalent in course credits.

In recent decades many Canadian law schools have introduced joint degree programs with related, but separate disciplines. The Task Force recognizes that interdisciplinary education is a rich and valuable part of law school education. Nothing in its recommendations should be interpreted to interfere with the capacity of law schools to offer such degrees. So long as the student has been engaged in a study of law for three years or its equivalent in course credits, and has acquired the competency requirements in so doing, joint degree programs should satisfy the national requirement. Law schools introducing major changes in their academic program, such as the introduction of a joint degree, should be encouraged to discuss them with the Federation to ensure that their graduates will continue to meet the competency requirements.

Methods of Delivery

The Law Society of Upper Canada's 1957/69 requirements specified that the three-year law school program should consist of full time attendance at a law faculty. Forty years ago the only delivery method for education, short of correspondence courses, was in-person attendance. Today there are new learning and delivery methods. As Dean Cotter's June 29, 2009 letter sets out law schools currently employ a variety of learning methods, including "in class" lectures, seminars, independent research, exchange programs, internships, clinical education, video conferencing with other law schools and so on. Outside Canada there are law schools that offer the degree entirely by way of distance learning.

Technological advances for delivering information are moving rapidly. The Task Force does not wish to inhibit innovative delivery or experimentation in this area. At the same time, however, it is of the view that Canadian law school education should, as it does today, provide a *primarily* in-person educational experience and/or one in which there is direct interaction between instructor and students. The use of the term "primarily" in the Task Force's recommendation is intended to allow for innovation and experimentation.

Learning Resources

The Law Society of Upper Canada's 1957/69 requirements specified the form of an acceptable law school, including the number of faculty, the number of weeks of teaching in a term, the maximum number of hours faculty could teach and other "bricks and mortar" requirements. The ABA maintains detailed accreditation requirements, although this approach is being studied with a view to shifting emphasis to other more outcome based learning measurements.

The Task Force is reluctant to define in great detail the form law school must take, particularly given the role of provincial governments in approving degree granting institutions and the complex university-based decision making process that addresses many of the law schools' physical components. The Task Force does, however, recognize that there are certain necessities for an effective legal education whose graduates can serve the public. The assistance of the working group of the Council of Canadian Law Deans has been considerable in helping the Task Force to appreciate the current practices and their advantages for law student education.

In the Task Force's view the most important consideration is that the law school be adequately resourced to fulfill its educational mission. At a time when all public resources are subject to financial pressures, the Task Force is reluctant to be too prescriptive in its recommendations, but has concluded that there are certain irreducible minima that must be maintained if law societies are to accept the law degree as evidence that the competency requirements are being achieved. To that end it recommends that the law school must,

- be adequately resourced to enable it to meet its objectives;
- have appropriate numbers of properly qualified academic staff to meet the needs of the academic program;
- have adequate physical resources for both faculty and students to permit effective student learning;
- have adequate information and communication technology to support its academic program; and
- maintain a law library in electronic and/or paper form that provides services and collections sufficient in quality and quantity to permit the law school to foster and attain its teaching, learning and research objectives.

The Task Force recommends that the approved Canadian law degree requirements also be applied in considering new Canadian law school applications. The presence of adequate learning resources in new law schools is essential to ensure that the high quality of legal education in Canada is maintained. The provincial and territorial governments will also make decisions in this area. Any new Canadian law schools whose graduates are to be eligible to enter bar admission programs will be required to comply with all of the components of the approved Canadian law degree, set out in the Task Force's recommendations.

COMPLIANCE REQUIREMENTS

Law Schools

National requirements for the approved Canadian law degree will require a national compliance mechanism. This is the most efficient and appropriate way to ensure consistency across the country and transparent, fair and objective processes.

The requirement for a national compliance mechanism does not, however, necessitate an intrusive or onerous approach. Existing Canadian law schools offer a high standard of education and the Task Force is satisfied that compliance with the competency requirements will not pose difficulty for any of them. At the same time, however, the Task Force does recognize that the creation of requirements represents a change in current practices and any compliance mechanism, however modest, will require some adjustment. It also recognizes that the recommendation for a stand-alone course relating to ethics and professionalism and the requirements to address competencies may require adjustment by some law schools.

The Task Force recommends that the compliance mechanism for law schools should be a standardized annual report that each law school Dean completes and submits to the Federation or the body it designates to perform this function. In the annual report the Dean would confirm that the law school has conformed to the academic program and

the learning resources requirements and would explain how the program of study ensures that each graduate of the law school has met the competency requirements.

NCA Applicants

The Task Force recommends that, applying the national requirement, the NCA continue to assess applicants educated outside Canada to determine whether they have achieved the requirements and if not what additional requirements they will have to meet to obtain their certificate of qualification. The national requirement described in this report should provide appropriate guidance and result in NCA applicants being assessed in a manner consistent with graduates from Canadian law schools and in a transparent, objective, impartial and fair manner.

New Canadian Law Schools

The Task Force recommends that the national requirement for the approved Canadian law degree be applied when considering proposals for new law schools. Proposals would be required to demonstrate how graduates of the new law school would meet the requirements for the approved Canadian law degree, including the competency requirements. The Task Force recommends that the Federation's accrediting body be entitled to approve the new law degree with such conditions as it thinks appropriate, relevant to the national requirement.

Effective Date

The Task Force recommends that the Federation forthwith *adopt* the national requirement set out in these recommendations. Adopting the national requirement will make clear to existing law schools, to those making proposals for new law schools and to the NCA administrators and applicants the basis upon which applicants will be entitled to enter bar admission courses on a going forward basis.

It is essential, however, to ensure that the *implementation* of the adopted national requirement is completed in a fair manner that allows sufficient time for all those

affected by it to make the necessary adjustments and changes to their procedures. The Task Force's recommendation for an effective date specifically takes into account that,

- law societies and the Federation will need time to consider and approve the report and recommendations;
- law schools will need time to make any necessary curriculum changes, including in some cases the development of an ethics and professionalism course; and
- the timing of implementation must not prejudice students/applicants already engaged in their law school education or NCA processes.

The Task Force recommends that by no later than 2015, and thereafter, each applicant seeking to enter a bar admission program be required to meet the national requirement. Typically, as relates to applicants coming from law schools in Canadian common law jurisdictions, the requirements will apply to the class entering law school in September 2012, two academic years from now.

The Task Force is of the view that current law schools and the NCA should be encouraged to implement the national requirement before 2015 if they are capable of doing so. Moreover, any new law school proposals put forward before the date should address the national requirement since their own programs would likely be starting very close to or after 2012.

Implementation Issues

In addition to the effective date for the national requirement to apply, there are a number of other implementation issues that must be addressed. These include, but are by no means limited to,

- the form and substance of the standardized annual law school report;
- a mechanism to address non-compliance;
- the Federation's determination of the body to address compliance issues; and
- funding issues.

An implementation committee should begin working immediately to ensure a smooth transition period and the development of a transparent and flexible process that will effectively implement the national requirement.

The Task Force recommends that the Federation establish a committee to implement the recommendations.

CONCLUSION

Law societies have already demonstrated the ability to work together, adjust their individual approaches to embrace a national goal and maintain the necessary ongoing mechanisms to ensure that collaborative approaches remain relevant and meaningful in furtherance of the original goal.²⁷

A national requirement for entry of law school graduates to bar admission programs represents a continuation among law societies of a trend to foster and develop common approaches to regulation in the interest of the Canadian public in general, not limited by province or territory.

A national requirement for entry to bar admission programs addresses the issues raised in this report respecting the protection of the public interest, transparent regulation, fair access to regulated professions, criteria to be applied for new law school applications, AIT and CCB considerations and government scrutiny of regulators.

The requirement does this while at the same time respecting the high quality of legal education that Canadian law schools provide and the flexibility law schools should have to determine the most effective way to meet the requirements.

²⁷ For example, the NMA now provides for territorial mobility through The Territorial Mobility Agreement and work is currently underway on an agreement for mobility with the members of the Barreau du Québec.

Appendix 1

TASK FORCE MEMBERS AND PROCESS

The Task Force comprises eight benchers and three staff members from law societies across the country:

John J. L. Hunter, Q.C. (Chair) (British Columbia)
Susan Barber (Saskatchewan)
Babak Barin (Québec)
Vern Krishna, C.M., Q.C. FRSC (Ontario)
Brenda J. Lutz, Q.C. (New Brunswick)
Douglas A. McGillivray, Q.C. (Alberta)
Grant Mitchell, Q.C. (Manitoba)
Catherine S. Walker, Q.C. (Nova Scotia)
Sophia Sperdakos (Law Society of Upper Canada)
Donald F. Thompson, Q.C. (Law Society of Alberta)
Alan D. Treleaven (Law Society of British Columbia)

The Task Force has met 21 times and has issued three previous reports:

- Discussion Paper, November 2007
- Consultation Paper, September 2008
- Interim Report, March 2009

In 2007 the Task Force Chair met with the Council of Canadian Law Deans (“the Council”) and invited input from the Deans. The Task Force met twice with a working group that the Council established whose members were former Dean Patrick Monahan of Osgoode Hall Law School, former Dean Nicholas Kasirer of McGill University and Dean Brent Cotter of the University of Saskatchewan College of Law.

In March 2008 an ad hoc group of law faculty invited the Task Force to a question-and-answer session and provided the Task Force with a paper outlining its perspectives and suggestions outlined during the session.

In September 2008 the Federation authorized this Task Force to distribute its consultation paper to law societies, the legal academy, the profession and legal

organizations and to seek written submissions until December 15, 2008. The Federation distributed the paper to all law societies, the Canadian Association of Law Teachers, the Canadian Law and Society Association, the Canadian Bar Association, the Deputy Minister - Justice Canada, the Minister of Justice and Attorney General of Canada, the Ad Hoc Working Group of Law Faculty that had met with the Task Force at an earlier stage in its work, the Council of Canadian Law Deans, and the provincial Attorneys General. It invited law societies to consult with their own constituencies as they saw fit. A number of law societies issued invitations to their members and legal organizations to provide written submissions.

The Task Force received 37 responses from individuals, law societies, the legal academy, government, and organizations as follows:

Law Societies

Law Society of Alberta
Law Society of British Columbia
Law Society of Manitoba
Law Society of New Brunswick
Law Society of Saskatchewan
Law Society of Upper Canada
Law Society of Yukon

Canadian Law Faculties/Deans/Professors/Students

Professor H. W. Arthurs, Osgoode Hall Law School
Council of Canadian Law Deans
Queen's University Faculty of Law
Dean Mary Ann Bobinski, Dean University of British Columbia, Faculty of Law (Personal Capacity)
University of Calgary Faculty of Law
Bruce Feldthusen, Dean – University of Ottawa (Personal Capacity)
University of Saskatchewan, College of Law
Dean Brent Cotter, University of Saskatchewan, College of Law (Personal Capacity)
Dean Bruce P. Elman University of Windsor Faculty of Law (Personal Capacity)
Associate Professor Joanna Harrington –Faculty of Law, University of Alberta
Canadian Academic Law Library Directors Association (CALLDA)
Canadian Association of Law Teachers (CALT) and Canadian Law and Society Association (CLSA)

Other Law Schools

University of Huddersfield, West Yorkshire England
Lee Stuesser – Bond University

Universities

Wilfred Laurier University

Government

The Hon. Alison Redford, Minister of Justice, Alberta
The Hon. Jackson Lafferty, Minister of Justice, Northwest Territories
Department of Justice, John H. Sims
The Hon. Thomas J. Burke, Attorney General, New Brunswick

Organizations

Canadian Human Rights Commission
Canada Law from Abroad
Office of the Fairness Commissioner – Ontario

Individuals

George K. Bryce
Margaret N. Capes
D. Fox
Ersdale Knight
David Norman
Shaida Ratansi
Brittany Tofangsazan
John W. Whiteside (summary)¹

In June and July 2009 the Task Force received further helpful input from the Council on the issues raised in the Task Force's consultation paper, received a motion that Faculty Council of the University of Ottawa adopted in March 2009 and met with members of law faculties, including a meeting at the University of Toronto Faculty of Law and the Faculty of Law, University of Ottawa to further discuss the issues in the Task Force's consultation paper.

¹ All submissions are available on request.

Appendix 2

THE LAW SOCIETY OF UPPER CANADA

Office of the Secretary
(416) 947-3300

Osgoode Hall
Toronto, Canada
M5H 2N6

20th February 1984

David H. Jenkins, Esq.,
P.O. Box 2140,
Seventy Kent Street,
CHARLOTTETOWN, Prince Edward Island.
CIA 8B9

Dear David;

RE: APPROVED CANADIAN LL.B. DEGREES

Background

During the latter decades of the 19th century and the early decades of the present century a legal education in Ontario consisted of a mixture of service under articles in a law office and attendance at lectures in Osgoode Hall.

For the purpose of this letter it is unnecessary to go into detail, but it should be noted that the earliest records indicate a recognition that the substantive law could best be learned in a different way from the techniques involved in the practical application of it. In the period which included the First World War matriculant students were enrolled in Osgoode Hall Law School, entered into articles of clerkship and served in that capacity for five years during which time they also attended lectures at Osgoode Hall, normally, one lecture first thing in the morning and another late in the afternoon. This arrangement made it necessary for all articling to be done in Toronto. Students with a University degree could complete the course in three years.

In 1949 the curriculum changed. Students were required to have a first degree before entering Osgoode Hall Law School and then attended two years full time lectures in Osgoode Hall followed by a third year of full time articling. The fourth and final year harked back to the earlier system and involved half a day's lectures with the remainder of the day devoted to work under articles in the office.

A Time of Ferment

The arrangements just described continued into the second half of the century but were subjected to increasing criticism. Dr. Cecil Wright, a dean of Osgoode Hall Law School and later dean of the University of Toronto Faculty of Law, articulated the dissatisfaction which was growing within the profession with what was called a trade school approach to the teaching of law. It was no longer considered appropriate for law students simply to learn the law and the techniques of applying it. At the University of Toronto Law School they were led to approach existing law critically, to regard the law as a developing organism which should be subjected to critical analysis and which would benefit from imaginative reform. The so-called case method which had developed in the United States became the foundation of an innovative approach to the teaching of law particularly at the University of Toronto Law School. The differences between that school and Osgoode Hall Law School became focused on the requirement that university law school graduates must complete the fourth year of the Osgoode curriculum before being called to the Bar. There was no dispute that the university graduates needed to serve the third year under articles but they resented being required to attend lectures during the fourth year which largely duplicated coverage of subjects they had already studied during their university law course.

During the late 1950's and early 1960's the pendulum attained its furthest swing toward an academic as distinct from a practical approach to the teaching of law.

The Problem of Increasing Enrolment

The average number of students attending Osgoode Hall Law School in the years 1937 to 1940 was about 325. Enrolment fell during the war years to a low of 109 in 1944 but with the end of the war it began to rise. In the Fall of 1945 it had climbed to 445, in 1946 to 700, and in 1947 it reached 801. Between 1948 and 1952 there was a drop to 624 but the following year showed a return to increasing enrolments which were not expected to decline again.

It was clear that the physical facilities at Osgoode Hall had become inadequate to cope with an enrolment of double the number of students it had been designed to accommodate in the pre war years. A special committee of Benchers under the chairmanship of the then Treasurer,

Cyril Carson, Q.C., was formed to address the problem and quickly concluded that two new lecture halls were needed together with accessory rooms for study and instruction as well as increased library facilities.

The committee recognized that the extent of the new accommodation that would be needed was linked to the question of the role that Osgoode Hall would play in legal education in the future and whether or not the Society would continue to assume the increasingly costly bulk of responsibility for legal education. To explore this question the committee invited representatives of eight universities and colleges in Ontario to meet with them to discuss the future of legal education in Ontario. Meanwhile, the need for improved facilities at Osgoode Hall had become so acute that the committee recommended that the building project could no longer be delayed and in October 1955 Convocation approved an immediate start on the construction of an addition to the law school wing.

A New Approach to Legal Education

Approved LL.B. Degree — Bar Admission Course

During a lengthy series of meetings the general form of a new system of legal education began to emerge. The first outlines were sketched in a letter from Dr. W. A. Mackintosh, principal and Vice-Chancellor of Queen's University, Kingston, to the Treasurer, Cyril Carson, Q.C. Later the committee agreed to place the development of the plan in the hands of a small group consisting of D. Park Jamieson, Q.C., John D. Arnup, Q.C. and Professor Corry of Queen's University.

From their meetings emerged a memorandum proposing that for anyone desiring to practise law in Ontario legal education would be divided into three stages: pre law study, law school course and Bar Admission Course. For those wishing to take legal training as preliminary to a business, governmental or a similar career only the first two stages would apply. The memorandum described the three stages as follows:

"A. ADMISSION TO LAW SCHOOL COURSE

1. The minimum requirement for admission to a law school course should be
 - (a) Successful completion of two years in an approved course in an approved University after senior matriculation;
 - or
 - (b) Successful completion of three years in an approved course in an approved University after junior matriculation.

Note: No opinion was reached as to whether a minimum standing in any such course should be required.

2. Of course, a degree in an approved course in an approved University would satisfy the minimum requirement.

B. LAW SCHOOL COURSES

1. The Length of the law school course should be not less than three years.
Under the proposals being considered by the Special Committee of the Benchers, the present Osgoode Hall Law School course would be divided into a full-time academic course of three years and a Bar Admission Course in which the practical training would be given. Thus the two functions which the Law Society now performs as a teaching institution for Legal Education and as part of the accrediting mechanism of the Law Society would be separated.
2. A law school course should contain certain basic subjects which would be compulsory for all students in all schools.
3. Additional subjects to complete the regular course should be at the discretion of each law school.
4. It is also recognized that some law schools may desire to specialize in particular fields.
5. Successful completion of a law school course should entitle the student to a law degree.

C. A BAR ADMISSION COURSE

1. Graduates from the Osgoode Hall Law School academic course or from an approved law course in an approved University in Ontario would be eligible for admission to the Law Society and entrance to the Bar Admission Course at

Osgoode Hall provided they also satisfied the further requirements prescribed by the Benchers such as citizenship, good character and fitness, and payment of fees.

2. Under the proposals being considered by the Special Committee of the Benchers, the Bar Admission Course would consist of a period of service under articles of not more than 15 months (June 1st to August 31st of the succeeding year) and a further period of practical and clinical training at Osgoode Hall, supervised by members of the Law School Staff and practising members of the profession, of not more than 6 months (September 1st to February 28th).
3. Upon proof of the required service under articles and the passing of such oral and written examinations as may be prescribed, the staff of the Bar Admission Course would certify to the Benchers that the student in question had successfully completed such course.
4. Call to the Bar would then follow in the usual way, which under these proposals, would take place not later than March in each year."

Because of the importance of understanding the full scope of the discussions which took place at that time I have attached as an appendage to this letter excerpts from the Report of the Special Committee on Law School of the 14th of February, 1957 in which the three stages of legal education are particularly described; a copy of a letter written in 1957 by D. Park Jamieson, who was then chairman of the Legal Education Committee, to the principals or deans of law schools interested in establishing approved law courses; a summary of the 1957 Regulations of the Law Society respecting approved law courses which set out the courses each approved law school was required to offer.

The new shape of legal education received the support of practitioners and teachers throughout Ontario but also commended itself to the profession in other parts of Canada. It preserved and indeed emphasized the distinction between the substantive and the practical components of a legal training and vested full authority in the law schools to teach the prescribed academic courses without in any way limiting their freedom to teach other courses which might not have direct relevance to a training for the traditional practice of law.

It is clear from the reports of 1957 that the original intention was simply to reshape legal education for Ontario. It soon became obvious, however, that universities in other parts of Canada expected that some of their graduates would want to be able to qualify to practise in Ontario. Also they approved of the direction in which Ontario was moving and were ready to move in the same direction themselves. Accordingly, the Law Society of Upper Canada made it clear that any university law faculty in Canada that was prepared to follow the format which had been adopted in Ontario could be approved for the purpose of having its graduates enter the Bar Admission Course in Ontario. The following is a list of the approved law schools in the order in which they received approval:

Osgoode Hall Law School — 1957
 University of Toronto — 1957
 Queen's University — 1957
 University of Ottawa — 1957
 Dalhousie University — 1957
 University of Western Ontario — 1958
 University of New Brunswick — 1958
 University of British Columbia — 1959
 University of Saskatchewan — 1961
 University of Alberta — 1964
 University of Manitoba — 1965
 McGill University — 1969
 University of Windsor — 1968
 University of Victoria — 1975
 University of Calgary — 1979
 University of Moncton — 1979

In each case the same routine was followed in granting approval: the university law faculty would enquire what standards were to be met, they would receive the information from the Law Society of Upper Canada and after a period of planning would submit a detailed plan to bring themselves within the requirements. Their submission would then be circulated to all

the then existing approved law faculties and any comments received would be sent back to the applicant faculty and if necessary adjustments would be made. Ultimately, with the approval of all the existing faculties, the legal education committee in Ontario recommended to Convocation that the application for approval of the new law faculty be approved. When this was communicated to the faculty concerned they would put the first year's operation into effect followed by the second and third years until full approved status had been reached with the graduation of their first graduates.

There are at present sixteen universities across Canada which confer the approved LL.B. degree. It should be noted that until 1957 Osgoode Hall did not grant an LL.B. degree but rather the degree of Barrister at Law which was done at the same time the candidate was called to the Bar of Ontario. By a change in statute in 1957 Osgoode Hall Law School became empowered to grant academic degrees in law.

The first Bar Admission Course in Ontario began in 1958 composed of about thirty students. As transitional arrangements worked themselves through, the numbers began rapidly to increase as the graduates of the expanding number of approved schools reached the Bar Admission Course stage of their education.

Evolution

Within a few years a number of pressures began to develop within Osgoode Hall which were to have far reaching effects on the new system of legal education.

The physical addition to Osgoode Hall of two large lecture rooms and a series of seminar rooms and additional library facilities were again becoming overcrowded. They had originally been planned to accommodate a larger law school. By the early 1960's they were trying to house both a law faculty and LL.B. program and the Bar Admission Course teaching term. It became obvious that there was not enough room and that the two organizations had quite different needs which could only with difficulty be accommodated in the same space.

A second change was growing in significance. Osgoode Hall Law School had altered its essential nature by relinquishing to the Bar Admission Course the practical component of the legal education spectrum. It began more and more to take on the characteristics of a university law faculty and to lose the characteristics that it had shown during the many years that it had been the only professional law school in Ontario governed directly by the Benchers.

A third pressure came from government. The Law Society received some financial assistance from the government to help defray the costs of running the Bar Admission Course and also to help meet the expense of the new LL.B. program at Osgoode Hall Law School. The government made it clear that they would prefer Osgoode Hall Law School to be affiliated with a university for the purpose of receiving government assistance.

Coincidentally with these developments a new university to be called York was taking shape on the outskirts of Toronto and wished to have a law faculty. It was judged that there was no need for an additional law faculty in Ontario and so the suggestion was made that Osgoode Hall Law School quit Osgoode Hall and move to York University to form the basis of its law faculty. This was done in 1968.

The real significance of the move was that the Benchers no longer were in direct control of an approved law school and the first hand detailed knowledge they had had of the LL.B. course began to slip away from them. They retained the power of approval of law courses for the purpose of having their graduates enter the Bar Admission Course but they lost the intimate connection with one such course which had formed the basis of their control of the development of the courses taught in the approved law schools.

Another important change came about in 1968. The law deans in Ontario felt that the prescribed core courses provided too little flexibility and that if the various approved faculties were to be able to evolve better teaching methods they needed more freedom to decide on the contents of their curricula. They negotiated with the Society with the result that the number of so-called core subjects was reduced from eleven to seven by the deletion of evidence, agency, company law, and wills and trusts from the list of required core subjects.

The Ontario deans made the point that the law itself was evolving quickly and that law school curricula needed to be able to evolve as well and that in addition new teaching methods and techniques made it imperative that the Society evidence their faith in the ability of the law faculties to teach appropriately and well by trusting them to give their students a good legal education.

Traditionally almost every student that embarked on a legal education intended to be called to the Bar and engage in some form of practice. During this period, however, a small but

slowly increasing number of students entered law school intending to use the training in fields outside the traditional practice of law. The situation in this regard had been quite different from the experience in the United States where almost half the students entered law school without intending to practise law. In responding to this development the law faculties particularly in Ontario wanted to broaden the scope of their courses by offering an increased number of elective subjects to accommodate those who intended to enter fields on the periphery of practice or unconnected with practice altogether.

The change from eleven core subjects to seven had been accepted in Ontario without reference to the approved law schools outside Ontario. A number of other provinces deeply resented this unilateral action and proposed that graduates from Ontario would no longer be eligible to enter their Bar Admission Courses. Through several meetings of the Federation of Law Societies the position of the provinces which had been most critical of the change softened first to propose accepting Ontario graduates who had in fact covered the eleven core subjects and finally to accept an Ontario LL.B. on the original basis of equality. It was at this time that the approved Canadian LL.B. began to be known as the "portable" degree.

Role of the Federation of Law Societies of Canada

In view of the history of the development of the portable LL.B. degree in Canada it is understandable how Ontario became the approving authority for the Canadian approved LL.B. degree. It is less clear that it should continue to discharge this responsibility.

At the Federation's meeting in Quebec City in 1983, Ontario suggested that the responsibility be assumed by the Federation.

The development of the approved LL.B. degree in Ontario in 1957 had the effect of introducing a degree of uniformity of approach and content in legal education across the whole of Canada. This in turn has ensured a high degree of mobility for graduates seeking to enter practice in the various provinces and as well has provided a common basis from which LL.B. courses across Canada have developed while maintaining a standard which has remained acceptable nation-wide.

Inevitably as personnel within the various university law faculties change and new Benchers assume responsibility within the various law societies, stresses develop within the framework of the portable LL.B. degree. Individual law faculties wish to introduce innovations to improve both the content of their courses and the teaching techniques being used and it is important that these evolutionary changes do not endanger the portability of the degree. To accomplish this it is suggested that the same degree of consultation among the various law schools as characterized the initial approval of their program should be maintained to evaluate changes a faculty may wish to make which might bear on the basis of its approval or be of interest and assistance to other approved faculties. At present there is no formal reference to the Law Society of Upper Canada by approved law schools when changes in their curriculum or teaching methods are made. It may be that no significant changes have taken place which bear upon the basis for the approval of the degree given by any particular law school but it is not known with certainty whether or not this is the case. This situation must be remedied or the cumulative differences among the various law schools will continue until the very basis of portability is threatened which, once destroyed, might prove extremely difficult or even impossible to re-establish.

There are some indications that some graduates of approved LL.B. courses are coming to the Bar Admission Course in Ontario without adequate grounding in some areas of substantive law. This is occurring notwithstanding that law school faculties have undertaken to counsel students with respect to the courses they should take if they intend to go on to the Bar Admission Course. The extent of the problem is not precisely known, but it has become necessary for the Society to consider means of remedying the defects at the Bar Admission Course stage.

The scheme of legal education which was put in place in 1957 has served well for over a quarter of a century. It is not surprising, however, that it should now be subject to fresh evaluation in the light of circumstances which have been changing rapidly during those years. This letter is not the place to attempt such an evaluation but one or two matters might be identified for the sake of illustration.

It was probably never true that a newly called lawyer was omni-competent and fully capable of practising in any field of law. It is certainly true that the tremendous expansion in the number and complexity of fields of law has rendered such omni-competence quite impossible. It has always been difficult for a practitioner accustomed to handling certain types of matters

to switch the nature of his practice to another field of law. Some assistance can be gained by Continuing Education programs but often such programs do not provide adequate basic grounding for a person attempting to become adept at a new field but rather have been aimed at maintaining and enhancing the competence of those who continue to practise in fields familiar to them.

There is at present considerable discussion of specialization within the practice of law and it is suggested that there should be discussion as well of the possibility of recognizing clusters of related subjects which have in common their relationship to a recognizable area of legal practice. Such discussions might lead to the development of an alternative to true specialization which would involve the co-operation of law schools, governing bodies, and voluntary associations such as the Canadian Bar Association all of which organizations are in varying degrees involved in the initial education and training of lawyers and their continuing education. There is a bedrock of basic law which every lawyer must know and at the other end of the scale there are recognizable areas or fields of legal practice which can clearly be distinguished from other fields of practice each of which fields involves detailed mastery of skills and knowledge peculiar to that field of law. These clusters of knowledge may overlap with the clusters appropriate to another field but the fields themselves are more or less distinct as for example a real estate practice as distinguished from the practice of a criminal advocate.

Many law students recognize at the outset that their talents lie within certain broad limits and at an earlier stage than is now the case. As the conditions of practice change due to economic and other circumstances lawyers who have engaged in practice for some years may wish to change to engage in practice in another field. It is at present difficult for them to obtain the appropriate continuing legal education to enable them to do so.

The rapid expansion in the numbers serving in the legal profession has resulted in a dilution of the experience of the profession as a whole and this has made it more difficult for newly called lawyers to obtain the informal but invaluable counsel and advice of senior practitioners. Terms of articling are often served with quite junior members of the Bar and newly graduated practitioners form firms in which no senior experienced practitioners are included. It may be that some form of conditional licencing is indicated which would require junior lawyers to spend some minimum period of their early practice in association with members experienced in their chosen field of law before being permitted to practise alone or with others as junior as themselves.

These possibilities have been mentioned here to illustrate that after 25 years the present scheme can be expected to undergo re-examination and change. It is important, therefore, that appropriate steps be taken to ensure that these developments proceed if possible without the loss of the portability of the basic legal education.

The anomaly of one province discharging the necessary responsibility of co-ordination and control should be ended. The time appears to be ripe for the Federation of Law Societies to accept that responsibility and to play a central role in the orderly evolution of legal education in Canada. I should like to add a further thought respecting the role of the Federation in the future.

The development of a Federal Court System resembling the organization of a Provincial Court System and the rapid development of matters of national significance such as decisions on the Charter of Rights and Freedoms and the growth of inter-provincial or national commerce and industry which favours professional mobility all point to the desirability of the strengthening of the role of the Federation of Law Societies. In recent years through the auspices of the Federation the cohesion of the law societies across Canada has been greatly enhanced and questions of importance to all provincial governing bodies have been resolved through discussion and co-operation in a way which has bound them more closely together without in any way threatening the autonomy of the individual societies in their respective provinces.

I suggest that the governing bodies across Canada through the Federation of Law Societies not only keep pace with these developments but provide leadership in the consideration of the question of the formation of a Law Society of Canada which would accept responsibility for governing the national aspects of practice without impairing the status or the traditional roles of the individual provincial licencing bodies.

Yours very truly,
Kenneth Jarvis,
Secretary.

*Copy for all
returning members of
the Section Council
marked for your
attention for the particular
of the Committee
16/4/69 T.G.F.*

THE LAW SOCIETY OF UPPER CANADA
OFFICE OF THE SECRETARY



OSGOODE HALL
TORONTO 1

15th April, 1969.

Professor Thomas G. Feeney,
Dean,
Faculty of Law,
University of Ottawa,
Ottawa 2, Ontario.

Dear Dean Feeney:

As you know, the Society's requirements for approval of law courses for the purpose of having their graduates enter the Bar Admission Course in Ontario have been in existence unchanged since 1957. The Legal Education Committee and Convocation have given careful consideration to these Regulations, particularly in the light of the changing conditions of legal education generally. They consider it desirable to introduce a greater measure of flexibility into the stipulated requirements. This will facilitate a greater diversity of emphasis among the approved courses and allow the individual schools to develop along the lines of their special interests.

I am pleased to enclose a copy of the requirements embodying amendments which have the support of the Legal Education Committee and the approval of Convocation.

Yours very truly,

Kenneth Jarvis,
Secretary

J:R

Encl.

LAW SOCIETY OF UPPER CANADA

The requirements of the Law Society of Upper Canada pertaining to the approval of Law Faculties for the purpose of the admission of their graduates to the Bar Admission Course as amended on March 21, 1969 are as follows:

1. Admission Requirements

The admission regulations for an approved law school are as follows:

- (a) Successful completion of two years in full-time attendance in an approved course in an approved Canadian university after senior matriculation; or
- (b) Successful completion of three years in full-time attendance in an approved course in an approved Canadian university after junior matriculation; or
- (c) A degree in an approved course in an approved university.

2. Academic Programme

The course for an approved law school is three years in full-time attendance leading to the degree of Bachelor of Laws (LL.B.) or its equivalent.

3. Curriculum

- (a) An approved law school shall offer instruction regularly in the following subject areas:

Agency
Banking and Bills of Exchange
Civil Procedure

- 2 -

Company Law
Conflict of Laws
Constitutional Law
Contracts
Criminal Law and Procedure
Equity
Evidence
Family Law
Jurisprudence or one subject of a
jurisprudential nature
Labour Law
Legal History
Legislation and Administrative Law
Municipal Law
Partnership
Personal Property
Real Estate Transactions
Real Property
Sale of Goods
Taxation
Torts
Trusts
Wills and Administration of Estates

(b) It is understood that the different subject areas may be variously combined or subdivided at the different law schools, hence the above list should be regarded as indicating areas of the law in which instruction will be regularly offered. The list should not be regarded as necessarily establishing courses that must be taught separately or in combination under these specific labels. For example, 'Legislation' and 'Administrative Law' might be two separate courses under those names, whereas 'Personal Property' and 'Real Property' might be combined into a single course entitled 'Property'. Or, under a heading like 'Remedies', substantial parts of 'Civil Procedure', 'Contracts' and 'Property' might be combined.

- 3 -

The same sort of thing could be done under the heading 'Commercial Law'.

(c) Every student shall be required to take the major basic course offered in each of the following subject areas:

- Civil Procedure
- Constitutional Law of Canada
- Contracts
- Criminal Law and Procedure
- Personal Property
- Real Property
- Torts.

(d) It is understood that subject to subparagraph 3 (c), the academic planning authority of each approved Law School may provide any or all courses to its students on a required or an optional basis; may require students to elect between alternative courses or groups of courses to attain either diversification or specialization to an extent deemed desirable and may add courses to its curriculum on a required or an optional basis in subject areas other than those listed in subsection 3 (a).

4. Sequence of Courses

The academic planning authority of each approved law school may determine the sequence in which courses are taught.

5. Annual Session and Hours of Lectures

(a) The academic year shall extend for approximately thirty effective teaching weeks exclusive of examination periods.

- 4 -

Each student shall be under instruction or supervision by the teaching staff for approximately fifteen hours per week in class sessions, seminars, tutorials and legal writing or research projects.

(b) The academic planning authority of each approved law school may determine the hours allotted to the various courses offered.

6. Teaching Staff

Chiefly for the benefit of universities considering setting up new law faculties, the Law Society has prescribed certain basic requirements with regard to full-time teaching staff. Thus, the minimum number for the instruction of the first year is three, including the Dean. One additional full-time member must be appointed to the staff for each additional year so that in the result the basic full-time staff will be five when all three years are being taught.

7. Teaching Hours

The maximum teaching load recommended by the Law Society for each member of the full-time staff is six lecture hours per week.

8. Library

The Law Society requires to be assured that adequate

- 5 -

facilities, including library books and reading space, are available to the students and the faculty.

April 1st, 1969.

Appendix 4

ENTRY TO THE LEGAL PROFESSION – A COMPARATIVE SNAPSHOT**APPROACHES TO REGULATORY/ACCREDITATION STANDARDS IN OTHER JURISDICTIONS****UNITED STATES**

There are hundreds of law schools in the United States and a wide range of quality from superlative to those that operate entirely on-line and are not associated with any university. To address this wide range of quality the American Bar Association (“ABA”) has developed and administers a rigorous law school accreditation process, including a period under provisional accreditation.² As of June 2008 there were 200 ABA accredited law schools in the United States. This is in contrast to Canada’s 16 law faculties that offer a common law degree and six that offer a civil law degree.

There are U.S. law schools that do not have ABA accreditation. In most jurisdictions graduates may only write the state bar examination if they have graduated from an ABA accredited school. A few jurisdictions, such as California, have a separate accreditation system for non-ABA school graduates who may be entitled to write the bar examination. Thus, generally speaking the ABA requirements dictate minimum standards to which the “approved” American law school must conform.

The preamble to the ABA Standards for Approval of Law Schools states that they are founded primarily on the fact that law schools are the gateway to the legal profession. They are minimum standards, designed, developed and implemented for the purpose of advancing the basic goal of providing a sound program of legal education. The preamble goes on to state that an approved law school must provide an opportunity for its students to study in a diverse educational environment, and in order to protect the interests of the public, law students and the profession, it must provide an education program that ensures that its graduates:

- (1) understand their ethical responsibilities as representatives of clients, officers of the courts, and public citizens responsible for the quality and availability of justice;
- (2) receive basic education through a curriculum that develops:
 - (i) understanding of the theory, philosophy, role and ramifications of the law and its institutions;

² The American Association of Law Schools also maintains an accreditation system, which operates with a slightly different perspective from the ABA. Member schools must meet its accreditation requirements for membership, but it is not recognized by the Department of Education as an accrediting agency and no jurisdiction requires that a student have graduated from an AALS school in order to gain admission to the bar.

(ii) skills of legal analysis, reasoning and problem solving; oral and written communications; legal research; and other fundamental skills necessary to participate effectively in the legal profession;

(iii) understanding of the basic principles of public and private law; and

(3) understand the law as a public profession calling for performance of pro bono legal services.

The ABA standards then go on for eight chapters setting out the minimum requirements for the organization and administration of a school, the program of legal education, the qualifications, size, instructional role, responsibilities of and professional environment for its faculty, admissions and student services, its library and information resources including personnel and the collection, and its minimum physical facilities.

In addressing the program of legal education the ABA standards state:

Standard 301. OBJECTIVES

(a) A law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession.

(b) A law school shall ensure that all students have reasonably comparable opportunities to take advantage of the school's educational program, co-curricular programs, and other educational benefits.

Standard 302. CURRICULUM

(a) A law school shall require that each student receive substantial instruction in:

(1) The substantive law generally regarded as necessary to effective and responsible participation in the legal profession;

(2) Legal analysis and reasoning, legal research, problem solving, and oral communication;

(3) Writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after first year;

(4) Other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and

(5) The history, goals, structure, values, rules and responsibilities of the legal profession and its members.

(b) A law school shall offer substantial opportunities for:

(1) Live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one's ability to assess his or her performance and level of competence;

(2) Student participation in pro bono activities; and

(3) Small group work through seminars, directed research, small classes, or collaborative work.

In the American context, this approach provides a consistent template against which to measure schools. In an environment of hundreds of schools it provides a highly structured measurement tool to ensure minimum quality. It provides law schools with arguments for funding within their university environments to meet the standards. It recognizes that quality education is about both program content and learning environment.

In September 2008 the Council of the ABA Section of Legal Education and Admissions to the bar began a comprehensive review of the ABA Standards for the Approval of Law Schools. It is expected to take two years. Among the issues under discussion is the proposal to shift the focus of the Standards from input measurement to outcome measurement. The interim report of the ABA's Outcome Measures Committee notes that the proposal flows from a shift in thinking among legal educators in the United States and elsewhere, with particular emphasis on two reports published in the U.S.: WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (Carnegie Foundation for the Advancement of Teaching 2007); and ROY STUCKEY AND OTHERS, *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* (Clinical Legal Education Association 2007). The Outcome Measures Report places a great deal of importance on the Carnegie study's analysis of how schools should prepare students to become competent professionals. The Report notes that the Carnegie study,

...ascribes three apprenticeships that should make up their education. The first apprenticeship is the cognitive or intellectual, which provides students with the academic knowledge base. The second apprenticeship is the forms of expert practice shared by practitioners. The third is the apprenticeship of identity and purposes, which introduces the student to the values required of the professional community. ... In shorthand, CF describes these three apprenticeships as "knowledge, skills, and attitude."(p.7)

The ABA has also recently announced the establishment of a “Special Committee on the Professional Education Continuum” to consider the implications of a number of studies and changing theories of pedagogy on the legal education continuum. The goal and approach of the Committee has been described in a memorandum from Randy Hertz, Chair, Section of Legal Education and Admissions to the Bar, as follows:

Using the MacCrate Task Force's conception of legal education and preparation for practice as a continuum that begins prior to law school and continues after law school, the Special Committee will consider the pedagogical innovations stimulated by the Carnegie Foundation's report on legal education, the follow-up work by the Legal Education Analysis and Reform Network (LEARN), and the CLEA "Best Practices" report, and will examine the implications of these developments for all stages of the professional education continuum.

The committee's central purposes will be to (1) contribute to the ongoing national discussion of legal education, bringing to bear the Section's unique perspective as an organization composed of academics, practitioners, judges, and bar examiners; and (2) serve as a resource for and consultant to Section committees that are concerned with one or more of the segments of the professional education continuum. The committee will gather information, write reports or papers as appropriate, and propose conferences and/or workshops as appropriate.

It will be some time before either of these reviews results in any changes to standards or accreditation, but it is clear that there is momentum gaining in the United States for a shift in the approach to both legal education and law school accreditation.

COMMONWEALTH JURISDICTIONS

Australia, England and Wales, and New Zealand focus their attention on curriculum-based requirements.

In both Australia and England and Wales the law degree can be a true undergraduate degree, namely that students may enter it right out of high school. Often the law degree is taken at the same time as another liberal arts or science degree. In some schools it may also be taken following completion of an undergraduate degree.

Australia

Typically the Australian jurisdictions provide that a degree will be accredited if it requires completion of the equivalent of at least three years full-time study of law and a satisfactory level of understanding and competence in the following areas of knowledge:

Criminal Law & Procedure
Torts

Contracts
Property
Equity
Company Law
Administrative Law
Federal & State Constitutional Law
Civil Procedure
Evidence
Professional Conduct.³

In respect of each of these areas of knowledge, the rules in each jurisdiction include a synopsis of the subject area in a schedule, which specifies a range of topics for each area or, as an alternative, requires that topics, of such breadth to satisfy a more general guideline, are taught. So, for example, under criminal law and procedure the academic requirements might be stated as follows:

Criminal Law and Procedure

1. The definition of crime
2. Elements of crime
3. Aims of the criminal law
4. Homicide and defences
5. Non-fatal offences against the person and defences
6. Offences against property
7. General doctrines
8. Selected topics chosen from:
 - attempts
 - participation in crime
 - drunkenness
 - mistake
 - strict responsibility.
9. Elements of criminal procedure. Selected topics chosen from:
 - classification of offences
 - process to compel appearance
 - bail
 - preliminary examination
 - trial of indictable offences.

OR

Topics of such breadth and depth as to satisfy the following guidelines.

The topics should provide knowledge of the general doctrines of the criminal law and in particular examination of both offences against the person and against property. Selective

³ These are commonly known as the Priestley 11, named for the Chairman of the Committee that drafted them.

treatment should also be given to various defences and to elements of criminal procedure.⁴

Although there is currently no formal national accreditation system the uniform adoption of the Priestley 11 in every law school in Australia has meant that there is a strong degree of uniformity to the accreditation process that happens at the State level.

In 2008 the Australian Council of Law Deans (CALD) unanimously approved in principle a national standards model for application to law schools. The issue of a national accreditation system based on the standards is also under discussion. In considering the standards for the law course some outcome measurement language is used as follows:

2.1 Educational Outcome

2.11 The law school has identified, defined and disseminated the attributes that law students should exhibit on graduation.

At the same time, however, the standards speak to “curriculum content.” The standards also address “bricks and mortar” requirements somewhat along the lines of the ABA Standards.

England and Wales

The Law Society of England and Wales and the General Council of the Bar are authorised to prescribe qualification regulations for those seeking to qualify as solicitors or barristers. They have indicated that they will “recognise a course of study leading to the award of an undergraduate degree” if it satisfies the requirements as set out in their 2002 *Joint Statement issued by the Law Society and the General Council of the Bar on the Completion of the Initial or Academic Stage of Training by Obtaining of an Undergraduate Degree* (Joint Statement).

The statement includes both resource and program of instruction components, addressing learning resources (includes human resources, physical resources, and student supports), the requirement that the institution granting the degree has such authority granted by the Privy Council, the length and structure of the course of study, standards of achievement expected of students (knowledge and skills), the knowledge and general transferable skills (there is significant overlap between the standards and the knowledge and transferable skills) and the content or coverage of the course of study.

The content or coverage, referred to as the Foundations of Legal Knowledge, is

- a. Public law, including Constitutional Law, Administrative Law and Human Rights
- b. Law of the European Union

⁴ CALD Report 2008. p.78.

- c. Criminal Law
- d. Obligations, including Contracts, Restitution and Tort
- e. Property Law
- f. Equity and the Law of Trusts
- g. In addition, training in legal research.
- h. The remaining half-year in law must be achieved by the study of legal subjects. A legal subject means the study of law broadly interpreted.

The required knowledge and general transferable skills are articulated as

Knowledge

Students should have acquired –

- 1 Knowledge and understanding of the fundamental doctrines and principles which underpin the law of England and Wales particularly in the Foundations of Legal Knowledge.
- 2 A basic knowledge of the sources of that law, and how it is made and developed; of the institutions within which that law is administered and the personnel who practise law.
- 3 The ability to demonstrate knowledge and understanding of a wide range of legal concepts, values, principles and rules of English law and to explain the relationship between them in a number of particular areas.
- 4 The intellectual and practical skills needed to research and analyse the law from primary resources on specific matters; and to apply the findings of such work to the solution of legal problems.
- 5 The ability to communicate these, both orally and in writing, appropriately to the needs of a variety of audiences.

General Transferable Skills

Students should be able –

- 1 To apply knowledge to complex situations.
- 2 To recognise potential alternative conclusions for particular situations, and provide supporting reasons for them.
- 3 To select key relevant issues for research and to formulate them with clarity.
- 4 To use standard paper and electronic resources to produce up-to-date information.
- 5 To make a personal and reasoned judgement based on an informed understanding of standard arguments in the area of law in question.
- 6 To use the English language and legal terminology with care and accuracy.
- 7 To conduct efficient searches of websites to local relevant information; to exchange documents by email and manage information exchanges by email.
- 8 To produce word-processed text and to present it in an appropriate form.

The Solicitors Regulation Authority has recently revised the rules and approaches for the Legal Practice Course (LPC), which is a required step in the process of becoming a solicitor. It follows and builds upon the academic training. The new LPC focuses on outcomes that the successful students should be capable of doing at the end of the

course. They are described as the “irreducible minimums” that all students need to demonstrate to pass.

New Zealand

Legal education regulation in New Zealand is governed by the New Zealand Council of Legal Education. It is an independent statutory body that defines and prescribes courses of study for those seeking admission as barristers and solicitors and for general legal education.

The Council's 2008 report sets out the role of the Council in setting standards:

The general activities of the Council are public interest, regulatory concerns and centre on the Council's responsibilities for the quality and provision of legal training prior to admission as barristers and solicitors.

These activities include -

- setting courses of study for the examination and practical legal training of persons wishing to be admitted as barristers and solicitors in New Zealand;
- providing, or arranging for the provision of those courses of study;
- arranging for the moderation and assessment of those courses of study;
- assessment of qualifications particularly those of overseas law graduates and legal practitioners wishing to practise in New Zealand;
- arranging for the provision of research as necessary, and tendering advice on legal education;
- administering and conducting certain examinations.

To carry out its tasks in discharge of its functions set out in Lawyers and Conveyancers Act 2006, the Council has maintained its general liaison with the Judiciary, the legal profession, the universities and law students, and has specifically undertaken the activities detailed below.

PROVISION OF COURSES

Compulsory Law Subjects

The Council prescribes the core curriculum for the bachelor of laws degree and monitors these subjects through a moderation system. The five compulsory subjects that are moderated are –

Law of Contracts

Law of Torts

Criminal Law

Public Law

Property Law (or Land Law and Equity and Succession where Property Law is not offered.)

In respect of the above subjects the examination papers are settled by a university teacher and a moderator appointed by the Council of Legal Education. Moderation is also required for Legal Ethics which is a compulsory course for admission to the profession. A sixth Council prescribed core degree subject (Legal System) is not moderated owing to the introductory nature of the course and variations between courses.

Subjects Compulsory for Admission

During 1997 the Council introduced a requirement for all law students who completed their bachelor of laws, or bachelor of laws with Honours degrees after July 31, 2000 to pass a university course in Legal Ethics as a further requirement for admission. On August 1, 2008 the requirement was extended to all applicants for admission regardless of the completion date of their degree.

The course which was prescribed and moderated by the Council, has as its broad principles -

- an introduction to ethical analysis including an examination of various theories of ethics
- the applicability of ethical analysis to legal practice
- the concept of a profession and the ethical professional duties of practitioners (which includes, among other topics, conflicts of interest, confidentiality, duties to the Court, duties of loyalty and fidelity)
- the wider responsibilities of lawyers in the community.

The course was introduced in response to a report which had recommended that courses in Legal Ethics be required at three levels of legal education: academic, vocational training and continuing education after admission to the Profession. In New Zealand this was implemented by the Council by the introduction of the undergraduate university course in Legal Ethics which, while not a compulsory degree subject, is required for those students wishing to be admitted to the profession. The requirement was further implemented by the introduction of Ethics and Professional Responsibility components into the Council's Professional Legal Studies Course.

The Council also has responsibility for accreditation of professional legal studies courses.

Scotland

At present, the Scottish legal education and training framework consists of three stages leading to qualification, followed by a Continuing Professional Development regime post-qualification.

Academic stage

The first stage in the route to qualification is the academic stage which, in Scotland, can be undertaken either by way of an Exempting Scottish LL.B. Degree accredited by the Law Society of Scotland, or by way of the Society's own Professional Exams.

Exempting Scottish LL.B. Degree

The Society prescribes the program content and structure for degree programs to be accredited as Exempting Scottish LL.B. Degrees, which, together with other training, will provide entry to the Scottish solicitors' profession. The content and structure is equivalent to the curriculum for the Society's Professional Exams ('the Examination Syllabus').

The Society's current "Accreditation Guidelines for Applicants" for the Exempting Scottish LL.B. Degree state:

The professional subjects taught within the wider context of the LL.B. allow students exiting from an LL.B. to have acquired the requisite knowledge, understanding and generic skills of those subjects that form the foundation of subsequent professional training.

Specifically, those requirements are for:

Subject-specific abilities of:

- knowledge
- legal and ethical values
- application and problem-solving
- sources and research

General Transferable Intellectual Skills of:

- analysis, synthesis, critical judgement and evaluation
- independence and ability to learn

Key Personal Skills of:

- communication and literacy
- personal management
- numeracy, information technology and teamwork

And the following Professional Subjects:

- public law and the legal system
- conveyancing
- Scots private law
- evidence
- Scots criminal law
- Taxation
- European Community law
- Scots commercial law

The Society does not specify the number of credits to be attached to particular courses or, indeed, the overall number of credits to be allocated to the core subjects. What the Society's LLB accreditation guidelines do specify is that the program of study for an accredited LLB must include the study of the Professional Subjects for the equivalent of not less than two years.

Professional Exams

Unlike the Exempting Scottish LL.B. Degree accredited by the Society, the Society's Professional Exams require the individual to be in a pre-Diploma training contract under the supervision of a practising solicitor. The Professional Exams may also be taken by an individual who has graduated or is eligible to graduate with an Exempting Scottish LL.B. Degree but who lacks passes in all of the Professional Subjects. Although there is no validation or authorisation by the Society of firms offering pre-Diploma 'traineeships', the Society requires the pre-Diploma 'traineeship' to cover experience in Conveyancing, Litigation and either Trusts and Executries, or where the training solicitor is not engaged in private practice, the legal work of the training solicitor.

In 2006 the Law Society of Scotland launched a significant project to review all components of legal education from pre-call to post-call requirements. A project plan was introduced at the Annual General meeting in 2009 and is progressing forward. Among other features the proposals focus on learning outcomes. The report on the project notes:

Changing trends in professional education: Increasingly, the trend in professional education has been to move away from prescription of 'process' (ie specifying the length of the course, the curriculum, class sizes, tutor ratios, library holdings, and the like), to description of outcomes which need to be demonstrated. These are often referred to as "competencies", and are, increasingly, being adopted by firms in their use of 'competence frameworks' in order to measure or assess staff performance in a more objective and meaningful way. Jurisdictions in Australia, and England and Wales, as well as other professions, have adopted an outcomes-based approach, an approach which is also supported and encouraged by the UK Quality Assurance Agency for higher education.

Appendix 5



Council of Canadian Law Deans
Conseil des doyens et
des doyennes des facultés
de droit du Canada

57 Louis Pasteur
Ottawa ON K1N 5N5
www.cclc-cdfdc.ca

June 1, 2009

Mr. John Hunter, Q.C.
Hunter Voith
1040 West Georgia Street
Suite 2100
Vancouver, B.C.
V6E 4H1

Dear John:

**Re: Federation of Law Societies of Canada
Task Force on Accreditation of the Common Law Degree**

I am writing on behalf of the Council of Canadian Law Deans (CCLD) to offer our perspective on the March 2009 Interim Report of the Task Force on the Canadian Common Law Degree. We note the Task Force's plans for continued engagement with the legal education community regarding its work, and we believe it helpful to share with you our most recent thinking regarding the Task Force's Interim Report.

As I am sure you appreciate, the CCLD has come to regard the Task Force's mandate and activities as one of the most significant developments in many years in relation to legal education in Canada. We have given the issues extensive consideration in our law schools and within our own Council, virtually from the time of our first meeting with you in November of 2007. We have also carefully considered the Reports from the Task Force and the views of others in their submissions to the Task Force. We have appreciated having had this material shared with us.

In this letter we wish to communicate two perspectives or positions related to the Task Force's work. One relates to "competencies". The other relates to "compliance". (We are also preparing a separate response on "Institutional Requirements", which I will send to you in the coming few weeks.). We think that the perspectives we share in this letter are important to the work of the Task Force, and also of long term importance to legal education in Canada, the legal profession and the public that lawyers serve.

We advance them in the context of what we understand to be two acknowledged realities of your work. The first reality is that the legal profession in Canada presently faces the challenge of i) ensuring that a system is in place to ensure that fair consideration is given to foreign-trained lawyers who seek to become qualified to practice law in Canada, and ii) ensuring that a sound process, with sound criteria, is in place to assess applications for

new law schools in Canada. The Canadian law deans see this reality as an acknowledgment that there is a growing need for opportunities to be made available so that more people may take up the study and practice of law in Canada. We fully support this objective.

The second reality is that it is critical that these objectives - captured in the Task Force's mandate - be achieved in ways that do not diminish the quality of legal education presently provided in Canada. Our understanding is that this reality is widely shared within the Canadian legal profession and within the Task Force itself. We note with appreciation the Task Force's recognition of this in the Introduction in your March 2009 Interim Report:

"In varying degrees the submissions raise, directly or indirectly, the question of whether the Task Force intends some fundamental change to Canadian law schools. That is neither our intention nor what we consider to be our mandate. The Task Force fully appreciates the richness of legal education offered in Canadian law schools and the importance to the law schools of preserving their ability to deliver a rich and diverse legal education to students. "

We agree with this observation. It is in this spirit that we express the following perspectives.

With respect to the Task Force's work on the delineation of "competencies", we welcome the acknowledgment that "competencies" does not mean "courses", and that it is within the purview and mandate of a law school to identify the most suitable ways to satisfy "competencies" requirements of its students. We have given careful consideration to the Task Force's perspective on "competencies", as well as the suggestions and proposals of other commentators on this question. It is our considered judgment that if the Task Force continues to contemplate a "competencies" approach, the recommendations of the Law Society of Upper Canada (see attached) in this regard should be adopted by the Task Force. We are of the opinion that they reflect a modernized, relevant and contextual approach to legal education in Canada and that they meet the legal profession's expectations and requirements. Given that the issues leading to the formation of the Task Force are liable to have the greatest influence in Ontario, we are of the view that the Law Society of Upper Canada's perspectives on this question should be given special consideration in your deliberations. It is a framework that the law deans, including the law deans from Ontario, could accept.

Our second perspective is associated with the Task Force's expressed confidence in the quality of legal education in Canada at the present time. It is our view that the Task Force should recommend only those requirements for law school compliance that are necessary for fulfillment of law societies' mandated public interest responsibilities. Indeed these articulated standards are not only met, but exceeded, by our law schools today. It would be unfortunate in the extreme and contrary to the best interests of legal education, the legal profession and the public interest if substantial resources were required to be dedicated to compliance in circumstances where less intrusive alternatives are available to confirm that a high quality of legal education continues to be delivered at our law schools.

As you may know, Deans Monahan and Kasirer are leaving their positions in the near future. The CCLD intends to continue the Working Group of Law Deans, as a liaison group to your Task Force, but with the addition of Dean William Flanagan of Queen's Law School and Interim Dean Daniel Jutras of McGill University, along with myself. We would be pleased to continue our engagement with the Task Force, either through the Working

Group or through the CCLD as a whole, to address any issues related to your work or related to our submissions to the Task Force. We would be available to meet at your convenience.

Sincerely,

W. Brent Cotter
President
Council of Canadian Law Deans

APPENDIX

LAW SOCIETY OF UPPER CANADA
SUBMISSION
TO
THE FEDERATION OF LAW SOCIETIES OF CANADA
TASK FORCE ON THE APPROVED COMMON LAW DEGREE
(NOVEMBER 2008)
EXCERPT (p.6-7)

The Law Society [of Upper Canada] suggest the following as the competences that should be required for entry to law society bar admission/licensing programs in common law jurisdictions in Canada:

- a. Foundations of Canadian common law, including,
 - the doctrines, principles and sources of the common law, how it is made and developed and the institutions within which law is administered in Canada;
 - Contracts, torts and property law; and
 - Criminal Law
- b. The constitutional law of Canada, including principles of human rights and Charter values and Canadian law as it applies to Aboriginal peoples.
- c. Principles of statutory analysis.
- d. Principles of Canadian administrative law.
- e. Legal research skills.
- f. Oral and written communication skills specific to law.
- g. Professionalism and ethical principles.

In listing these competencies the Law Society,

- supports the Federation Task Force's views that these are *competencies*, not *courses*, and that law students should be able to satisfy them in a number of ways that may differ from competency to competency and law school to law school;
- has deleted civil procedure as a required competency. It is important for law students to understand the principles that govern the resolution of disputes in the Canadian common law system; it is not essential for them to learn specific practice rules in law school. Students should be exposed to the principles while learning the foundations of common law;
- has specified which competencies should be acquired in the Canadian legal context, rather than requiring this of every competency;
- has expanded the competency related to constitutional law principles to include specific mention of Canadian law as it is applied to Aboriginal peoples;

- emphasizes “principles” of administrative law to ensure that there is no confusion that a course is being required. It also suggests that the word “regulatory” is unnecessary;
- has substituted the term “professionalism and ethical principles” for the Federation Task Force’s “professional responsibility”.

Appendix 6



Council of Canadian Law Deans
Conseil des doyens et
des doyennes des facultés
de droit du Canada

57 Louis Pasteur
Ottawa ON K1N 5N5
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June 29, 2009

Mr. John Hunter, Q.C.
Hunter Voith
1040 West Georgia Street
Suite 2100
Vancouver, B.C.
V6E 4H1

Dear John:

**Re: Federation of Law Societies of Canada
Task Force on Accreditation of the Common Law Degree**

I am writing on behalf of the Council of Canadian Law Deans to follow up on my previous letter of June 3, 2009 in order to provide, as promised, the CCLD's perspective on the Approved Common Law Degree described as "Institutional Requirements" in the March 2009 Interim Report by the Task Force. We have tried to respond to the Task Force's "Institutional Requirements" questions as presented in the Interim Report, but have also added a few comments on some aspects of Canadian law schools' present commitment to our 'institutional infrastructure' that we urge the Task Force to incorporate into its final report.

In general terms, CCLD is of the view that the current situation, where Canadian law schools enjoy a margin of manoeuvre to set those requirements, subject to the general policies of their universities, produces satisfactory results. While the requirements imposed by each law school are broadly similar, we note that the liberty they currently enjoy is used to tailor their programs to specific situations or to implement initiatives that are designed to respond to the increasingly diverse needs of the legal profession. There is no evidence that this flexibility threatens the protection of the public in any way. Accordingly, we would urge the Task Force not to recommend the adoption of any stringent standards with respect to those issues.

1. Entry Requirements

The Task Force Interim Report asks whether the current entry requirement of two years of university education should be maintained or whether the "*de facto* requirement of an undergraduate university degree" should be adopted.

We think it is inaccurate to speak of a "*de facto* requirement" of a prior university degree. While it is true that a large number of law school entrants do hold such a degree, and

sometimes even a masters or a doctorate, some Canadian law schools have, in circumstances including but not limited to mature students and Aboriginal students, felt entitled to admit students with less than a university degree.

Moreover, it is well-known that at McGill University about 15%-20% of the first year students arrive directly from CEGEP (*i.e.*, a two-year, post-secondary, pre-university program of study). McGill has decided that the level of achievement of this small group of CEGEP candidates is so outstanding that these students deserve admission. As a matter of fact, this group regularly produces some of McGill's best students: gold medalists, Supreme Court clerks, Trudeau Foundation scholars. Many of them go on to careers of high achievement as lawyers in Canada or elsewhere around the world. There is every reason to believe that these students are no less equipped to practice law than others. Moreover, Québec universities, including McGill, cannot require more than a CEGEP degree for entry into any undergraduate degree, including law.

There are other programs for the joint study of the civil law and the common law, including the University of Ottawa's National Program and Programme de droit canadien, the exchange programs between Université de Montréal and Osgoode Hall Law School and between Université Laval and the University of Western Ontario, and the graduate common law programs at Université de Montréal and Université de Sherbrooke, and finally the Université de Sherbrooke and Queen's University program. A number of graduates from those programs entered law school directly from CEGEP. Again, there is no reason to believe that they are less equipped to practice law. To take the University of Ottawa's National Program as an example, evidence has shown that outstanding CEGEP students perform equally well in law school as students who hold a prior university degree, and graduates of the National Program have led successful careers throughout Canada.

We would also point out that Canadian law schools participate in a number of joint programs where law is studied concurrently with another discipline. In some circumstances, this may result in a student beginning to study law before completing the requirements of the other degree. Yet, those students are held to the same standards for their law courses and there is no evidence to suggest that they perform differently than students who completed their undergraduate degree before the commencement of their law degree.

Therefore, in the absence of cogent evidence that the current situation is problematic in terms of the protection of the public, we would recommend that the flexibility currently enjoyed by each law school with respect to entry requirements be maintained.

2. Duration of the Program

We believe that it is more appropriate, and more in line with university practice, to express the duration of university studies in terms of credits rather than years. Increasingly, universities are recognizing that teaching takes place during summers, on exchange with other universities, through internships, on a part-time basis and subject to other temporal modalities. These days, it is more reliable to speak about the academic program by reference to credit requirements.

In this regard, the usual duration of a common law degree is 90 credits. This amounts to three years of study, excluding summer terms. However, we would suggest that this need not be a strict requirement, in order to take into account situations including, but not limited to courses followed in other faculties, exchange programs abroad, joint common law and civil law degrees, a common law degree undertaken after a Canadian civil law degree and joint degrees involving law and another discipline.

3. Methods of Delivery

The Task Force asks whether “in-person” learning should be a requirement for all or part of the common law degree, or whether other delivery systems should be taken into account. We understand the expression “in person” to mean direct interaction with an instructor.

Canadian law schools employ a variety of learning methods, including “in-class” lectures, seminars, independent research, exchange programs, internships, clinical education, and so forth. Some of those methods may not constitute “in-person” learning strictly speaking. The benefits of employing a variety of learning methods within a curriculum are widely acknowledged. Law professors retain a substantial discretion over the choice of learning methods, and CCLD members recognize the value of academic freedom in this regard. On the whole, Canadian law schools have strived to provide their students with the best learning methods.

Canadian law schools have begun to explore the possibilities offered by technological advances to embrace new methods of learning that would enrich the students’ learning experience. We would point out that technology allows forms of direct interaction between student and instructor that may be as beneficial as classical “in-person” interaction. To some extent, technology may help to make legal education more accessible to persons with disabilities, or to persons living in remote areas.

CCLD is of the view that it is too early in the adaptation of law teaching to technology to set precise standards concerning learning methods. We are concerned that precise standards could stifle creativity and prevent law schools and law professors from embracing technological advances to improve their students’ learning experience. Nevertheless, we do believe in the value of currently employed learning methods that may loosely be described as “in-person” and we do not support their replacement with technology-based learning. We believe that substantial “in-person” learning, with the opportunities for significant formal and informal engagement between the students and the instructor, and among the students themselves, provides important learning opportunities that are not able to be achieved in other ways.

4. Joint Degrees

Joint degrees, involving the study of law and another discipline, are common among Canadian law schools and are increasingly popular. These programs are designed to train professionals who will be able to successfully integrate another discipline in their legal practice. Law schools have been uniformly vigilant about preserving the law-specific character of their degrees so that the interdisciplinary experience complements legal training rather than acts as a substitute for the law. There is no indication that graduates of these programs fail to meet the regulatory standard of protecting the public.

CCLD is of the view that joint programs do not require a monitoring procedure distinct from the one envisaged for the regular common law degree.

5. Research and Scholarship

The importance of research and scholarship was not raised in the most recent Interim Report of the Task Force. Nevertheless, it is one of the features of Canadian legal education that has introduced into Canadian law schools a degree of vibrancy and relevance unparalleled in prior generations. We are strongly of the view that a law school without a commitment to research and scholarship is doing a disservice to its students, to the law, to the legal profession and to society itself. While we appreciate that the legal profession is not directly mandated to promote legal research and scholarship, we think it would be a serious mistake to fail to appreciate the ways in which faculty members committed to the scholarly enterprise of legal education, enrich the learning experience for students and prepare them for professional careers. The work of law teachers who are also legal scholars gives students the tools to see the law in imaginative ways, to give them the confidence to search for new perspectives in law, to approach legal problems and issues in a new light and to search out innovative solutions for their clients. This contribution to legal education is one of the most dynamic features of Canadian law schools, and contributes to an enriching legal education for students. In our view a commitment to research and scholarship is a critical 'institutional feature' of a modern, high quality law school.

6. Institutional Infrastructure

Though the Task Force did not identify the following institutional requirements of a modern, high quality law school in Canada in its most recent Interim Report, we wish to emphasize that other features of Canadian law school infrastructure are critical to the maintenance of quality. We urge you to address in your final report the essential nature of a well equipped law library, of appropriate faculty-student ratios, of law school investments in financial aid for students to ensure access to legal education, and related features of a legal education that have helped to maintain and improve the quality of Canadian law schools to date. Absent a recognition of these requirements, the Task Force risks inviting a minimal framework for the establishment of law schools in Canada and invites a 'race to the bottom' regarding legal education in Canada. This is surely in direct opposition to the mandate of the Task Force, is a set of potential outcomes that the Task Force itself would oppose and, most importantly, is the opposite of what Canadians rightfully expect of a high quality of legal education intended to protect and advance the public interest.

We appreciate the opportunity to share these perspectives with you and your Task Force, and welcome the opportunity to continue the dialogue on legal education with you and your colleagues.

Sincerely,

A handwritten signature in dark ink, appearing to read "Brent Cotter". The signature is fluid and cursive, with the first name "Brent" and last name "Cotter" clearly distinguishable.

W. Brent Cotter, Q.C.

Professor and Dean
College of Law
University of Saskatchewan

President
Council of Canadian Law Deans

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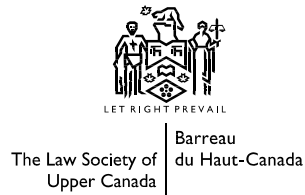
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LAW SOCIETY OF UPPER CANADA

SUBMISSION

TO

THE FEDERATION OF LAW SOCIETIES OF CANADA

TASK FORCE ON THE APPROVED COMMON LAW DEGREE

November 2008

INTRODUCTION

The Law Society of Upper Canada thanks the Federation of Law Societies of Canada for inviting it to make submissions on the Task Force on the Approved Common Law Degree's ("the Federation Task Force") consultation paper.

One of the Law Society of Upper Canada's ("the Law Society") most important functions is to ensure the entry level competence of newly called lawyers. Since early 2007, through its own Task Force, the Law Society has considered licensing and accreditation issues, the relationship between law school and professional licensing regimes, the accreditation of internationally trained professionals and criteria for the establishment of new law schools.

The factors identified as influencing the decision to establish the Federation Task Force are all at play in Ontario, perhaps more so than at any other law society. Ontario has the largest bar in the country, an increasingly diverse legal profession and citizenry, growing numbers of international lawyers and Canadian students with law degrees from outside Canada seeking admission to the bar, and challenging market place factors. It has six law schools and the highest number of law students and articling students in the country. Recent proposals for new law schools have all been made in Ontario. The Law Society is subject to the *Fair Access to Regulated Professions Act* requirements for transparent, objective, impartial and fair licensing processes. Its firsthand experience with all these issues has illustrated that they are complex and interwoven, requiring careful analysis and sensitive treatment.

The Law Society's submission reflects its Task Force's work as well as its relationship with the profession and legal academy in Ontario. It also reflects the Law Society of Upper Canada's unique position as the only law society that already has a formal statement, dating back to 1957 and amended in 1969, (1957/1969 document) of "requirements pertaining to the approval of Law Faculties for the purpose of admission of their graduates to the bar admission course."

The Law Society sought the views of lawyers, legal organizations and law schools in Ontario. It received a number of comments, which it is providing to the Federation Task Force under separate cover with this submission.

The Federation Task Force's consultation period has been short. A number of the issues the consultation paper raises are touched upon only briefly. The Law Society believes it is necessary to hear the views of others before it can properly comment on some of these. Accordingly, the Law Society's submission provides its preliminary views on some issues and defers comment on others. It looks forward to further opportunities to discuss the issues once the Federation Task Force reports on the results of the consultation process. It reserves its final views on any Federation Task Force recommendations to a later date.

TASK FORCE QUESTIONS

- 1. Does the suggested list of foundational competencies encompass those that candidates for entry to bar admission programs should possess?**
- 2. Is it over or under-inclusive?**
- 3. Is a stand-alone course on professional responsibility an appropriate requirement for candidates seeking entry to bar admission programs?**

The Law Society's by-laws require a candidate seeking entry into the licensing process to have graduated from an accredited law school in Canada or obtained a certificate of accreditation from the National Committee on Accreditation.

The 1957/1969 document defined a number of components for the "approved law school." In 2006, having received an application from Lakehead University respecting a proposed new law school, the Law Society recognized the need to revisit the 1957/1969 document, particularly because of significant changes that have taken place in the legal profession and law schools since 1969.

The Law Society has the responsibility for admission of lawyers to the bar and it has authority to articulate required competencies for those seeking to be licensed. The 1957/1969 document is evidence of this authority. Although outdated, it has had an important influence on the general structure of Ontario, as well as other Canadian, common law schools respecting prerequisites for admission to law school, compulsory courses and the duration of the law school program. At the same time, because the Law Society only specified a limited number of required components, law schools were able develop innovative and flexible programs. The 1957/1969 document reflects a balance between the regulator's and the academy's priorities.

The Federation Task Force has recommended, as one option, that this document be updated, with the Federation and individual law societies articulating "foundational competencies" that law graduates seeking admission to provincial bar admission/licensing programs must have acquired in law schools. The LSUC Task Force on Licensing and Accreditation devoted considerable

time to discussing the advantages and disadvantages of this approach. A majority of the LSUC Task Force decided to recommend this model.

There were alternate views expressed by a minority of the LSUC Task Force members. The basis for the minority view is explained in the “Response to the Consultation Paper of the Task Force on the Canadian Common Law Degree,” submitted by Professor Harry W. Arthurs, former Dean of Osgoode Hall Law School, former President of York University, a leading Canadian expert on legal education and the legal profession. His full paper can be found as an Appendix, along with the other submissions received during the consultation process. See “Minority View” on page 11.

The majority of the LSUC Task force decided that the “foundational competencies” approach was the preferable option of those offered by the Federation Task Force Report. The next question, which the Federation Task Force has recognized, is what should be included as a foundational competency? A connected question is at what point in the legal education continuum is a competency best acquired?

The comments the Law Society received illustrate the range of views on foundational competencies. While most individuals and legal organizations agreed with stating competencies they differed somewhat on what should be included. They suggested changes to the list and additions such as family law, operation of a law practice, trans-systemic legal competency, taxation, and labour. In contrast, those in legal education raised concerns that any attempt to list competencies, with no evidence justifying one over another, or even explaining why such a list is necessary in the Canadian law school context, would damage quality and innovation in law schools.

The majority of the LSUC Task force does not agree that a statement of competencies would undermine law school innovation or that such a statement would mark a significant shift in the relationship between law societies and law schools. The 1957/1969 document’s statement of required courses, although not officially adopted as a national statement, has resulted in

beneficial consistency across all common law schools; arguably one of the reasons law societies could so readily adopt national mobility for lawyers in 2002.

The LSUC Task Force has received submissions that suggest that the Federation Task Force's competencies list is both over and under-inclusive. It is over-inclusive because it goes beyond foundational competencies and it is under-inclusive because having done so it ignores other equally or more important competencies. Moreover, even if all the competencies are foundational, it may not be necessary for them to be acquired in law school. The key is that they be acquired before call to the bar.

The Law Society suggests the following as the competencies that should be required for entry to law society bar admission/licensing programs in common law jurisdictions in Canada:

- a. Foundations of Canadian common law, including,
 - the doctrines, principles and sources of the common law, how it is made and developed and the institutions within which law is administered in Canada;
 - Contracts, torts and property law; and
 - Criminal law
- b. The constitutional law of Canada, including principles of human rights and Charter values and Canadian law as it applies to Aboriginal peoples.
- c. Principles of statutory analysis.
- d. Principles of Canadian administrative law.
- e. Legal research skills.
- f. Oral and written communication skills specific to law.
- g. Professionalism and ethical principles.

In listing these competencies the Law Society,

- supports the Federation Task Force's views that these are *competencies*, not *courses*, and that law students should be able to satisfy them in a number of ways that may differ from competency to competency and law school to law school;
- has deleted civil procedure as a required competency. It is important for law students to understand the principles that govern the resolution of disputes in the Canadian common law system; it is not essential for them to learn specific practice rules in law school. Students should be exposed to the principles while learning the foundations of common law;
- has specified which competencies should be acquired in the Canadian legal context, rather than requiring this of every competency;

- has expanded the competency related to constitutional law principles to include specific mention of Canadian law as it is applied to Aboriginal peoples;
- emphasizes “principles” of administrative law to ensure that there is no confusion that a course is being required. It also suggests that the word “regulatory” is unnecessary;
- has substituted the term “professionalism and ethical principles” for the Federation Task Force’s “professional responsibility” for reasons discussed below.

The Law Society disagrees that,

- a. equitable principles, including fiduciary obligations, trusts and equitable remedies;
- b. business organization concepts; and
- c. dispute resolution and advocacy skills and knowledge of their evidentiary underpinnings;

should form part of the competencies that *must* be acquired in law school.

These are all important competencies, but they open up a potentially endless debate of what else should be included, with proponents of different components each advocating strongly for their particular area of law. This could result in law school curricula being largely mandated, a development that is neither necessary nor in the interests of quality legal education.

Prior to revising its licensing examinations in 2006, the Law Society spent over 12 months in extensive consultation with practitioners determining, assessing and validating the competencies that barristers and solicitors require in the early years of practice. It spent a further 18 months developing the licensing examinations that test those competencies. Among many others, the examinable competencies include the three that the Law Society suggests be removed from the Federation’s list. These are examples of important competencies that should be acquired before call to the bar, but not necessarily in law school. Law societies should also ensure that they continue to be emphasized in post-call education and requirements.

The Law Society suggests that in narrowing the competencies list, the Federation would accomplish its goal of articulating the fundamentals that law societies should expect of students *entering* their licensing programs, while avoiding an admittedly controversial debate that arises

as soon as the additional competencies are suggested. Law societies can address any additional competencies they believe important in their bar admission/ licensing programs and examinations.

The Law Society notes as well, that this approach could enhance the process for accrediting internationally trained lawyers. The equivalency assessment could be more directly linked to the stated competencies, while law society examinations could address the remaining competencies required for call to the bar.

Professional Responsibility as a Required Competency or Stand-Alone Course

A key competency for all law students, articling students and lawyers is identifying and applying the ethical principles that underlie the legal profession. This includes understanding the legal profession's unique role in society and the individual lawyer's role and responsibilities as a member of that profession. In addition to the broad ethical principles, lawyers must learn and apply the specific provincial and territorial law society rules of professional conduct that govern them.

In recent years, as concerns about declining professionalism and civility have increased and rules of professional conduct have become more complex all law schools and law societies have placed more emphasis on this area.

In Ontario, there are significant collaborative initiatives among the bench, bar and the Law Society to enhance the teaching of professionalism at various levels, including law school. The Chief Justice of Ontario's Advisory Committee on Professionalism was established in September 2000 "to maintain and encourage those aspects of the practice of law that make it a learned and proud profession." Composed of representatives of the judiciary, the Law Society, the legal academy and various legal and county law organizations, it is a steering committee to generate ideas and to make recommendations to other organizations and individuals within the legal community about voluntary initiatives to enhance professionalism.

The Law Society believes that the Federation Task Force's use of "professional responsibility" as a suggested competency may be restrictively interpreted to refer specifically to the *Rules of*

Professional Conduct. Law school may not be the most effective stage of the legal education continuum to teach the professional responsibility issues that flow specifically from the rules of professional conduct. There is little context for this learning, leaving students likely uninterested or confused.

The Law Society recently revised its licensing process to better situate professional responsibility training where it could be most effective. It has integrated it into the articling program, so that students are better able to directly relate what they learn to the “real world” articling environment. In addition, newly called lawyers will be required to complete 24 hours of accredited professional development during the first 24 months of their entry into practice. The objective is to ensure that early in their careers candidates receive the practical training they need to serve their clients in accordance with the expectations of lawyers prescribed in the *Rules of Professional Conduct*.

The post-call instruction is designed to create a tighter nexus between learning and day-to-day practice requirements, permitting lawyers to relate their educational materials directly to the events and issues that confront them in their own law practice. Moving some of the key professional responsibility competencies to the post-call venue allows the intended recipients to obtain this essential education as lawyers, amongst other professional lawyers.

Law school is, however, an appropriate stage at which to begin the process of identifying and applying ethical principles. The Law Society is satisfied that in Ontario law students currently learn these principles in a variety of ways across the law school curriculum, as well as in optional stand-alone courses, and within some of the other competencies the Law Society has suggested should be required. It believes that to emphasize the importance of these ethical principles it is appropriate to list this as a foundational competency.

The Law Society suggests, however, that it is not necessary to mandate a stand-alone course in ethical principles or professional responsibility at law school. The Federation Task Force has made a point in specifying competencies, not courses in its list, except for professional responsibility. It states that “the need to ensure that students have a solid understanding” in this

area justifies the exception. However, this argument could be made of any of the competencies and there is little else in the Federation Task Force's paper to bolster the argument in favour of the exception.

The Law Society also suggests that the danger of a stand-alone course in ethical principles or professional responsibility is that it segregates the topic and renders it less likely to be addressed across the curriculum and in context. Ontario's experience with the Chief Justice of Ontario's Advisory Committee on Professionalism is that the academy, bench and bar are working well together in enhancing the profession's exposure to the ethical issues at all stages of the legal education continuum. Listing "ethical principles" as one of the required competencies complements such a collaborative approach.

Minority View

One LSUC Task Force member, Professor Constance Backhouse, had a dissenting opinion with respect to the Federation Task Force's "foundational competencies" approach. This minority view can be summarized as follows:

- 1) This is a "static" approach that fails to recognize that the practice of law is multi-directional, fluid, and that the pace of change has never been so fast.
- 2) The Federation Task Force failed to conduct sufficient or detailed research into the current educational offerings of law school or to consult fully with experts in legal education prior to making its recommendations.
- 3) The proposed list of "foundational competencies" is not based upon historical or current evidence of what lawyers actually know or do, nor is the list defended by evidence-based speculation about what they will have to know or do in the future.
- 4) This approach fails to recognize the important distinctions between *pre-entry* foundations needed to register for a bar admission/licensing process, and foundations that will be acquired during the opportunities presented throughout the articling period, the bar

admission/licensing process, the professional licensing exams, and the life-long continuing legal education that we know is necessary in today's changing world.

- 5) The approach has the potential to stifle innovation, experimentation, and diversity amongst Canadian law schools.
- 6) The Federation Task Force failed to consider the resource implications of mandating new “foundational competencies.” It also failed to consider the diverse objectives of legal education, or to develop reliable measures to test the present or proposed education practices.

- 4. Should the existing prerequisite for entry into Canadian common law faculties of two years of post-secondary education in a university setting be maintained or should it be changed to reflect that the factor requirement of an undergraduate university degree?**
- 5. If so, should McGill's tradition of admitting students following completion of a two-year CEGEP program be accommodated as an exception to the general prerequisite?**
- 6. Are there other exceptions that should be recognized and accommodated?**

Like the Federation Task Force, the Law Society does not have information on whether all common law schools in Canada (with McGill having a unique admission requirement) accept applications from students with only two years of post-secondary education in a university. It understands that although law schools may permit this, in recent years, the competition for admission has been such that those without a university degree are at a disadvantage.

The Law Society has not heard any significant argument for formally changing the prerequisite, and would be interested in hearing other comments on this issue. Without some clear reason for doing so it suggests that the option to apply to law school after two years of post-secondary education in a university, be left open. It does not have enough information about McGill's CEGEP admissions to be able to comment.

The Law Society does note that in considering this issue the Federation Task Force should pay attention to fair access to regulated professions legislation in Ontario and Manitoba. However the prerequisite for the Canadian common law school is expressed, particularly if the prerequisite is increased, the reasons should be clear to all applicants, domestic and international.

Whatever the decision on the general prerequisite for admission to law school there should also continue to be special admission categories, such as Aboriginal or mature students, to meet unique needs.

- 7. Should the standard length of the common law degree be expressed in terms of credit hours rather than years of study?**
- 8. If so, is 90 credit hours the appropriate standard?**
- 9. Should in person learning be required for all or part of the law school program?**
- 10. Are there other delivery systems that should be taken into account?**
- 11. How should joint degree programs be treated for the recognition of the common law degree?**
- 12. Should a national body monitor joint degree programs?**

The Federation Task Force has asked for comment on a number of “institutional requirements,” pointing out that these issues require reflection because of the changes that have taken place in law school education over recent decades. In particular, the Federation Task Force’s consultation paper includes a report from the Canadian Council of Law Deans describing the educational experience in the modern law school. The Federation Task Force has emphasized “the need for structures that accommodate regulatory requirements, but are flexible and capable of innovation.”

The Law Society is very interested in the issues raised in Questions 7 – 12, but it does not feel it has sufficient information to provide input at this time. In particular, it would appreciate learning more from law schools about,

- in person versus distance learning;
- whether expressing the law degree in terms of credit hours permits more flexible delivery methods and approaches; and
- the importance of joint degrees in the modern law school and how they are developed.

13. Should a national body be established to develop the components for recognition of law degrees from new law school programs?

14. Are there alternatives to this approach?

The Federation Task Force has identified a very important issue with which the Law Society has had both historic and recent experience in the form of the 1957/1969 document and the recent applications in Ontario for new law schools. Although, as the Federation Task Force points out, the Ontario government has announced that it will not be funding new law schools at this time, there may well be applications in the future. Applicants will want to know what criteria they are expected to satisfy.

The Law Society believes it is important to discuss an approach to new law school applications, but it is premature to answer the question the Federation Task Force has asked without more information on the proposed structure and operation of such a body. There are many questions to be considered, including,

- How broad would the body's mandate be?
 - Would it address curriculum, infrastructure, admission standards or something more limited?
 - How would it interact with government?
 - What recourse would an unsuccessful applicant have for further consideration of its application?
- Who would be represented on the body?
 - law societies
 - law schools
 - judiciary
 - community groups
 - law students
 - government
- Would those represented on the body determine the standards?
- Who would fund the body?
 - If the funding were unequal would those with a greater financial stake have greater control?

- If the body were a Federation body would all law societies be represented on it?
 - If not, how would this accord with the Federation's requirements for unanimity in decision-making?
 - If not all law societies were represented, how would representation be determined? Given its experience on this issue, for example, the Law Society would have concerns about not being directly involved. Others might feel the same way.

- 15. The Task Force has identified three possible compliance models. Please provide comments on these models.**
- 16. Are there other models that should be considered and if so, what are they?**

Under Question 1 the Law Society suggested modified foundational competencies. It agrees that if there is an articulated competency standard it is appropriate to consider how regulators can best monitor compliance.

Any compliance model should be only as intrusive as is necessary to satisfy regulators that the standard is being met. It should be cost efficient and flexible enough to reflect evolving priorities. In the Canadian context it should recognize that the profession is regulated provincially and that the more complex the compliance model the more difficult it will be to obtain agreement or accomplish change.

One of the Task Force models is described as “the approved law degree.” In some ways, this model reflects the approach under Ontario’s 1957/1969 document, with the main difference being the proposal for a national monitoring body. Whereas the 1957/1969 document assumed compliance, the Federation Task Force suggests that it is time for something more formal to address ongoing issues and changes to the standard, and to ensure, perhaps every five years, that schools are complying. As described, it could also be the body to consider criteria for new law schools and new programs such as joint degrees.

The implication of this model is that regulators must have an objective way of assessing that those entering bar admission/licensing programs have met the standard. Rather than requiring graduates to prove this individually, which would result in uncertainty and a highly complex monitoring bureaucracy, the onus would be on law schools.

While this approach makes sense in the American context, the Law Society is less convinced that it is necessary in Canada. The United States has hundreds of law schools of vastly different quality. As mentioned above, in Canada the 16 Canadian common law schools provide high

quality education, which in 2002 enabled law societies to easily agree that lawyer mobility was in the public interest.

The creation of a national monitoring body would be expensive, time consuming, and controversial with no clear rationale for why this approach is actually necessary in Canada. Given that the Federation of Law Societies of Canada requires unanimity for approving national initiatives, this model would be difficult to implement. Since viable alternatives to this approach exist, the Law Society suggests that this model not be pursued. Moreover, if it is to be given further serious consideration it must first be fully described, including its composition, infrastructure and cost.

The examination option is another proposed model. This would test law school compliance by requiring graduates to write a national examination as a prerequisite to entering law society bar admission/licensing programs. It is not clear what would happen to a student who fails the examination or how, except indirectly, law schools would be held accountable. Given that there are any number of reasons why students fail examinations it is not clear that this approach would accomplish its intended goal.

The Law Society supports licensing examinations that test competencies, as its extensive work in this area demonstrates. It shares, however, the concerns the Federation Task Force expresses about an *entrance* examination that purports to monitor compliance with regulators' standards. In addition, this model would require establishing a national body to set the examinations and monitor that their content remains relevant. The Law Society is not satisfied that the expense of this approach is warranted. Moreover, an entrance examination runs the risk of becoming a wall between law schools and law societies that makes dialogue between them more difficult.

The Task Force's third model is described as "the status quo." By this the Federation Task Force would appear to mean that there is no articulated regulators' national standard of competencies. Instead, a number of non-regulatory influences, described in the consultation paper, create the framework for quality law schools.

The Law Society disagrees with the status quo option. Like the Federation Task Force it considers that however rigorous university internal evaluation structures are, they have different mandates from law societies and define their missions differently.

At the same time, however, there are components of the current approach to law schools with which the Law Society agrees, namely that costly, intrusive compliance regimes are unwarranted for the reasons described above.

The Law Society suggests a compliance model that combines aspects of the approved law degree and status quo models. As is suggested in the approved law degree model the Federation of Law Societies of Canada and individual law societies should articulate those foundational competencies that law graduates seeking to enter bar admission/licensing programs must have acquired in law school. This would make it clear that regulators expect law schools to ensure that their students are taught these competencies. Articulating a national standard would be an important step forward from the status quo.

The Law Society is satisfied that having articulated the competency standard it is unnecessary at this time to specify a monitoring regime. Nothing in law societies' relationships with the current 16 common law schools suggests that this is warranted. Further, without the input on all the questions the Federation Task Force has posed it is not clear what the monitoring regime would be intended to address or what its scope would be.

The Federation and individual law societies should ensure that the profession, judiciary and law students are aware of the foundational competencies, so that they can identify gaps in the curriculum and address them with law schools. The Law Society suggests that its experience with the seven required courses set out in the 1957/1969 document is that Ontario law schools have conformed to the requirement without monitoring. Indeed, even without a nationally articulated standard there has been a high degree of compliance across the country. Moreover, none of the competencies in the Law Society's suggested list are new to the curriculum or would necessitate a substantial restructuring of law schools programs.

APPENDIX 3

L &A Task Force Report
Correspondence (Letters are ordered with their replies, where applicable)

A

October 27, 2009 Letter from Debra Parkes, President, Canadian Law and Society Association, to Derry Millar;
November 26, 2009 Letter from Derry Millar to Debra Parkes.

B

October 27, 2009 Letter from Professor Martha Jackman, Faculty of Law University of Ottawa, to Derry Millar;
December 2, 2009 Letter from Derry Millar to Martha Jackman.

C

November 20, 2009 Letter from W. Brent Cotter, President, Council of Canadian Law Deans, to Derry Millar;
November 24, 2009 Letter from John Campion, President, Federation of Law Societies of Canada, to John J.L. Hunter, Q.C. Chair, Federation Task Force on the Canadian Common Law Degree;
November 25, 2009 Letter from John J.L. Hunter to John Campion;
December 2, 2009 Letter from Derry Millar to W. Brent Cotter.

D

November 25, 2009 Letter from Dean Ian Holloway, Q.C. Western Faculty of Law, to Professor Vern Krishna, CM, Q.C.

E

December 3, 2009 Letter from Interim Dean Jinyan Li, Osgoode Hall Law School, to Sophia Sperdakos.

F

December 9, 2009 Letter from Donna Greschner, Dean of Law University of Victoria, to Richard Stewart, Q.C., Benchers, Law Society of British Columbia.

G

- January 4, 2010** E-mail from Jonathan Herman, CEO, Federation of Law Societies of Canada, to Law Societies referencing November 27, 2009;
- November 27, 2009** Memorandum from National Committee on Accreditation to the Federation Executive Committee.

H

- January 18, 2010** Letter from Amit Chakma, President and Vice-Chancellor University of Western Ontario; Allan Rock, President and Vice-Chancellor, University of Ottawa; Mamdouh Shoukri, President and Vice-Chancellor, York University and Alan Wildeman, President and Vice-Chancellor, University of Windsor to Derry Millar;
- January 20, 2010** Letter from Derry Millar to Presidents and Vice-Chancellors Chakma, Rock, Shoukri and Wildeman.

I

- Undated** Motion – Faculty of Law University of British Columbia

J

- Undated** Motion – Faculty of Law at Dalhousie (now Schulich School of law)

K

Articles and Essay

- November 6, 2009** Lawyers Weekly “Task Force Calls for National Standards.”
- November 6, 2009** Globe and Mail “When Pigs Fly”
- February 2, 2010** *The “Fiercest Debate” over the Regulation of Legal Education in Ontario*, by Katherine Levitt, Directed Student Research Paper, University of Ottawa, Faculty of Law.

A



Canadian Association
Law and Society Canadienne
Association Droit et Société

October 27, 2009

Derry Millar
Treasurer
Law Society of Upper Canada
Osgoode Hall, 130 Queen Street West
Toronto, Ontario M5H 2N6

via e-mail to dmillar@weirfoulds.com

Dear Treasurer Millar:

Re: Final Report of the FLSC Task Force on the Canadian Common Law Degree

I write on behalf of the Canadian Law and Society Association ("CLSA") to express our concern about the proposals contained in the Federation of Law Societies' Task Force on the Canadian Common Law Degree ("Task Force Report") and to invite you to discuss the issues raised in the Task Force Report with us. We understand that provincial and territorial law societies are being asked to adopt and act on the recommendations contained in the Task Force Report, recommendations which we believe will have serious and negative consequences for the continuum of legal education in Canada and for university legal education in particular.

In 2008, the CLSA joined with the Canadian Association of Law Teachers ("CALT") in 2008 to strike an expert joint committee on legal education to prepare a response to the Task Force's Consultation Paper. A copy of the CALT-CLSA response accompanies this letter. We believe that the concerns outlined in that document are even more apt in relation to the final Task Force Report and its recommendations.

Our members are interested in working with law societies across Canada to address emerging issues that have an impact on legal education (including, for example, the influx of lawyers who have received their legal education outside of Canada) and, to that end, we have adopted a set of principles that we propose should guide any initiatives to institute an "approved common law degree." Those principles are attached as Appendix A. We have also reviewed the Law Society of Upper Canada's submissions to the Task Force and we are open to considering the advantages and disadvantages of those proposals as a possible alternative to the Task Force's recommendations. I would be pleased to speak with you and to connect you with other members of our association who have expertise in these issues. I can be reached at parkesd@ms.umanitoba.ca.

The CLSA is a national not-for-profit association of over 300 scholars who are interested in the place of law in social, political, economic and cultural life. A majority of CLSA members teach and research in law faculties; however, our membership includes substantial representation from diverse disciplines such as history, sociology, political science, criminology, psychology, anthropology, and economics. Among its activities, the CLSA publishes a peer-reviewed journal, sponsors an annual conference and graduate student workshop, awards prizes for socio-legal scholarship, and generally works to encourage socio-legal inquiry in Canada and internationally.

Thank you for your attention to this matter.

Yours very truly,



Debra Parkes
President
Canadian Law & Society Association
parkesd@ms.umanitoba.ca

cc: Vern Krishna, Chair, Licensing and Accreditation Task Force, LSUC

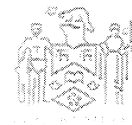
Appendix A

**PROPOSED PRINCIPLES TO ACCOMPANY
ANY FLSC STANDARDS FOR APPROVED COMMON LAW DEGREES**

**Adopted by the Board of the Canadian Law & Society Association
January 24, 2009**

Recognizing the excellence of existing Canadian Law Faculties and the partnerships that are required for effective functioning of the Canadian continuum of legal education:

- *Governing and accrediting bodies undertake to seek the fullest possible participation and approval of the legal academy in adopting, implementing or amending the proposed list of competencies.*
- *Governing bodies will undertake not to use their accrediting authority for any purpose except the protection of the public against demonstrated harms attributable to shortcomings in the education of entrants.*
- *Governing and accrediting bodies will commit themselves to respecting the intellectual freedom of individual professorial and student members of law faculties and the autonomy of law faculties to adopt the scholarly and pedagogic approaches they deem best.*
- *Governing and accrediting bodies will respect the decision-making and resource allocation processes established within the university system.*
- *Governing and accrediting bodies will assist law faculties to acquire any additional human and material resources they need to implement the new requirements.*
- *Governing and accrediting bodies will ensure that their practising members possess and maintain the same competencies as law schools are to be required to impart and students to acquire.*



Barreau
The Law Society of du Haut-Canada
Upper Canada

November 26, 2009

Professor Debra Parkes
President
Canadian Law & Society Association
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K1S 5B6

Office of the Treasurer

Osgoode Hall
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M5H 2N6

tel 416-947-3415
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Dear Professor Parkes:

Re: Federation Task Force Report on the Canadian Common Law Degree

Thank you for your letter dated October 27, 2009 and a copy of your December 2008 submission to the Federation Task Force on the Canadian Common Law Degree, which I understand the Task Force considered along with the other submissions it received.

The Law Society of Upper Canada's Licensing & Accreditation ("L&A") Task Force has been provided with copies of your correspondence and submissions, which set out your concerns. The consultation period is now over, but the L&A Task Force has had the opportunity to hear the concerns the legal academy has raised on this important issue. Its report will make recommendations that Convocation will consider in making its determination on the federation Task Force report.

Thank you for your input.

Yours very truly,

W. A. Derry Millar
Treasurer

cc. Vern Krishna, Chair L&A Task Force

Malcolm Heins

B

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COMMON LAW

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uOttawa

Université d'Ottawa
Faculté de droit
Section de common law

University of Ottawa
Faculty of Law
Common Law Section

October 27, 2009

Treasurer Derry Millar
Law Society of Upper Canada
Osgoode Hall
130 Queen Street West
Toronto, Ontario
M5H 2N6

FAX: 416-947-5263

Dear Treasurer Millar:

Re: *Final Report of the FLSC Task Force*

We understand that the Law Society of Upper Canada Licensing and Accreditation Task Force will be meeting shortly to discuss issues surrounding the *Final Report of the Federation of Law Societies of Canada Task Force on the Canadian Common Law Degree*. As you may know, the FLSC Task Force's deliberations and recommendations are of considerable interest to Common law faculty members here at the University of Ottawa.

This past February our Faculty Council formally adopted a motion to approve the following *Proposed Principles to Accompany the FLSC Standards for Approved Common Law Degrees*:

**PROPOSED PRINCIPLES TO ACCOMPANY THE FLSC
STANDARDS FOR APPROVED COMMON LAW DEGREES**

Recognizing the excellence of existing Canadian Law Faculties and the partnerships that are required for effective functioning of the Canadian continuum of legal education:

- *Governing and accrediting bodies undertake to seek the fullest possible participation and approval of the legal academy in adopting, implementing or amending the proposed list of competencies.*
- *Governing bodies will undertake not to use their accrediting authority for any purpose except the protection of the public against demonstrated harms attributable to shortcomings in the education of entrants.*

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- *Governing and accrediting bodies will commit themselves to respecting the intellectual freedom of individual professorial and student members of law faculties and the autonomy of law faculties to adopt the scholarly and pedagogic approaches they deem best.*
- *Governing and accrediting bodies will respect the decision-making and resource allocation processes established within the university system.*
- *Governing and accrediting bodies will assist law faculties to acquire any additional human and material resources they need to implement the new requirements.*
- *Governing and accrediting bodies will ensure that their practising members possess and maintain the same competencies as law schools are to be required to impart and students to acquire.*

University of Ottawa Common Law faculty members share the concerns and criticisms expressed by the Canadian Association of Law Teachers and Canadian Law and Society Association in their December 2008 *Response to the FLSC Task Force's initial Consultation Paper*.

In particular the CALT/CLSA submit that the exclusive focus on the 'Canadian Common Law Degree' is fundamentally misconceived and raises serious jurisdictional, pedagogical and resource-issues that are ignored by the Task Force; that meaningful participation from all affected parties (including legal educators, law students and diverse organizations of lawyers) is urgently required; that the Task Force's claims are not evidence-based and that empirical research and data collection are necessary before any further steps are taken in relation to the significant and complex issues raised. If anything, the discussion and recommendations contained in the FLSC Task Force's *Final Report* heighten, rather than address or mitigate any of these serious concerns.

Law faculties in Ontario are publicly funded post-secondary institutions, governed by the Universities to which they belong, pursuant to statutory authority granted by the Province. The legal authority and powers that would be required to regulate our faculty and curriculum in the manner proposed in the FLSC's *Final Report* are nowhere evident in the *Law Society Act*. We strongly urge the members of the LSUC Licensing and Accreditation Task Force, and Convocation as a whole, to reject the FLSC's report and recommendations. Instead, in keeping with the 'Proposed Principles' adopted by our Faculty Council, we call upon you to enter into meaningful discussions with the legal academy, our parent Universities, and other affected parties.

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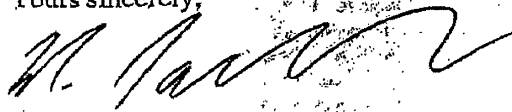
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PAGE 04/04

- 3 -

As the CALT/CLSA point out, an open, representative and informed dialogue 'is a prerequisite to developing recommendations that will genuinely address the key issues that are now confronting those who are responsible for all aspects of legal education in Canada.' In this regard, the November 2008 LSUC *Submission* to the FLSC Task Force represents an important and very useful starting point.

Yours sincerely,



Professor Martha Jackman, L.S.M.
Shirley E. Greenberg Chair for Women and the Legal Profession
Faculty of Law, Common Law Section
University of Ottawa

c.c. Vern Krishna, Chair, Licensing and Accreditation Task Force, LSUC
Thomas Conway, Federation of Law Societies Council Representative
Allan Rock, President, University of Ottawa
Bruce Feldthusen, Dean, Faculty of Law, University of Ottawa



The Law Society of
Upper Canada

Barreau
du Haut-Canada

December 2, 2009

Professor Martha Jackman, LSM
University of Ottawa
Faculty of Law
Common Law Section
57 Louis Pasteur
Ottawa, Ontario
K1N 6N5

Office of the Treasurer

Osgoode Hall
130 Queen Street West
Toronto, Ontario
M5H 2N6

tel 416-947-3415
fax 416-947-7609

Dear Professor Jackman:

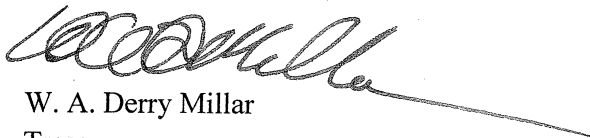
Re: Your letter of October 27, 2009

Thank you for your letter of October 27, 2009 concerning the Final Report of the Federation Task Force on the Canadian Common Law Degree.

I have provided the Law Society of Upper Canada's Licensing & Accreditation Task Force with a copy of your correspondence. Its report will make recommendations that Convocation will consider in making its determination on the Federation Task Force report.

Thank you for your input.

Yours very truly,



W. A. Derry Millar
Treasurer

cc. Vern Krishna, Chair L&A Task Force
Thomas Conway, Federation of Law Societies Council Representative
Allan Rock, President, University of Ottawa
Bruce Feldthusen, Dean, Faculty of Law, University of Ottawa
Malcolm Heins

C



Council of Conseil des doyens et
Canadian des doyennes des facultés
Law Deans de droit du Canada

57 Louis Pasteur
Ottawa ON K1N 5N5
www.cclc-cdfdc.ca

November 20th, 2009

By e-mail and ordinary mail: dmillar@weirfoulds.com

Mr. W. A. Derry Millar, Treasurer
The Law Society of Upper Canada
Osgoode Hall, 130 Queen Street West
Toronto, Ontario M5H 2N6

Dear Mr. Millar:

**Re: Final Report of the Federation of Law Societies of Canada
Task Force on Accreditation of the Common Law Degree**

I am writing on behalf of the Council of Canadian Law Deans with regard to the Federation of Law Societies of Canada's Task Force Report on the Common Law Degree. It is our understanding that the Report and its Recommendations have been referred to the provincial and territorial Law Societies for consideration and potential adoption. In view of the implications of the Report and its Recommendations for Canada's law schools, we believe it is important for the CCLD to share our perspective and our concerns with you.

OUR INVOLVEMENT WITH THE TASK FORCE AND ITS WORK

It would be helpful to begin by describing the process followed by the Federation of Law Societies in undertaking this work and the relationship that the Canadian Law Deans have had with this process. As you will know, the Task Force was established in the fall of 2007 to address two significant issues: i) the criteria to be applied in the consideration of applications to establish new law schools in Canada; and ii) the criteria to be applied by the National Committee on Accreditation in the consideration of the qualifications of foreign trained lawyers, the latter within the context of provincial legislation in some provinces mandating fair processes for the consideration of such applications.

Since both of these issues necessarily involved a consideration of the existing understanding of a common law degree in Canada, it was natural that these issues would engage the interest and attention of legal academia and in particular the interests and expertise of the Canadian Law Deans.

The Task Force that was established by the Federation of Law Societies of Canada had an appreciation of the CCLD's unique role and expertise. In November of 2007 the Chair of the Task Force, John Hunter, Q.C., met with the CCLD to inform the Law Deans of the Task Force of its composition, its mandate, its contemplated processes and its interest in a degree of engagement with the Law Deans. I think it is fair to say that the Deans were surprised to learn of the establishment of the

Task Force, its plans and its composition. Given the issues to be addressed, we were also surprised to learn that there was no interest on the part of the Federation in including representatives of the Canadian Law Deans or legal academia on the Task Force. This was all the more surprising given the active and constructive contribution that the Canadian Law Deans have made to the work of the National Committee on Accreditation, one of the central subjects for Task Force consideration. Notwithstanding this, the CCLD agreed in November of 2007 that it would offer to work constructively with the Task Force. We established a Working Group of Law Deans, composed of Dean Nicholas Kasirer of McGill Law School, Dean Patrick Monahan of Osgoode Hall Law School and myself to provide information, assistance and advice to the Task Force. We were, at our own expense, essentially at the disposal of the Force whenever it felt the need of our involvement. Consistent with this commitment, we met whenever the Task Force requested us to do so, and provided the collective perspective on the CCLD through various reports and letters from the CCLD to the Task Force. While we were not always in agreement with the need for this project or with Task Force thinking, I believe that our engagement was undertaken in a spirit of respect for the members of the Task Force and their assignment. We believe that the Task Force engaged with us in a similar spirit of mutual respect. The Task Force made it clear that it had complete confidence in the state of legal education in Canada, and in the quality of the existing law schools, and that there was no plan to 'remake' law schools in a new image. This expression of confidence in our law schools inspired a genuine commitment on the part of the CCLD to assist the Task Force with its work. In this spirit we did our best to provide a clear understanding of the state of legal education in Canada and the implications of the various options that we understood to be under consideration by the Task Force.

This is particularly evident in our submissions to the Task Force in response to its October 2008 Consultation Paper. In a series of communications throughout the process, including two lengthy submissions to the Task Force in June of this year, (the latter two are attached for your consideration), we shared our perspective on matters of critical importance to legal education and to the Task Force. Concurrent with these submissions we communicated a willingness to continue to be engaged with the Task Force. We heard nothing further until the Task Force had completed its work and submitted its Report.

While some of the perspectives provided by us to the Task Force were incorporated in its final Report, one critical concern of the Canadian Law Deans was ignored and some matters of concern were introduced in the final Report without any request for input from the CCLD or any other group. I will make further reference to these matters later in the letter.

OUR PERSPECTIVE IN RELATION TO THE REPORT AND ITS RECOMMENDATIONS

As you will know, the Task Force has produced a series of recommendations that seek to establish a new set of standards for an 'approved common law degree' in Canada. While we have offered suggestions to the Task Force on alternatives to this approach, we acknowledged the Task Force's commitment to this objective in our June 1, 2009 letter to the Task Force. Indeed, in that letter we signaled support for the 'competencies' approach being contemplated by the Task Force. Such an approach is consistent with much modern thinking about legal education, and is being incorporated into the curricula of a number of our law schools in Canada. We urged the Task Force to follow this 'competencies' approach comprehensively, as had been recommended by the Law Society of Upper Canada in its own submission to the Task Force in 2008. We would have welcomed such an approach. For reasons that are not clear to us, the Task Force elected not to do so, and in particular in relation to its recommendations regarding a mandatory, stand-alone Legal Ethics and Professionalism, has recommended an approach that is contrary to its own previously stated approach to competencies. This deviation in approach is more than a matter of pedagogical debate or semantics. While the Canadian law Deans generally have little objection to a competencies-based approach, a requirement related to a specific new mandatory course is more problematic. A 'competencies' approach confirms the legal profession's confidence in our law schools, and in our ability to fashion programs that can

meet our educational objective of delivering a rigorous academic education for our students while at the same time providing us with the flexibility and imagination to design a curriculum that will ensure that the legal profession's expected competencies are learned by our students. The dictate of any specific 'course' requirement makes the opposite statement. It 'directs' legal education, and prevents law schools from achieving 'competency' in our students through flexibility, imagination and innovation, the specific responsibilities of legal educators, the specific prerogative of legal education and the very work that the Task Force signaled was being well done in our law school. In addition, we are surprised and concerned that the Task Force has gone further, identifying what it expects – perhaps requires – to be the content of this mandatory course. Regardless of the course under consideration in this regard, we see this whole approach as unprecedented and inappropriate.

Second, to our surprise, the Task Force elected to include in its final Report a recommendation that establishes a compliance requirement for a law school to be 'approved'. This was a surprise to us for two reasons. First, while there was a passing reference to 'compliance' in the Task Force's 2008 Consultation Paper, the Task Force did not set out any questions in relation to compliance or compliance mechanisms and did not invite any feedback on this issue. Second, and perhaps more important from the perspective of the Canadian law Deans, we were advised that the Task Force intended to leave this issue to another day and another body. We are troubled that a recommendation of this sort, on a matter of critical importance to legal education in general and to the Canadian Law Deans in particular, would be included in the final Report with no dialogue with us.

The Canadian Law Deans have concerns with additional aspects of the Report. These include the adoption of some 'legal knowledge' competencies whose meaning we have struggled to understand, as well as a variety of technical, or 'institutional' matters that, unresolved, where implementation could jeopardize various aspects of our existing programs. In our view these are also matters of sufficient importance that any approval of the Report and Recommendations should await their clarification and resolution.

THE APPROACH WE RECOMMEND

The decisions your law society will be making in relation to the Report and its Recommendations will necessarily be undertaken within the context of your responsibility to regulate in the public interest. In our view, this responsibility can best and only be achieved through a process of engagement with legal education, and in particular with the Canadian Law Deans, in advance of making any decisions regarding the Task force Report and its Recommendations. The work of the Task Force is important to the legal profession and to Canada's law schools. It is the most significant examination of the nexus between our law schools and the legal profession in over 40 years. The Task Force has done much good work, but in our opinion it has not gotten all of the questions right. And it is important, with a project of this significance, that both law societies and the legal education community make every effort to make the best decisions possible. We believe that it is possible to develop, together, a set of recommendations that can strengthen the Report that is before you for consideration. There is ample time to do this. We note that, even within the context of the Report's own recommended timetable, implementation would not take place until 2015.

For these reasons, we recommend that you defer any decisions in relation to the Report and its Recommendations. We recommend that a dialogue be undertaken between the law societies and the Law Deans to work out the difficulties presented by the Task Force's Report and Recommendations and to put in place the necessary refinements and clarifications to optimize the Task Force's work and make it meaningful, effective and beneficial for legal education, for the legal profession and for the public interest. We are prepared to make a commitment to such a project. It would be a signal that those who are privileged to be charged with the regulation of the legal profession in the public interest wish to strive for the 'best' in this aspect of their regulatory responsibilities. It would also honour the

work of the Task Force, whose members have made a genuine and heartfelt effort to solve some seemingly intractable problems facing the legal profession of today.

Failing this, we urge that any adoption of the Report and its Recommendations be 'in principle' only. There are many unresolved issues related to the Report, and we believe that these must be resolved before law societies give their imprimatur to the features of any new regulatory regime. This is again a responsibility to ensure that the model you approve best serves the public interest. In our view the best process to address the unresolved issues would be a joint committee of the legal profession and the Council of Canadian Law Deans, co-chaired, and with equal representation from these two communities of interest. We are committed to undertaking this work in a principled and timely way, with a view to developing – together - the best model we possibly can.

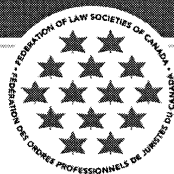
At the present time, some Canadian Law Deans are unable to support the Report and its Recommendations in their current form. We believe that with good will from the Deans and from the leaders of the legal profession, differences can be bridged and a suitable model can be developed. Such a model can meet the immediate challenges faced by the legal profession in ways that will build upon the continuing evolution and strengthening of legal education in Canada. It can also reinforce the strong and positive relationship between our profession and our law schools.

Sincerely,

A handwritten signature in black ink, reading "Brent Cotter". The signature is fluid and cursive, with the first name "Brent" and the last name "Cotter" clearly distinguishable.

W Brent Cotter
President
Council of Canadian Law Deans

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

November 24, 2009

Mr. John J. L. Hunter, Q.C.
Hunter Litigation Chambers
1040 West Georgia Street, Suite 2100
Vancouver, BC V6E 4H1

Dear Mr. Hunter,

The President of the Council of Canadian Law Deans, Dean Brent Cotter, has written to the Presidents of Canada's law societies with respect to the work of the Task Force on the Canadian Common Law Degree, which you chaired. In the attached letter, Dean Cotter makes a number of observations regarding the consultations between your Task Force and the Council of Canadian Law Deans and raises issues about how certain specific matters were dealt with in the Task Force recommendations.

On behalf of the Federation, I seek your observations and comments regarding Dean Cotter's letter so I can share them with the law societies to enhance their debate of the Task Force's Report.

Thank you for your continuing efforts.

Sincerely,

John Champion
President

Encl.

c.c. Dean Brent Cotter, President
Council of Canadian Law Deans



November 25, 2009

BY EMAIL

Mr. John A. Campion, President
Federation of Law Societies of Canada
World Exchange Plaza
1810 - 45, rue O'Connor Street
Ottawa, ON K1P 1A4

Dear Mr. Campion:

Re: November 20, 2009 letter from the Council of Canadian Law Deans

I am in receipt of your letter dated November 24, 2009, in which you provided me with a copy of the November 20, 2009 letter from the Council of Canadian Law Deans ("the Council") and requested my comments on it. As Chair of the Federation Task Force on the Canadian Common Law Degree, I agree that it is important to clarify some of the points made in the letter so that law societies will be able to fully assess the recommendations before them in the Task Force's final report dated October 2009 ("the Task Force Report").

Task Force's Mandate

The Deans' letter states that the decisions law societies will make in relation to the Task Force Report "will necessarily be undertaken within in the context of [law societies'] responsibility to regulate in the public interest." As Chair of the Federation Task Force I also took it as a given that the Task Force's mandate flowed from this responsibility. The Federation Task Force was established in June 2007 to,

- a) review the criteria currently in place establishing the approved LL.B/ J.D. law degree for the purposes of entrance to law societies' bar admission/licensing programs ("the approved LL.B./J.D. degree") and determine whether modifications are recommended;
- b) if modifications are recommended, to propose a national standard for the approved LL.B./J.D. degree; and
- c) consider the matters in (a) and (b) in relation to the National Committee on Accreditation requirements for granting a certificate of qualification and determine what changes if any should be made to those requirements. By articulating standards for the approved LL.B./J.D. law degree the Federation can more clearly identify for

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Hunter Litigation Chambers Law Corporation
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e: jhunter@litigationchambers.com
PRACTICE CONDUCTED THROUGH A PERSONAL LAW CORPORATION

internationally trained candidates and those with civil law degrees from Quebec the meaning of “equivalent to a Canadian LL.B./J.D. degree.”

While the Council letter is correct that issues related to the NCA and new law school proposals were part of the Task Force’s analysis the mandate was primarily to consider the appropriate criteria for entry to bar admission programs. Once these were determined they could be applied as well to the NCA and new law school context.

Involvement of CCLD with the Task Force

The Council’s letter accurately comments on the Task Force’s appreciation of the CCLD’s unique role and expertise. As the letter confirms it and the Task Force engaged with each other in a spirit of mutual respect.

While it is correct that the Task Force membership consisted only of law society representatives the Law Deans’ input was sought immediately and continued throughout the process. Among other steps the Task Force took to address the Council’s submissions and views, it postponed its final report, originally intended for March 2009, to obtain further input from the Council. The Task Force paid particular attention to the views the working group of the Council expressed to it in January 2009 and to the letters the Council wrote to the Task Force on June 1, 2009 and June 29, 2009, both of which are included in the Task Force’s Report and are referred to in the Council’s November 20, 2009 letter.

While the Task Force did not accept all of the Council’s submissions, it is not accurate to say that the Task Force ‘ignored’ them. Quite the contrary is the case. I remain convinced that the Task Force Report and the views the Council has expressed are significantly more similar than the November 20, 2009 letter suggests.

Consultation Process and Task Force Recommendations

The Council’s November 20, 2009 letter expresses a concern that the Task Force did not consult with it on a number of issues on which it made recommendations in the final report. I am not sure on what basis the Council raises this concern as the Task Force’s consultation process was public and detailed.

In its September 2008 Consultation Paper the Task Force stated its preliminary view that there should be a required standard for entry to bar admission courses and that the standard “should address competencies in fundamental areas of substantive knowledge, legal skills and professional responsibility.” It then outlined its proposed competencies and stated that the one exception to relying on competencies should be a stand-alone course in professional responsibility (renamed ethics and professionalism in its final report). It then discussed compliance, identifying three possible approaches (the status quo, the examination model, and the approved law degree.) The approved law degree option was described as follows:

Under this option a required standard would be established...and law faculties would demonstrate what they are doing to ensure that their graduates have achieved the required competencies.

The consultation paper also discussed a number of possible institutional requirements that could be part of the approved law degree. It did so in direct response to the Council of Canadian Law Deans' persuasive submissions that if the Task Force did no more than articulate a list of competencies without discussing institutional requirements, it would undermine the quality legal educational standard that exists in today's law faculties.

Since the Task Force sought input on all these issues in the consultation paper, it is somewhat surprising to see in the Council's November 20, 2009 letter that no such input was sought. Moreover, the Council's June 1, 2009 and June 29, 2009 letters, referred to earlier, provide input on many of the issues, including the competencies, a compliance mechanism and institutional requirements.

In making its recommendation on a compliance mechanism, the Task Force paid particular attention to the Council's submission in its June 1, 2009 letter that "the Task Force should recommend only those requirements for law school compliance that are necessary for fulfillment of law societies' mandated public interest responsibilities." Moreover, the Task Force made it clear that the details of the approach should be left to the implementation committee.

I hope this letter clarifies some of the issues raised in the Council's November 20, 2009 letter.

Yours truly,



John J.L. Hunter, Chair
Task Force on the Canadian Common Law Degree

JJLH/smr

cc: Dean Brent Cotter, President
Council of Canadian Law Deans



The Law Society of
Upper Canada

Barreau
du Haut-Canada

December 2, 2009

W. Brent Cotter
President
Council of Canadian Law Deans
57 Louise Pasteur
Ottawa, Ontario
K1N 5N5

Office of the Treasurer

Osgoode Hall
130 Queen Street West
Toronto, Ontario
M5H 2N6

tel 416-947-3415
fax 416-947-7609

Dear Dean Cotter:

Re: Your letter dated November 20, 2009

Thank you for your letter dated November 20, 2009 on the Final Report of the Federation Task Force on the Canadian Common Law Degree. The Law Society has also received copies of John Campion's letter to John Hunter, the Chair of the Federation Task Force, dated November 24, 2009, and John Hunter's reply, dated November 25, 2009. I have provided all this correspondence to the Law Society's L&A Task Force, which is considering the Federation Task Force report and will be making recommendations to Convocation.

Thank you.

Yours very truly,

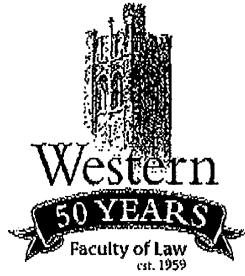
W. A. Derry Millar
Treasurer

D

11-26-'09 16:00 FROM-Western Law Dean

5198502412

T-028 P002/003 F-689



November 25, 2009

URGENT - BY FAX: (416) 947-3924

Professor Vern Krishna, CM, QC
The Law Society of Upper Canada
Osgoode Hall
130 Queen Street West
Toronto, ON M5H 2N6

A handwritten signature in dark ink, appearing to read "Vern Krishna".

I am writing in my capacity as the Chair of the Ontario Law Deans group, and am writing on behalf of all of us. I apologize for the urgency of this letter, but I understand that the Licensing and Accreditation Task Force is meeting tomorrow morning, and I wanted to make sure that you received this beforehand.

The letter is simply to reiterate our support for the letter that was sent you last week by our colleague, Dean Brent Cotter of the University of Saskatchewan. I know that some members of the Task Force are of the view that the only job that remains for the Law Society is to vote the Federation Task Force's report up or down. I would hope, though, that after reading Dean Cotter's letter, a different feeling might emerge. As you agreed at our meeting last month, the step that we are about to take is one that will forever alter the course of legal education in Ontario. And I can't help but note that two previous agreements of 1957 and 1969 – which together have served the cause of legal education in Canada well – were the product of the process of agreement with the Ontario Law Deans. I don't mean to belabour the point that I made at the close of our meeting, but we really have come a long way in the past decade or so in terms of our engagement with one another. I completely agree that we should strive for a consistency in the standards of quality of legal education across the country. But I continue to believe – as past experience has shown – that we are much more likely to achieve positive outcomes if we worked together, than if a report is imposed upon us from the outside. Indeed, I don't need to tell you that the whole of the "great debate" that Ian Kyer wrote about in his book was engendered by a series of attempts by the profession to impose their views about legal education on the law schools. The *last* thing that we want now, is to return to some sort of state like that.

The University of Western Ontario
Faculty of Law
Josephine Spencer Niblett Law Building • London, Ontario • CANADA • N6A 3K7
www.law.uwo.ca/50th

11-26-'09 16:00 FROM-Western Law Dean

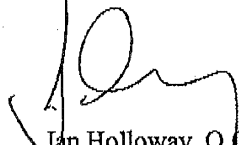
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Again, on behalf of the Ontario law schools, I want to say that Dean Cotter's letter captures our views perfectly well.

With warmest wishes always,

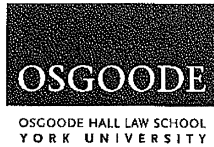
A handwritten signature in black ink, appearing to read 'Ian Holloway', is written over the typed name.

Ian Holloway, Q.C.
Dean and Professor of Law

IH:nl

cc: Ontario Law Deans
Dean Brent Cotter, Q.C.

E



December 3, 2009

Office of the Dean

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F 416 736 5251
lawdean@osgoode.yorku.ca
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Ms. Sophia Sperdakos
Policy Counsel
Policy Secretariat
Law Society of Upper Canada
130 Queen Street West
Toronto, Ontario M5H 2N6

Dear Ms. Sperdakos,

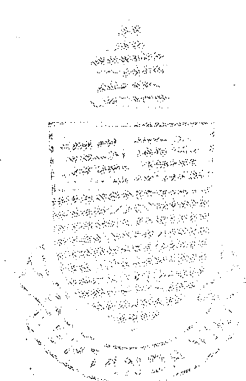
Re: FLSC Final Report of the Task Force on the Canadian
Common Law Degree – Motion from Faculty Council

As alluded to in my letter of October 27, a motion was brought to
Faculty Council on November 30 and the motion was passed, a copy of
which is attached for your information.

Yours truly,

A handwritten signature in black ink, appearing to be "Jinyan Li".

Jinyan Li
Interim Dean



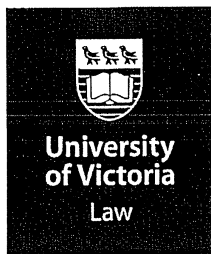
**Osgoode Hall Law School
of York University**

Meeting of Faculty Council

Monday, November 30, 2009

Notice of Motion

Moved by Interim Dean Jinyan Li and **seconded** by Professor Bruce Ryder that for the reasons set out in Dean Li's letter dated October 27, 2009 and the Canadian Council of Law Deans' letter dated November 20, 2009, Faculty Council of Osgoode Hall Law School cannot support the implementation of the recommendations of the FLSC's Final Report of the Task Force on the Common Law Degree (October 2009) in their current form and urges the Law Society of Upper Canada to withhold approval of the Report until outstanding issues have been resolved through a process involving dialogue between representatives of the law societies and the law schools. Failing this we urge that any adoption of the Report and its Recommendations be 'in principle' only to allow resolution of the outstanding issue.



Faculty of Law
Office of the Dean
University of Victoria
Fraser Building
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Victoria British Columbia
V8W 3H7 Canada

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Web www.law.uvic.ca

December 9, 2009

Richard N. Stewart, Q.C.
Cook Roberts LLP
700-1175 Douglas Street
Victoria, BC V8W 2E1

Dear Richard:

Re: Faculty of Law Response to the Federation Task Force Report

I am writing to inform you that Faculty Council, the governing body of the Faculty of Law, University of Victoria, met today and passed the following motion regarding the Final Report of the Task Force on Canadian Common Law Degree that was released by the Federation of Law Societies in October, 2009:

The Faculty of Law, University of Victoria supports the position of the Council of Canadian Law Deans ("CCLD"), set out in its letter of November 20, 2009, that a more serious engagement with legal educators is required before moving forward on the Task Force Report and its recommendations.

In particular we support the concerns raised by the CCLD regarding the impact of the Task Force recommendation imposing a specific course requirement. We endorse the CCLD position that specifying a mandatory course impinges on the ability of legal educators to meet their core responsibility to develop pedagogically sound programming in a flexible, imaginative and innovative manner.

We also support the concern raised by the CCLD regarding the establishment of a compliance requirement for a Law School to be 'approved'.

Finally, we support the CCLD's recommendation that the way forward requires a newly constituted committee co-chaired by a member of the CCLD and of the Legal Profession. We would add to the CCLD's recommendation regarding process, however, that membership of the committee should include teaching faculty as well as Deans.

The motion was passed unanimously by Faculty Council. You will see that Faculty Council strongly endorses the position of the Canadian Council of Law Deans, and in addition requests that membership of a newly-constituted committee include teaching faculty as well as Deans.

Please share this letter with member of the Credentials Committee. At Faculty Council's instruction, I will also be sending a copy of the motion to the Benchers of the Law Society of British Columbia, and the Presidents of other Canadian Law Societies.

Sincerely,

A handwritten signature in black ink, appearing to read "Donna Greschner".

Donna Greschner
Dean of Law



To:
Cc:
Bcc:
Subject: Fw: NCA comments on Federation Task Force report

From: "Jonathan Herman" <JHerman@flsc.ca>
To: 'Alan Treleaven' <atreleaven@lsbc.org>, 'Allan Fineblit' <afineblit@lawsociety.mb.ca>, 'Christian Tremblay' <christian.tremblay@cdnq.org>, 'Darrel Pink' <dpink@nsbs.org>, 'Don Thompson' <Don.Thompson@lawsociety.ab.ca>, Frederica Wilson <FWilson@flsc.ca>, 'Howard Kushner' <Howard.Kushner@lawsociety.ab.ca>, 'Jacques Houle' <jhoule@barreau.qc.ca>, 'Katherine Corrick' <kcorrick@lsuc.on.ca>, 'Law Society of Nunavut' <lawsociety@qiniq.com>, 'Linda Whitford' <linda.whitford@lawsociety.nt.ca>, 'Lynn Daffe' <lynn.daffe@lawsocietyyukon.com>, 'Malcolm Heins' <mheins@lsuc.on.ca>, 'Marc Richard' <mrichard@lawsociety-barreau.nb.ca>, 'Marilyn Billinkoff' <mbillinkoff@lawsociety.mb.ca>, 'Peter Ringrose' <peter.ringrose@lawsociety.nf.ca>, 'Susan Robinson' <srobinson@lspei.pe.ca>, 'Timothy McGee' <tmcgee@lsbc.org>, 'Tom Schonhoffer' <tom@lawsociety.sk.ca>
Cc: Frederica Wilson <FWilson@flsc.ca>, Deborah Wolfe <DWolfe@flsc.ca>, Bob Linney <Blinney@flsc.ca>
Date: 01/04/2010 09:29 AM
Subject: RE: Task Force on the Canadian Common Law Degree - NCA Comments / Groupe d'étude sur le diplôme canadien en common law - Commentaires du CNE

MESSAGE EN FRANÇAIS À LA SUITE

Good morning everyone and Happy New Year.

Further to my e-mail below, I understand that some of you have inquired about the matters raised in the memorandum from the NCA to the Federation Executive. Federation President John Campion has asked me to advise you that, after consultation with Deborah Wolfe, the Managing Director of the NCA, all such matters can be addressed by the Federation at the time of implementation of the Hunter Task Force recommendations in the event that the Task Force Report is approved by the law societies.

Best regards,

Jonathan

Bonjour et bonne année à tous.

Suite à mon courriel ci-dessous, j'ai cru comprendre que certains ou certaines d'entre vous ont demandé des renseignements au sujet des questions soulevées dans la note de service qui a été envoyée par le CNE au Comité exécutif de la Fédération. Le président de la Fédération, John Campion, m'a demandé de vous informer qu'après avoir consulté Deborah Wolfe, directrice de l'exploitation du CNE, il a été convenu que la Fédération pourra régler toutes ces questions au moment de la mise en œuvre des recommandations du Groupe d'étude Hunter si le Rapport du Groupe d'étude est approuvé par les ordres professionnels de juristes.

Salutations cordiales.

Jonathan

From: Jonathan Herman

Sent: December 17, 2009 4:29 PM

To: 'Alan Treleaven'; 'Allan Fineblit'; 'Christian Tremblay'; 'Darrel Pink'; 'Don Thompson'; Frederica Wilson; 'Howard Kushner'; 'Jacques Houle'; 'Katherine Corrick'; 'Law Society of Nunavut'; 'Linda Whitford'; 'Lynn Daffe'; 'Malcolm Heins'; 'Marc Richard'; 'Marilyn Billinkoff'; 'Peter Ringrose'; 'Susan Robinson'; 'Timothy McGee'; 'Tom Schonhoffer'

Cc: Frederica Wilson; Deborah Wolfe; Bob Linney

Subject: Task Force on the Canadian Common Law Degree – NCA Comments / Groupe d'étude sur le

diplôme canadien en common law – Commentaires du CNE

MESSAGE EN FRANÇAIS À LA SUITE

Good afternoon everyone,

The Federation Executive has requested that I forward to you the attached memorandum from the National Committee on Accreditation. You may wish to take this into account as part of your law societies' consideration of the Report from the Task Force on the Canadian Common Law Degree, as well as its implementation, in the event that the Task Force recommendations are approved.

Kind regards,

Jonathan

Bonjour.

Le Comité exécutif de la Fédération m'a demandé de vous envoyer la note de service ci-jointe provenant du Comité national sur les équivalences des diplômes de droit. Votre ordre professionnel pourra tenir compte de ce document lorsqu'il examinera le rapport du Groupe d'étude sur le diplôme canadien en common law, ainsi que sa mise en œuvre si les recommandations du Groupe d'étude sont approuvées.

Sincères salutations.

Jonathan

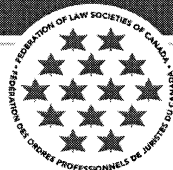
Jonathan G. Herman

Chief Executive Officer / Premier dirigeant

**Federation of Law Societies of Canada /
Fédération des ordres professionnels de juristes du Canada**

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*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

MEMORANDUM

TO: FEDERATION EXECUTIVE COMMITTEE

FROM: NATIONAL COMMITTEE ON ACCREDITATION

DATE: November 27, 2009

RE: Hunter Task Force Report

1. The purpose of this Memorandum is to provide the comments and perspective of the National Committee on Accreditation (the “NCA”) to the Federation of Law Societies of Canada (the “**Federation**”) on the Hunter Task Force Report on Common Law Degrees (the “**Report**”).

2. The NCA understands that the Report has been sent by the Federation to law societies, for comment.

3. The Report describes in a limited way the consequences that the Report, if implemented, may have for the NCA and its review of internationally trained graduates to determine comparability to a Canadian common law degree. The NCA believes it to be important that the Federation have the benefit of the NCA’s perspective, particularly in respect of four areas.

4. The Report recommends [at page 30] that there be a requirement on Canadian law schools to teach skills competencies. Those skills competencies are described in the Report as:

- (a) problem solving;
- (b) legal research; and
- (c) oral and written communications.

5. The NCA does not currently assess skills competencies, although its assessment of each candidate indirectly provides some gauge of such matters, particularly problem-solving, legal research and written communication ability. Problem solving is tested directly in the NCA examinations, and perhaps little adjustment will be required.

Written communication skills are indirectly tested in the NCA examinations. Testing oral communication skills would be more challenging for the NCA, and might be very expensive. Some overseas schools may teach these three competencies at least as well as Canadian schools. Determining if they do might be difficult unless the relevant accrediting/approving body explicitly requires these in their standards.

6. The second matter relates to distance education. The Report [at page 41] states that a Canadian common law degree should be earned by “primarily in-person education experience”.

7. As part of its policies and its review of each application to it the NCA does consider the mode of delivery of a non-Canadian law degree. However, the current policy may not comply with this proposed standard, depending on the interpretation of “primarily”. The current policy, in respect of candidates who have graduated from a distance learning program at an accredited law school is as follows:

As the Canadian standard for law school is three years, in class, graduates of distance learning programs will normally be required to successfully complete six NCA examinations and eight one semester courses at a Canadian law school. Each candidate’s specific recommendation will depend on his/her individual qualifications.

The ultimate decision made by the law societies in respect of this topic may affect the future considerations of and analysis by the NCA.

8. The third area is that of pre-law educational requirements (which is that the candidate have at least two years of post-secondary education). Such considerations form part of the NCA’s present review of applications. The NCA policies and practices likely satisfy what is proposed in the Report. The approach may have to be modified depending upon the ultimate decision of the law societies.

9. Fourthly, the Report speaks [at page 36] of legal knowledge competencies. That list of competencies includes substantive knowledge competencies. It will be important for the NCA to understand those competencies (if that is the approach ultimately taken by the law societies), as it will need to revise its policies to ensure that competencies apply to its review of applicant qualifications.

10. To the extent that the Report (and the ultimate decisions of the law societies) deals with substantive legal knowledge, the NCA has the following thoughts:

- The NCA list of core common law subjects differs somewhat from the list in the Report’s standards.
- The proposed standards, under Private Law Principles, include “legal and fiduciary concepts in commercial relationships”. Further definition of this will be required for the NCA to assess whether its current policies appropriately assess this standard.

- The NCA currently requires applicants to demonstrate competency in corporate law. This subject is not included in the proposed standards described in the Report.
- The NCA currently requires applicants to demonstrate competency in evidence. This subject is not included in the proposed standards described in the Report.
- The current NCA syllabus in Foundations of Canadian Law is broader than the proposed Foundations of Law standard described in the Report.

The NCA will require clarification on the detailed requirements of the substantive legal knowledge standards in order to revise its policies.

11. The NCA anticipates that in deliberating on the Report the law societies will want to be aware that their decisions and the implementation of those decisions will affect the NCA and its assessment of internationally trained lawyers. We are approaching a situation in which within a few years 20 per cent of those now seeking admission to the legal profession in common law jurisdictions in Canada will be internationally trained lawyers. The consequences on the NCA of those decisions and their implementation will affect many applicants, may require modification to existing policies and procedures and may increase the cost of administering the assessment process. The NCA respectfully requests that the Federation share this Memorandum with the law societies, so that they will have the benefit of the document prior to their deliberations on the Report.

RESPECTFULLY SUBMITTED.



uOttawa

Université d'Ottawa
Cabinet du recteur

University of Ottawa
Office of the President

January 18, 2010

Mr. W. A. Derry Millar
Treasurer
The Law Society of Upper Canada
Osgoode Hall, 130 Queen Street West
Toronto, ON M5H 2N6

**RE: Federation of Law Societies of Canada Task Force Report on the
Canadian Common Law Degree**

Dear Mr. Millar:

The Federation of Law Societies of Canada Task Force Report on the Canadian Common Law Degree is proposing to require that certain courses be taught, some in a particular manner, in University law schools. Failure to comply would result in degrees not being recognized for the purpose of granting admission to the profession. We attach a copy of the report for your reference.

The Federation's proposal has been unanimously rejected by every law dean in Canada, including by each of the 7 law deans in Ontario. The deans' concerns are many, including the failure of the profession to consult meaningfully, the substance of the recommendations themselves, the uncertainty in the report, and the cost implications.

In addition, this proposal would effect a substantial change in the historical relations between the bar and the academy in Ontario. Heretofore, the mandatory content of an Ontario law degree for the purpose of recognition by the bar has historically been arrived at by discussion and negotiation between the bar and the academy.

While the Law Society of Upper Canada has every perfect right to determine the requirements that applicants for call to the Ontario bar must satisfy, the Law Society does not have, and has never before asserted, the jurisdiction to mandate unilaterally what is taught in law schools. In this important way, the Federation's proposal, if adopted, will challenge the autonomy of our Universities.

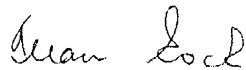
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Before it can take effect in Ontario, the Federation's proposal will have to be adopted by the Benchers of the Law Society of Upper Canada. We are deeply concerned about the implications of this proposal and urge the Law Society to sit down with the Ontario law deans and find a reasonable way forward. We are assured that the deans are quite willing to engage in constructive negotiations with the Law Society towards achieving cooperative governance. Surely that is the way these issues should be addressed.

Thank you for your consideration.

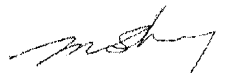
Yours very truly,



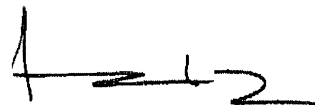
Allan Rock
President and Vice-Chancellor
University of Ottawa



Alan Wildeman
President and Vice-Chancellor
University of Windsor



Mamdouh Shoukri
President and Vice-Chancellor
York University



Amit Chakma
President and Vice-Chancellor
University of Western Ontario

Encl.



The Law Society of
Upper Canada

Barreau
du Haut-Canada

January 20, 2010

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Dear Presidents:

Thank you for your letter dated January 18, 2010.

I appreciate the perspective from which the Presidents have written the letter and would like to take this opportunity to assure you that the Law Society of Upper Canada understands and supports the important role of university law faculties in the development of a robust and forward looking legal profession.

At the same time, the Law Society and all law societies who are partners in the Federation of Law Societies of Canada have specific obligations and mandates to regulate the profession in the public interest. Included within that mandate is their responsibility to call qualified candidates to the bar. The *Law Society Act* imposes an obligation on the Law Society of Upper Canada to

ensure that, “all persons who practise law in Ontario...meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide.” This responsibility is not limited to the development of law society admission programs, but extends to determining the requirements candidates must meet for entry into those programs.

While your letter raises the suggestion that passage of the report will mark a substantial shift in the Law Society of Upper Canada’s relationship with law faculties, I am confident that in substance the recommendations reflect more continuity in the relationship than not. Indeed, the Federation of Law Societies of Canada Task Force on the Canadian Common Law Degree appears to have gone out of its way to express continuity with current law school practices.

My understanding of the process the Task Force undertook is different from yours. In a letter that the Task Force Chair, John Hunter, wrote on November 25, 2009 in response to correspondence that the Council of Canadian Law Deans sent to law society Treasurers and Presidents Mr. Hunter sets out the extensive nature of the Task Force’s consultation with the Council. He notes that although the Task Force did not agree with every submission the Council made it was influenced by many of them in developing its ultimate recommendations. I enclose a copy of his letter for your information.

Your letter states that the Federation’s proposal has been “unanimously rejected by every law dean in Canada.” That is not my understanding. A number of Law Deans, both in Ontario and elsewhere in the country, have individually expressed a willingness to accept the Task Force recommendations and have already done so. Both the law societies of Alberta and Manitoba have recently approved the Task Force Report with the positive support of their Law Deans. Further in Dean Cotter’s letter to me dated November 20, 2009 (the same letter was sent to other Treasurers and Presidents) he notes in the last paragraph that “*some* Canadian Law Deans are unable to support the report and recommendations in its current form.” These are important facts to which your letter makes no reference and which I respectfully submit suggest a much greater willingness among the Deans to work with the Federation. A careful reading of much of the correspondence from the Council of Canadian Law Deans’ reveals many areas of agreement with the Task Force’s approach, rather than the wholesale rejection your letter suggests.

As Convocation has not yet considered the Federation Report, I cannot comment on what it will decide. However, from my reading of the Report and correspondence from the Council of Canadian Law Deans and the individual positions a number of Deans have expressed on the Report, including a number in Ontario, I believe the implementation process is the appropriate forum at which to resolve any areas of disagreement.

The Council’s letter of June 1, 2009 generally agrees with the Task Force’s “competencies” approach. While there appears to be disagreement with the competency related to commercial relationships, the Council has not raised a concern with most of the competencies. The Council points with approval to the Task Force’s acknowledgement that “competencies” does not mean “courses” and that law schools by and large can satisfy those competencies in a variety of ways as they determine.

The exception to the overall Task Force approach is the recommendation for a stand-alone course in professionalism and ethics. The Task Force has set out why it has recommended as it has in this one case and has made it clear that this is the one exception to the competencies approach. In my view nothing in the Task Force approach suggests a general interest or intent on the part of law societies to generally mandate courses. In fact, the opposite is true. Given that the Law Society of Upper Canada's 1957/69 document of requirements mandated *seven courses*, the Federation Task Force's approach reflects an increased movement away from the mandatory course approach.

It is my view that the implementation issues to which the Task Force refers in its recommendation will necessitate the involvement of the Council of Canadian Law Deans. To the extent there are areas of disagreement between the law schools and the recommendations I am confident that the implementation phase will resolve them.

Yours very truly,

A handwritten signature in black ink, appearing to read 'W. A. Derry Millar', with a long horizontal flourish extending to the right.

W. A. Derry Millar
Treasurer

University of British Columbia Faculty of Law motion

The Faculty of Law, The University of British Columbia supports the position of the Council of Canadian Law Deans ("CCLD"), set out in its letter of November 20, 2009, that a more serious engagement with legal educators is required before moving forward on the Task Force Report and its recommendations.

In particular we support the concerns raised by the CCLD regarding the impact of the Task Force recommendation imposing a specific course requirement. We endorse the CCLD position that specifying a mandatory course impinges on the ability of legal educators to meet their core responsibility to develop pedagogically sound programming in a flexible, imaginative and innovative manner.

We also support the concern raised by the CCLD regarding the establishment of a compliance requirement for a Law School to be 'approved'.

Finally, we support the CCLD's recommendation that the way forward requires a newly constituted committee co-chaired by a member of the CCLD and of the Legal Profession. We would add to the CCLD's recommendation regarding process, however, that membership of the committee should include teaching faculty as well as Deans.

The motion was passed 14 in favour; 5 opposed and 4 abstained.

J

Motion on the Final Report of the Task Force on an Approved Common Law Degree

Moved by Professor Bruce Archibald; Seconded by Professor Dawn Russell:

Whereas, the Faculty of Law at Dalhousie University (now the Schulich School of Law) has had a collegial and collaborative relationship with the Nova Scotia Barristers' Society for more than 125 years; and

Whereas, in the process of developing the Final Report of the Task Force on a Canadian Common Law Degree (Oct 2009) the Federation of Law Societies did not adequately consult with Canadian law faculties, law teachers and other constituencies; and

Whereas, the Federation of Law Societies has ignored constructive suggestions from the Canadian Association of Law Teachers and the Canadian Law and Society Association; and

Whereas, the Federation has not dealt with many of the concerns of the Council of Canadian Law Deans; and

Whereas, while it is acknowledged that the Nova Scotia Barristers' Society has jurisdiction over admission to the profession, it has no legal authority to implement many of the recommendations of the Final Report;

BE IT RESOLVED THAT

The Faculty Council of the Schulich School of Law at Dalhousie University does not accept the core recommendations of the Final Report of the Task Force on a Canadian Common Law Degree;

And further, Faculty Council urges the Nova Scotia Barristers' Society not to approve the recommendations of the Final Report;

And further, Faculty Council urges the Nova Scotia Barristers' Society to endorse a new, representative and inclusive joint committee to address the creation of a system for the recognition of university programs as appropriate preparation for the practice of law.

Approved Unanimously.

K

THE LAWYERS WEEKLY

Task force calls for national law school standards

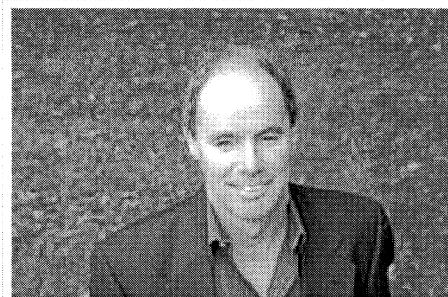
Recommendations will harm academic freedom, says professor

By donalee Moulton
Halifax
November 06 2009 issue

New ground will be broken and Canada's legal landscape will shift significantly if a recommendation from the Federation of Law Societies Task Force to have a made-in-Canada "requirement" for entry to the Bar admission programs of common-law jurisdictions is implemented.

"This is the first time, if adopted, we will ever have a national standard," said John Hunter, chair of the task force and past president of the Law Society of British Columbia.

The task force, which was appointed in June 2007 to review existing academic requirements for entry to Bar admission programs, is proposing: "a national requirement expressed in terms of competencies in basic skills, awareness of appropriate ethical values and core legal knowledge that law students can reasonably be expected to have acquired during the academic component of their education."



Richard Devlin

The national standard will ensure a minimum degree of competency by focusing on key knowledge requirements, said Hunter. "We didn't want at the beginning merely to have a course list as many jurisdictions do."

That standard defines education very narrowly — too narrowly, according to Richard Devlin, a professor at the Schulich School of Law at Dalhousie University in Halifax and one of the individuals who drafted responses to the task force on behalf of the Canadian Association of Law Teachers and the Canadian Law and Society Association.

"The report doesn't talk about lifelong learning. The report doesn't talk about Bar courses," he noted.

As a result, Devlin said, "it leads to a flawed analysis. We recommended a national conversation. The Federation of Law Societies rejected this."

Getting to anything even resembling terra firma has taken several interim reports and much discussion — much of it heated — with law schools and Bar societies across the country. "We have tried to address the concerns and modified our views as we went along," said Hunter.

"This is an appropriate place to be at this time," he added. "It is a very reasonable standard."

Many would agree — with important caveats. "I think the task force did quite a good job in terms of responding to some of the criticisms," said Alice Woolley, an associate professor in the Faculty of Law at the University of Calgary.

"In general," she added, "I'm supportive."

For many in the academic community, including Woolley, that support is qualified. One area of concern is requirements around the development of a mandatory ethics course. Those requirements, Woolley contends, are too specific and too directive. "I don't see it as an appropriate relationship between a regulator and a law school."

It is totally contrary, she noted, to the approach the task force took with respect to the issue of competencies.

The emphasis on ethics is a reflection of reality. The course is necessary, said Hunter, not because "of any deficiency in the profession but lawyers are held to a higher standard."

As a result, he noted, the task force felt it was important for students to have a particular course in ethics.

Such a detailed course outline stands in stark contrast to academic freedom, said Devlin. "It's a good idea," he said. "However, it's the law schools who should ultimately determine what they teach."

The task force, Devlin added, has "tried to dictate what should be taught in that course. That is a clear violation of academic freedom. This may be the edge of the wedge."

Whatever the final requirements, they must be enforced. How that will happen is unclear. "There is no enforcement spelled out," said Woolley. "That either means you're not going to enforce or you're not saying how. Accountability means being accountable."

The task force is recommending that a standardized annual report be prepared by law school deans that explains how the regulations have been met. However, noted Woolley, this would not address such issues as student complaints.

Such questions will likely be left to an implementation committee, which the task force has suggested be put in place to move forward on the national requirement.

It's a move the federation has no legal right to make, Devlin said, but which may well explain the federation's driving interest in this whole area. "The task force clearly acknowledged this is about maintaining self-regulation of the legal profession. They want to regulate law schools unilaterally."

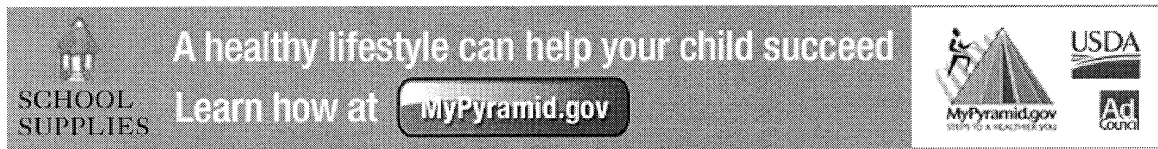
However, he noted, the federation has "no legal authority to regulate law schools."

Hunter doesn't understand all the hoopla. He believes there is no reason for inertia or controversy. "I don't think [this report] should create ripples. The recommendations are not onerous or startling," he said.

"I'm hopeful most people in the academic community will recognize we have tried not to be intrusive but [can] meet our needs at the same time," Hunter added.

Alice Woolley is also hopeful. "I'm hopeful," she added, "that this isn't the final word."

 [Close](#)



THE GLOBE AND MAIL

November 6, 2009

Can we teach ethics? When pigs fly

By Clifford Orwin
From Monday's Globe and Mail

Who would be at the head of the line to swear never to become Bernie Madoff if not Madoff himself?

Ethics is a serious business. And that's why, reading in last weekend's Globe and Mail about the gurgling wave of ethics education sweeping North American business schools, I had to laugh.

"MBA programs around the globe," wrote Joanna Pachner, "are rushing to prove that they teach students to be good - not just rich - by revamping their curriculums and encouraging debates about ethical corporate behaviour."

At the same time, she said, MBA students are busy doing their part to prove their moral bona fides, mostly by composing earnest oaths. "I solemnly swear ... never to become Bernie Madoff," as her article was wryly headlined.

Forgive me if the spectacle of MBA students taking oaths to be ethical fills me not with reverence but with giggles. Oaths: Aren't those what people take in courtrooms? And yet the lying there continues apace. Who would be at the head of the line to swear never to become Bernie Madoff if not Mr. Madoff himself?

I'm not suggesting that business students are bad people, or that those who would teach them to be good are any less competent than the rest of us. It's just that the whole notion of teaching ethical behaviour rests on a fundamental misconception - namely, that ethical behaviour can be taught.

Now I'm a pretty good teacher, or so people say. Yet, give me Mr. Madoff for one, two or three courses of ethics instruction and he would still be Bernie Madoff. Would he have learned anything from the experience? Yes, he'd talk a much better game of ethics. Thanks to my teaching, he'd be an even greater menace to society.

This year, I'm teaching 500 students about justice, and I'm not making a single one of them a better person. Those who already aspire to justice may refine their understanding of what it is. (They may also come to see that everything has its problems, even justice.) Those already minded to be good citizens may become more thoughtful ones. I believe strongly in what I do - I just don't think that what I do is to improve the moral character of my students.

A university course is not a revival meeting.

Students indifferent to justice just aren't going to be won over to it by anything that I could say. Or that anyone else could say. A university course is not a revival meeting. I don't cure palsies and I don't plead with students to come forward to declare themselves for ethics. And if I did - and if they did - it wouldn't mean a thing. Talk is cheap. Talk consisting of high-minded oaths and declarations of one's moral seriousness is even cheaper.

By the time a student arrives at university, and *a fortiori* several years later when he ambles on to his MBA, his ethical

character is already firmly set. Whether virtue can ever be taught was already a thorny question for Plato. Whether it can be taught to adults, in a classroom, shouldn't be a thorny question for anyone.

Ethics education has its place, especially in professional schools and if you define it narrowly. Doctors, lawyers and businessmen, too, should be informed of what is forbidden to practitioners of their respective professions. This is only fair to them, as well as being useful for us. When they go astray, and the law steps in to hold them accountable, they'll be all the less able to plead ignorance as an excuse.

But to inform business students of what qualifies as ethical is one thing. To make them more ethical is quite another. Does anyone really think there's one fewer crooked lawyer or cheating doctor in the world because of law school or med school ethics courses?

What can ethics education accomplish, then, beyond informing of professional standards? It can serve as an exercise in self-celebration. Look at us students, how earnest we are in avowing how earnest we are. Look at our institution, how bent we are on making our students better people.

The relation of such palaver to actual conduct is doubtful, to say the least. Take Stanford University, where the student body avows itself as green as Kermit the Frog. Buttressed by a stack of PowerPoint graphs, a friend likes to demonstrate to his students that, as they have grown ever more Gaia-friendly over the years, their consumption of energy in the Stanford dorms has grown ever more mind-boggling. It's those shiny gadgets of theirs. My friend does this for the sheer delicious malice of it, not because he expects a single student to unplug anything. He knows that, among any student body, ethics is primarily a fashionable pose.

Are there genuinely ethical businessmen, doctors, lawyers, police officers, plumbers? Sure. But not because of anything that I or any other professor taught them. Modesty, colleagues, modesty.

Clifford Orwin is professor of political science at the University of Toronto and distinguished visiting fellow at Stanford University's Hoover Institution.

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**THE “FIERCEST DEBATE” OVER THE REGULATION OF LEGAL
EDUCATION IN ONTARIO**

**Implications for the Federation of Law Societies of Canada’s Initiative to
Institute Requirements for the Canadian Common Law Degree**

By: Katherine Levitt
Date: February 2, 2010

I. INTRODUCTION

In June 2007 the Federation of Law Societies of Canada (the “federation”) convened a Task Force on the Canadian Common Law Degree (the “task force”) to review the existing academic requirements for entry to bar admission programs across Canada, and to recommend any modifications to such requirements that they saw fit. The task force published their recommendations in a final report published in October 2009. The recommendations include the adoption of national academic requirements for entry to bar admission programs in Canada’s common law jurisdictions, as well as certain institutional requirements that Canadian law schools would be expected to follow.

The focus of this paper will not be to critique and examine the merits of the task force’s final recommendations. Instead, this paper will examine the history of the regulation of legal education by the profession in Ontario, and what the implications of such history are on the profession’s sole authority to regulate the academic curriculum in law schools. What will be revealed in examining this history is that, quite unlike the current process undertaken by the federation’s task force, established standards for law schools in 1957 and 1969 in Ontario were the product of an *agreement* between the legal profession and legal academy. This agreement was arrived at through the use of careful negotiation, healthy debate and compromise, putting an end to decades of antagonism. The agreement would set an important tradition for the relationship between the profession and the legal academy with respect to the regulation of legal education – a tradition that the federation should not have the ability to easily depart from. I begin by presenting a brief overview of the task force’s process and recommendations and the

reaction of the legal academy. I will then offer background to the debate that occurred between the legal profession and the legal academy in the early 20th century, a debate that culminated in a compromise regarding legal education in 1957. In conclusion, I will examine the implications of this debate on the task force's recent initiative, and attempt to answer the question: wherein lies the authority to regulate legal education?

II. BRIEF OVERVIEW OF THE TASK FORCE'S RECOMMENDATIONS

The academic requirements in the task force's final report include what is referred to as "competencies in basic skills, awareness of appropriate ethical values and core legal knowledge that law students can reasonably be expected to have acquired during the academic component of their education".¹ The *basic skills* require that an applicant demonstrate competencies in problem-solving, legal research, and oral and written communication.² The *ethics and professionalism* requirement calls for a stand alone course dedicated to the subject, that would give the applicant "an awareness and understanding of the ethical requirements for the practice of law in Canada..."³ Finally, and perhaps the most contentious of all, the *core legal knowledge* requirement lists areas of study in which the applicant must be able to demonstrate a general understanding. These different areas of study specified by the task force are categorized under what the task force refers to as Foundations of Law, Public Law of Canada, and Private Law Principles.⁴

¹ Federation of Law Societies of Canada, *Task Force on the Canadian Common Law Degree, Final Report* (October 2009) at 4.

² *Ibid.* at 8.

³ *Ibid.* at 9.

⁴ *Ibid.* at 10.

The work of the task force has been met with resistance from members of the legal academic community in Canada.⁵ Much of this criticism centres around process, and in particular the inadequate debate and consultation that took place between the task force and a broad base of the legal academy when it devised the list of academic requirements. When the task force issued its consultation paper in September 2008, it offered only 3 months to receive submissions in response. In the end, a total of 37 submissions were received, only 12 of which were from representatives of Canadian law faculties, universities, deans, professors, and students.⁶ Moreover, although the task force says it met with two Canadian law faculties⁷, as important and distinguished as these faculties are, one can hardly say that the task force's findings were the result of a healthy debate between members of the profession and the legal academic community.

Many of the complaints about the inadequate consultation process can be seen in the various responses from members of the legal academy to the task force's consultation paper. The Law Society of Upper Canada (the "law society"), in its response to the consultation paper, remarked that "The Federation Task Force's consultation period has been short".⁸ The University of Calgary Faculty of Law, in its response held that "...more and deeper dialogue is required, that should be based on collaboration rather than the formal and sometimes adversarial process that we have seen".⁹ Dean Brent Cotter, writing on behalf of the University of Saskatchewan College of Law Faculty, recommended that a "national, integrated dialogue occur before any decisions

⁵ Much of this resistance can be found in the submissions to the Task Force's consultation paper.

⁶ *Supra* note 1 at Appendix 1.

⁷ In its final report the Task Force claims to have met with members of the law faculties at the University of Toronto Faculty of Law, and the University of Ottawa Faculty of Law, to further discuss its September 2008 consultation paper (*Ibid.*).

⁸ Law Society of Upper Canada, *Submission to the Federation of Law Societies of Canada Task Force on the Approved Common Law Degree* (November 2008) at 3.

⁹ University of Calgary Faculty of Law, *Submission to the Federation of Law Societies of Canada Task Force on the Approved Common Law Degree* (undated) at 1.

are taken by the Federation...”.¹⁰ Dean Bruce Feldthusen from the University of Ottawa Faculty of Law, writing in his personal capacity, remarked how “there is a difference between being involved in planning an initiative, and being allowed to comment on an initiative that is already well underway”.¹¹ Perhaps one of the most notable responses came from the Canadian Association of Law Teachers and the Canadian Law and Society Association (CALT/CLSA) who together formed a joint committee to respond to the task force’s paper. The CALT/CLSA response was very critical of the fact that “legal educators, via the CALT and/or CLSA, were never invited to participate in the preliminary process before the Consultation Paper was published and circulated for the purposes of consultation”.¹²

In addition to process, another criticism has been the lack of evidence-based reasoning used by the task force to arrive at its recommendations. As Harry Arthurs, a well-known Canadian expert on legal education, remarked in his response to the task force’s consultation paper: “The proposed list of ‘framework competencies’ is deficient because it is based neither on historical or current evidence of what lawyers actually know or do nor on evidence-based speculation about what they will have to know or do in the future...”.¹³ Arthurs goes on to say that:

...in the absence of any hard evidence that current graduates are more poorly trained or more prone to professional misconduct or incompetence than their predecessors, it is difficult to see why a more prescriptive approach should be adopted...At most, suggestions to reduce [academic] autonomy should be evidence-based, and should be directly related to the prevention of harm to the public by inadequately-educated graduates.¹⁴

¹⁰ Dean Brent Cotter on behalf of the University of Saskatchewan College of Law, *Submission to the Federation of Law Societies of Canada Task Force on the Approved Common Law Degree* (December 15, 2008) at 5.

¹¹ Dean Bruce Feldthusen, University of Ottawa Faculty of Law, writing in his personal capacity, *Submission to the Federation of Law Societies of Canada Task Force on the Approved Common Law Degree* (December 1, 2008) at 2.

¹² CALT/CLSA, *Submission to the Federation of Law Societies of Canada Task Force on the Approved Common Law Degree* (December 15, 2008) at 12.

¹³ Harry Arthurs, *Submission to the Federation of Law Societies of Canada Task Force on the Approved Common Law Degree* (undated) at 3.

¹⁴ *Ibid.* at 10-11.

The last time a major dispute arose between the legal profession and academics over the management and control of legal education was in the early 20th century in Ontario. This debate culminated in a 1957 *agreement* between the two groups about what the academic requirements should be for an approved law course (i.e. what academic standards universities should meet in order to open an approved law school that granted an LL.B.). The academic standards would later be revised in 1969. Ontario's history on the subject of legal education is so important because these standards would eventually become the guiding criteria for all Canadian approved law schools.

III. THE 'FIERCEST' DEBATE OVER LEGAL EDUCATION IN ONTARIO IN THE EARLY TO MID 20TH CENTURY

The current tensions between the legal profession and the legal academic community surrounding the issue of control over legal education harkens back to the early 20th century dispute in Ontario between the benchers of the Law Society of Upper Canada and those who, led by Cecil A. Wright, wanted more emphasis placed on academic training in legal education. This time of upheaval is what Bora Laskin would later refer to as “the fiercest debate on legal education that Canada has hitherto known”.¹⁵

Wright, who was dean of Osgoode Hall Law School and would later establish a competing law school at the University of Toronto, is widely viewed as “the architect of legal education in Ontario”.¹⁶ The debate about legal education in Ontario pitted those in favour of an emphasis on practical training against those who wanted a more academic, university-based approach. C. Ian

¹⁵ Bora Laskin, *The British Tradition in Canadian Law* (London: Stevens and Sons, 1969) at 84.

¹⁶ C. Ian Kyer & Jerome E. Bickenbach, *The Fiercest Debate: Cecil A. Wright, the Benchers, and Legal Education in Ontario 1923-1957* (Toronto: The Osgoode Society, 1987) at 4.

Kyer and Jerome E. Bickenbach, authors of *The Fiercest Debate: Cecil A. Wright, the Benchers, and Legal Education in Ontario 1923-1957* eloquently frame the debate as follows:

The benchers of the Law Society of Upper Canada staunchly upheld the principles that legal education must be practical in order to prepare the lawyer to serve society, and that the educational process should be controlled by those who practiced the profession. In contrast, Wright and his teaching colleagues stressed the ‘learned’ nature of the profession and the need for the educational process to be developed and controlled by professional educators.¹⁷

i. Early History

Before delving into the nature of the fiercest debate, some early history is important. The Law Society of Upper Canada was founded in 1797 by an Act of the Legislative Assembly of Upper Canada.¹⁸ The 1797 *Law Society Act* empowered the profession to “control entry to its ranks, define its standards, and police its monopoly of practice”.¹⁹ The first students of law were recorded by the law society in 1801.²⁰ Training of these students focused exclusively on practical training:

Students of the law were not required to pass examinations either before entering articles or before being admitted to the society with full privileges to practise law. The student’s master, or principal, was solely responsible for his education and, after five years, his acceptability.²¹

Eventually articling alone was seen as insufficient training, and law students began to demand lectures.²² In response to these demands, in 1843 the law society arranged for the appointment of William H. Blake as the first professor of law at the newly opened University of King’s College

¹⁷ *Ibid.* at 5.

¹⁸ Law Society of Upper Canada website: *History, The Oldest and Largest of Canadian Law Societies* <<http://www.lsuc.on.ca/about/a/history/>>.

¹⁹ Christopher Moore, *The Law Society of Upper Canada And Ontario's Lawyers 1797–1997* (Toronto: University of Toronto Press, 1997) at 9.

²⁰ *Supra* note 16 at 24.

²¹ *Ibid.*

²² *Ibid.* at 25.

(which would, by 1850, become part of the University of Toronto).²³ Tensions began to emerge between the law society and the university: in the early 1850s the law society began to “[discourage] students from attending what it saw as increasingly ‘academic’ lectures” and the university “responded by abolishing the chair in 1853”.²⁴ Eventually lectures would be restored through Trinity College, and in 1855 the law society arranged for Osgoode Hall (built by the law society in 1832) to deliver lectures.²⁵

Even in these early days tensions began to emerge between the profession and academy over questions of the content and control of legal education:

Although the law society was reluctant to invest its own funds in educational ventures...it feared losing control over the education of its students and therefore was unwilling to allow any of the province’s universities to take over the role. Still, law students clearly felt the need for some type of formal training, and the profession itself worried that articles alone might not afford a guarantee of fitness to practise.²⁶

Over the next 30 years (1855 – 1888) attempts would continue to be made to formalize legal education in Ontario. This period was marked by the opening and then subsequent closing of a school of law at Osgoode Hall over two times. In 1888 the law society convened a Committee on the Establishment and Maintenance of a Law Faculty, in response to a proposal put forward by the University of Toronto to establish a faculty of law that would be jointly run by both the university and the law society.²⁷ The committee recommended against such a partnership. It did, however, recommend improvements to the school of law at Osgoode Hall in the form of compulsory lectures and the hiring of a permanent teaching staff that was closely monitored by

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.* at 25-26.

²⁷ *Ibid.* at 29.

the law society's Legal Education Committee.²⁸ In 1889 the law society tasked the Legal Education Committee with the implementation of these recommendations, thus laying the foundation for the establishment of a permanent law school in Ontario:

The underpinnings of a permanent law school were thus secured: the law society, probably to block any further attempt by the University of Toronto to encroach on the field of legal education, was finally in the business of training students for admission to the bar.²⁹

William Albert Reeve was appointed the first principle of the newly minted Osgoode Hall Law School, which officially opened on October 7, 1889.³⁰ Although a principle had been appointed, the law society still maintained a fair degree of control over legal education at the law school: “Reeve was principal of the law school but the legal education committee [of the law society] was its collective dean, determining all significant matters of school discipline, curriculum, and policy”.³¹

The law society ensured the program at Osgoode Hall “offered a ‘black-letter’ law curriculum intended less to encourage free-wheeling academic inquiry than to bring new generations of law students into the established tradition”.³² John D. Falconbridge, who would become dean of Osgoode Hall Law School in 1923, explained clearly the early system of legal education at the school, in a 1932 article that appeared in the English *Journal of the Society of Public Teachers of Law*. His description illustrates how the school's program was not intended to conflict with articling:

At Osgoode Hall, unlike some of the other Canadian law schools, the system in actual use is one of concurrent law school training and office service. The law school lectures are given on Monday, Tuesday, Thursday and Friday at 9am and 10am, and on Wednesday at 9am, 10am and

²⁸ *Ibid.* at 30; *Supra* note 19 at 170.

²⁹ *Supra* note 16 at 29.

³⁰ *Ibid.* at 30-31.

³¹ *Supra* note 19 at 170.

³² *Ibid.*

I am, and for the rest of the day a student is, nominally at least, engaged in office work under the direction of the solicitor to whom he is articulated or the Toronto agent of that solicitor. Every student must be articulated to a solicitor. If a person is not a university graduate when he is admitted as a student on the books of the Law Society, the term of the articles is five years, during the last three of which he attends the law school. If he is a graduate, the term of the articles is three years running concurrently with the three years of his attendance at the law school.³³

After Reeve's death in 1894, Newman Hoyles took over as principal, and he would serve in that post until 1923.³⁴ Hoyles "expressed no wish to reform the Osgoode curriculum".³⁵ As such during his tenure there was little change to the system of legal education in Ontario.

ii. Voices for Change

In 1923 two events took place that would usher an era of change: Cecil A. Wright enrolled at Osgoode Hall as a student (after completing an undergraduate honours degree in history and economics at the University of Western), and John D. Falconbridge was appointed as Hoyles's successor. Falconbridge would eventually be given the title 'dean' of the law school.³⁶ Both Falconbridge and Wright wanted reform to the current system of legal education.

Falconbridge would work closely with a special committee created by the law society to look into matters pertaining to the law school generally.³⁷ After a trip to the University of Michigan Law School to "learn firsthand what he could of educational developments in the United

³³ John D. Falconbridge, "Legal Education in Canada" (1932) 1932 J. Soc'y Pub. Tchrs. L. 32 at 38.

³⁴ *Supra* note 19 at 170-171.

³⁵ *Ibid.* at 171.

³⁶ *Ibid.* at 213.

³⁷ *Supra* note 16 at 45.

States”³⁸, Falconbridge worked with the special committee, and according to Kyer and Bickenbach, had quite an impact on the committee’s report:

The report hinted at a change in attitude on the part of the benchers, a turning away from the stagnation of Hoyles’s years to a new and more vigorous school under Falconbridge. It appears that the committee granted all of Falconbridge’s requests. New courses in the history of English law, agency, bankruptcy, and company law were added to the curriculum, and other courses were consolidated. The number of lecture hours increased to 762 per school year...promises were made to expand the student library; and the legal education committee was advised to develop closer relations with the teaching staff.³⁹

Although this marked somewhat of a turning point for the proponents of a more academic focus for legal education, decisions about the curriculum were still to be approved by the law society’s Legal Education Committee. Falconbridge’s push for reform continued, however, as he – together with the Committee on Legal Education of the Canadian Bar Association – successfully helped to convince the law society to raise admission standards to the completion of two years of university in 1927.⁴⁰

After spending a year doing graduate work at Harvard, Wright was hired by Falconbridge as the law school’s fourth full-time faculty member. In a lecture delivered to The Law Club of Toronto University in 1931, Wright made his views known about the shortcomings of the system of legal education at the time:

It has been said that ‘Taught law is tough law.’ Law however cannot, like mathematics or the sciences be taught dogmatically. There are no essential verities. Law can never stand still long enough to allow them to be extracted. What is law to-day is not necessarily law to-morrow. Hence law, like the movements of the earth itself can only be observed in operation. Let us then at the same time observe and consider the changing conditions of society which furnish the path that law must follow and to which it must adjust itself. Only by so doing will we in any degree be able to prophesy where law is tending.⁴¹

³⁸ *Ibid.*

³⁹ *Ibid.* at 45-46.

⁴⁰ *Supra* note 33 at 33; *Supra* note 16 at 56.

⁴¹ Cecil A. Wright, “An Extra-Legal Approach to Law” (Lecture, delivered to The Law Club of Toronto University, 1931), (1932) 10(1) Can. Bar Rev. 1 at 17.

As Kyer and Bickenbach note, Wright's criticisms in this lecture of the law society's approach to legal education in Ontario were clear: without an academic component to legal education, lawyers would be unable to understand how the law can be improved:

...by viewing law as a list of rules and doctrines, lawyers were not only behind the times but were making it impossible for the law to solve the real problems that demanded real solutions. The consequences for legal education were clear: law could not be taught in the manner the benchers insisted it should be, as a collection of skills and rules that had to be learned by rote and applied precisely to practices.⁴²

iii. Resistance from the Law Society: 1935 Report of the Special Committee on Legal Education and its Aftermath

In May 1932 the Legal Education Committee reduced the requirements for admission standards, reversing Falconbridge's achievements of 1927. The new rule, which was to come into effect on September 1, 1932, permitted "candidates to enter on their legal training on proof of having passed certain examinations of the Middle School (Pass Matriculation) and of the Upper School (Honour Matriculation) of the Department of Education of Ontario".⁴³ In short, the requirement that law students acquire 2 years of university education prior to entering Osgoode Hall Law School, which had been in place since 1927, was abolished.

After being flooded by complaints from students and local bar associations opposing the reduction of admission requirements, the law society convened a special committee of the Legal Education Committee to "to investigate the subject of Legal Education in all its aspects, and report their conclusions and recommendations".⁴⁴ A 'Special Committee of the Students of

⁴² *Supra* note 16 at 109.

⁴³ *Supra* note 33 at 33.

⁴⁴ Law Society of Upper Canada, "Legal Education" (1935) 13(6) Can. Bar Rev. 347 at 347.

Osgoode Hall' was convened in order to prepare a response to the special committee's request for the student body's views on the present state of legal education.⁴⁵

The report made it clear that the students were more in line with the thinking of Falconbridge and Wright. The committee of students recommended going beyond the requirements of 1927, and favoured the attainment of a full university degree be required before permission to study law.⁴⁶ The report was also very critical of what it referred to as "concurrent law school and office work" calling it "a complete failure".⁴⁷ The report suggested that one of the reasons the concurrent system does not work is that it creates conflicting demands for law students.⁴⁸ In the end, the report recommended that students attend the law school full time for three years, followed by one year in a law office⁴⁹:

The root of the evil lies in the present system of concurrent law school and office work, and it is only by abolishing that system and establishing a full-time law school in which the students will have an opportunity to pursue their studies, free from the distraction of competing interests, that Osgoode Hall can completely fulfil its function in our system of legal education.⁵⁰

A final issue dealt with by the report had to do with courses and hours of lectures. The report was very critical of the status quo, claiming that "lectures are conducted, generally speaking, in a very elementary manner, and students are not trained to think for themselves".⁵¹ As Kyer and Bickenbach point out, behind many of the criticisms found in the students' report "was a more

⁴⁵ Report of the Special Committee of Students of Osgoode Hall, "Education for the Bar" (1935) 12(3) Can. Bar Rev. 144 at 144.

⁴⁶ *Ibid.* at 147.

⁴⁷ *Ibid.* at 155.

⁴⁸ *Ibid.* at 153.

⁴⁹ *Ibid.* at 155.

⁵⁰ *Ibid.* at 160.

⁵¹ *Ibid.* at 157.

basic premise, never expressly stated but clearly implied: the law society should not be allowed to control legal education in Ontario”.⁵²

The special committee of the law society issued its final report in 1935. It would eventually be adopted by the law society. The *Report of the Special Committee of Students of Osgoode Hall*, as well as submissions from others such as dean Falconbridge who voiced his concerns with the present state of legal education, all seemed to fall on deaf ears. The special committee’s 1935 report would, in the words of Kyer and Bickenbach, “bring to an end, and to a considerable extent undo, a decade of Falconbridge’s reforms”.⁵³

The 1935 report called for the status quo in terms of admission requirements, stating it was “unable to recommend either the two year college course or a university degree as a necessary condition for admission to the study of law”.⁵⁴ The report also recommended that academic training be scaled back – lectures were to be reduced, as well as the content of certain courses. The special committee’s disdain for academic training, which it believed came at the expense of ‘practical’ office work, was made clear in the report:

...the tendency has been to emphasize unduly the academic training at the expense of efficient office training . We think a change in this respect is desirable, and that greater facilities should be provided for work in the office...[the committee] is of opinion that a rearrangement of the curriculum and a change in hours of lectures will be of important advantage to the students, having special regard to widening the opportunity for practical training.⁵⁵

⁵² *Supra* note 16 at 128.

⁵³ *Ibid.* at 125.

⁵⁴ *Supra* note 44 at 351.

⁵⁵ *Ibid.* at 353.

The law society, through the work of the special committee in undoing the reforms that Falconbridge and others had worked tirelessly to achieve, was flexing its muscle and exerting power and control over legal education in Ontario.

Throughout the next ten years Wright would publish two important works on legal education: *Legal Reform and the Profession* in 1937⁵⁶, and *Law and the Law Schools* in 1938.⁵⁷ Not surprisingly, both pieces are very critical of the 1935 setbacks to legal education reform. In the 1937 article Wright discussed how the profession's over-emphasis on the 'practical' side of training at the expense of a more academic education stifles legal reform and the development of the law in general:

Not so long ago the governing body of the profession in one of the leading provinces of Canada reported that "the tendency has been to emphasize unduly the academic training at the expense of efficient office training". Let us, by all means, discard the impractical man who attempts to remove law from life and confine it within the four corners of a text-book. But the demand for "practical" training often leads, perversely, to precisely that type...[Unless] our system of legal education is broadened to include searching analyses of existing doctrine...we shall not only continue to turn out a profession unresponsive to legal reform, but we will have made no provision for the building of groups of professional men whose business it is to work for the improvement of the law itself.⁵⁸

In the 1938 article Wright argued that some degree of practical training was valuable when combined with a proper academic education:

Under a system of concurrent office and school work such as we have in Ontario, it is not an easy task to interest students in any aspect of law save that directed towards the quick results so characteristic of our commercial age...I believe that the future of our schools lies in what looks like two opposite directions; in improving the technical branch of our training by some method of supervised and rounded practical work, and with that a teaching of every course with some view of the social purpose that law serves, how it might be improved, how it ought to function.⁵⁹

Wright was arguing that a measure of both practical and academic training were of great value

⁵⁶ Cecil A. Wright, "Legal Reform and the Profession" (1937) 15(8) Can. Bar Rev. 633.

⁵⁷ Cecil A. Wright, "Law and the Law Schools" (1938) 16(8) Can. Bar Rev. 579.

⁵⁸ *Supra* note 56 at 634, 637.

⁵⁹ *Supra* note 57 at 593-594.

and importance in order to have a robust legal system. Until both groups could come together and jointly agree to an arrangement, this balance in legal education would not be realized.

Despite Wright's attempts to revive the debate about legal education in Ontario, the law society did not engage. The debate would not be revived in earnest until 1945. That year, Wright managed to bring together a movement for reform that included "as active participants the president of one of Canada's leading universities [Sidney Smith from the University of Toronto], members of the university's board of governors, and teachers at Osgoode Hall and the university".⁶⁰ Included in this group was Bora Laskin, who moved from teaching at the University of Toronto School of Law School to Osgoode Hall that year.

iv. Cecil A. Wright: Further Attempts at Achieving Legal Education Reform

The members of this movement for reform wanted to create a professional university law school that would combine the University of Toronto School of Law and Osgoode Hall:

The [University of Toronto School of Law] was granting an honours BA [in law] and an LL B, but its students received no credit from the law society and could not practise without graduating from Osgoode Hall; Osgoode Hall qualified students to practise, but could not give a degree. By combining the two schools into a professional university school much could be gained: one could reduce expenses, eliminate duplication, and grant a professional LL. B. degree.⁶¹

In 1948 Wright would replace Falconbridge as dean of Osgoode Hall. Kyer and Bickenback speculate that Falconbridge's resignation during this time could have been an attempt "to put pressure on the benchers to either accept Wright's proposal or declare their opposition openly".⁶²

⁶⁰ *Supra* note 16 at 175.

⁶¹ *Ibid.* at 174.

⁶² *Ibid.* at 193.

A special committee to study Osgoode Hall Law School and legal education in general was convened by the law society, and it was tasked with deciding whether to adopt Wright's proposed reforms, or retain the status quo. Once again, Wright would be disappointed with the results.

The special committee issued a majority report that was "highly critical of Wright and his supporters. [The report] was more a profession of faith in the existing system than an objective appraisal of the facts gathered by the committee".⁶³ Although two other minority reports were issued expressing dissenting views that were more sympathetic to Wright and his movement for reform, it was the majority report espousing more or less the status quo that would be adopted by the law society on January 20, 1949.⁶⁴

After learning of the law society's adoption of the report the next morning from a newspaper report⁶⁵, Wright immediately drafted a letter of resignation and held a press conference announcing his resignation, as well as the resignation of Osgoode Hall professors Stanley Edwards, John Willis, and Bora Laskin. Wright's letter of resignation criticized the law society for not informing him directly about the decisions taken:

In view of the fact that I am charged with the administration of the Law School, it seems to me that it would have been only an act of common courtesy to inform me of such a startling departure from all my recommendations to the Benchers before publishing them in the press. The fact that I was not informed, and the tenor of the recommendations lead me to the conclusion that my resignation as Dean must have been contemplated as a possibility by those persons drafting the report.⁶⁶

⁶³ *Ibid.* at 202.

⁶⁴ *Ibid.* at 207.

⁶⁵ Cecil A. Wright, "Should the Profession Control Legal Education?" (1950) 3(1) *Journal of Legal Education* 1 at 22.

⁶⁶ *Ibid.* at 22-26.

In the forthcoming days the law society would be publicly embarrassed in the newspapers. It would also be faced with the problem that “public opinion seemed to favour Wright’s position”.⁶⁷ Wright’s severance from Osgoode Hall was made final in March 1949, when Wright, together with Laskin and Willis, joined the faculty of law at the University of Toronto. Wright would take the post of dean.⁶⁸

Wright continued to produce important publications on the topic of legal education. In 1950 he wrote *Should the Profession Control Legal Education?* which was published in the American Journal of Legal Education.⁶⁹ The article offers an excellent account of the development of legal education in Ontario, and the events that led to Wright’s resignation from Osgoode Hall. Wright, unsurprisingly, is very critical of Ontario’s approach to the regulation of legal education by the profession. Although he states that the *Law Society Act* gives the law society “the widest possible control in the administration of every branch of the profession, including control and supervision of legal education itself”,⁷⁰ Wright nevertheless faults the law society for not granting recognition to the University of Toronto School of Law graduates:

The program and staff at the [University of Toronto School of Law] is the equal of any to be found in Canada. Under these circumstances, the present situation in which the Law Society, by virtue of its statutory powers, attempts to maintain an unfair advantage for its one school must still be resolved either by negotiation or legislation.⁷¹

Wright was laying the groundwork for the next major push for reform: to get the law society to qualify University of Toronto School of Law graduates to practise law in Ontario.

⁶⁷ *Supra* note 16 at 212.

⁶⁸ *Supra* note 19 at 231.

⁶⁹ *Supra* note 65.

⁷⁰ *Ibid.* at 7.

⁷¹ *Ibid.* at 32.

v. The 1957 Compromise: Recognition of Professional University Law Schools

After a few failed attempts on the part of the University of Toronto School of Law to achieve recognition equal to Osgoode Hall, the law society seemed to change its tune entirely on the issue in 1955. Faced with rising enrolment numbers, the school convened yet another special committee to consider the addition of new facilities to accommodate the ever-increasing student body.⁷² The committee soon realized that “planning for the future of Osgoode Hall Law School involved a determination of the school’s role in legal education in Ontario”⁷³, so it expanded its mandate to consider matters relating to the future of the law school in general.⁷⁴ Cost implications for the law society associated with expansion of the law school were also a driving factor for compromise with the universities. The committee articulated the problems associated with planning for future expansion without first settling the question on the role of universities in the report of a meeting held March 4, 1955:

The question of how extensive will be the accommodation required by the Law School in the somewhat more distant future, say ten years, cannot be answered until something is known of the role that Osgoode Hall will play in legal education in future in Ontario. Whether or not this Society should continue to assume the increasingly costly bulk of responsibility for legal education should be settled [emphasis added].⁷⁵

With the approval of the law society, the committee decided to convene a meeting with representatives from Ontario’s universities.⁷⁶ Wright was not present at the meeting. The meeting, however, was attended by Dr. Sidney Smith, President of the University of Toronto and

⁷² *Supra* note 19 at 257.

⁷³ *Supra* note 16 at 249.

⁷⁴ *Supra* note 19 at 257.

⁷⁵ Law Society of Upper Canada, *Report of the Special Committee on Law School* (February 14, 1957) at 3.

⁷⁶ The special committee met with the following representatives from Ontario’s universities: Dr. Sidney Smith (President, University of Toronto), Dr. W.A. Mackintosh (Principal and Vice-Chancellor, Queen’s University), Dr. G.P. Gilmour (President and Vice-Chancellor, McMaster University), Dr. R.A. Allen (Vice-President and Dean of Graduate Studies, University of Western Ontario), Father Rene Lavigne (Dean of the University of Ottawa), Father E.C. Lebel (President and Vice-Chancellor, Assumption College), Father G.E. Cousineau (Rector of St. Patrick’s College) and Dr. M.M. MacOdrum (President of Carleton College). (*Ibid.* at 3).

a close ally of Wright in his push for reforms. A meeting was held on April 30, 1955, to explore “the possibility of the universities of Ontario assuming a greater share of the burden of legal education”.⁷⁷ In the final report of the committee, which was published February 14, 1957, C.F.H. Carson, the committee’s chair, further articulated the purpose of the April 30, 1955 meeting as follows:

Such a meeting would provide an opportunity for an exchange of information, for a general discussion of legal education and in particular for a discussion of a question that was giving many concern namely, whether the time required between senior matriculation and call to the Bar could be shortened, or in any way better allocated.⁷⁸

At the end of the meeting Carson called on the university representatives to “...discuss among themselves the issues raised at the meeting”, and asked that they “formulate a proposal for consideration at a future meeting with [the] committee”.⁷⁹

In December 1955 the committee received a letter from Dr. W.A. Mackintosh, Principal and Vice-Chancellor of Queen’s University, outlining the general areas of agreement among the university representatives concerning legal education, and a proposed role for the universities.⁸⁰ Wright had taken part in these discussions.⁸¹ Key excerpts of the letter, as well as the recommendations, can be found below:

...There is complete agreement among us on the interest of the universities in having some share in legal education...A number of the universities are seriously interested in the possibility of establishing university law schools on the assumption that in the next decade there will be need for much extended facilities for law students...

The bases on which such schools might be established, with the cooperation of the Law Society, are considered to include:

(a) A B.A. or equivalent degree as a minimum entrance qualification.

⁷⁷ *Supra* note 75 at 3.

⁷⁸ *Ibid.* at 3.

⁷⁹ *Supra* note 16 at 250.

⁸⁰ *Supra* note 75 at 3.

⁸¹ *Supra* note 16 at 250-251.

- (b) A three-year course in law, presumably leading to an LL.B. degree, in which the minimum prescriptions for core subjects would be agreed with the Law Society but the University Senates would be left latitude to develop specialties and variations adapted to their own staffs and opportunities.
- (c) Such time spent by the student under articles as a law clerk, whether or not in attendance at Osgoode Hall, as the Law Society may require.
- (d) Such emanations for admission to the Bar as may be prescribed by the Law Society but which desirably might follow the pattern of the Royal College of Physicians and Surgeons in not duplicating university and Bar examinations.
- (e) Such substantial parity of treatment for all students as will make it possible for them to qualify for the Bar in the same length of time whether they have processed through Osgoode Hall or through a university law school.⁸²

The special committee reviewed the letter and recommendations, and suggested that a further meeting with representatives from the universities be convened on March 17, 1956.⁸³ At that meeting both sides realized that a misunderstanding existed between them concerning clause (a) of Mackintosh's letter. The university representatives, as it turned out, included this because they were under the impression that "the B.A. or equivalent degree was a stipulation imposed and insisted upon by the Law Society".⁸⁴ In the end it became apparent that the universities were more in favour of "an alternative route to the study of law...consisting of two years university work instead of a B.A. degree. Such two years could consist of a specially devised pre-law course or of successful completion of two years work in an approved Arts course."⁸⁵

The committee seemed determined to find a lasting solution to the dispute about legal education in Ontario that had plagued relations between members of the law society and the legal academy in the preceding decades. This resolve on the part of the committee to come to an agreement and end years of antagonism is evidenced in the language of the committee's 1957 final report:

⁸² *Supra* note 75 at 5-6.

⁸³ *Ibid.* at 6.

⁸⁴ *Ibid.* at 7.

⁸⁵ *Ibid.*

...every possibility raised by [the committee's] deliberations and its discussions with the universities and the Society's full-time staff were examined in detail in the hope that an arrangement of lasting benefit to all concerned, the future law students in Ontario, Osgoode Hall Law School, and the universities might be devised.⁸⁶

Eventually, based on the discussions with the university representatives, the committee developed a plan for the future of legal education in Ontario. Before going directly to the law society with the plan, a small study group composed of a member representing the universities, and two members representing the committee was created to engage in yet further discussions about the committee's plan. The group met on January 18 and 19, 1957, and following the meetings, submitted a jointly agreed-upon plan that was set out in a memorandum to all the universities.⁸⁷

The plan was met with "unqualified approval".⁸⁸ The heads of all the Ontario universities approved the plan "warmly without qualification".⁸⁹ The governing body of the law society would also approve the plan unanimously.⁹⁰ The day that legal education reformers such as Falconbridge and Wright dreamed of had arrived: the universities would undertake to provide the academic training of law by offering an approved law course.⁹¹ The law society and the universities were able to join forces, and through respectful discussion and negotiation, come to a compromise on what would be required for approved law courses. For legal education reformers like Wright, "this was the culmination of decades of effort...It could not be said that [the

⁸⁶ *Ibid.*

⁸⁷ *Ibid.* at 7-8.

⁸⁸ *Ibid.* at 8.

⁸⁹ *Ibid.* at 14.

⁹⁰ *Supra* note 16 at 263.

⁹¹ Law Society of Upper Canada, *Report of the Special Committee on Legal Education* (1972) at 6.

reformers] themselves had triumphed, however; what had triumphed was a spirit of co-operation, compromise, and mutual understanding...the war was over”.⁹²

The days of concurrent practical and academic training were gone. Under the new plan students would obtain formal academic training through an approved law course at a university, where they would obtain a law degree. This would be followed by the Bar Admission Course, which consisted of not more than 15 months of service under articles and a further period of practical and clinical training at Osgoode Hall of not more than 6 months, followed by a set of oral and written exams.⁹³

By the law society’s own admission, this 1957 compromise would be referred to as an “arrangement”.⁹⁴ This arrangement largely reflected the recommendations of the university representatives, as described in Mackintosh’s December 1955 letter to the committee. On April 3, 1957, the chairman of the law society’s Legal Education Committee, D. Park Jamieson, wrote a letter summarizing the 1957 requirements for an approved law course – the plan the universities had agreed to earlier that year:

1. An approved law course must have as minimum requirements for admission:
 - a. Successful completion of 2 years approved course in an approved university after senior matriculation, or
 - b. The successful completion of 3 years in an approved course in an approved university after junior matriculation.
 (Note: A degree in an approved course in an approved university satisfies the minimum requirement).
2. Minimum length of a law school course should be three academic years.
3. Each academic year should consist of an effective teaching period of approximately 30 weeks each of 15 hours per week, for a total of 450 hours each year.
4. Minimum full-time teaching staff of 5 professors.
5. Minimum law library of 10,000 volumes,

⁹² *Supra* note 16 at 262.

⁹³ *Supra* note 75 at 9.

⁹⁴ *Supra* note 91 at 6.

6. Curriculum. The following principles were enunciated:
- a. A law school course should contain certain basic subjects which would be compulsory for all students in all law schools.
 - b. Additional subjects to complete the regular course should be at the discretion of each law school
 - c. It is also recognized that some law schools desire to specialize in a particular field.
 - d. An approved school shall offer the following subjects to all its students:
 - Legal History
 - Contracts
 - Torts
 - Real Property
 - Personal Property
 - Civil Procedure
 - Criminal Law and Procedure
 - Agency
 - Partnership
 - Company Law
 - Constitutional Law
 - Evidence
 - Banking and Bills of Exchange
 - Family Law
 - Sale of Goods
 - Equity
 - Real Estate Transactions
 - Trusts
 - Wills and Administration of Estates
 - Municipal Law
 - Taxation
 - Legislation and Administrative Law
 - Jurisprudence or one subject of a jurisprudential nature.⁹⁵

The letter also included the following important paragraphs, which helped explain further the curriculum requirements:

It is appreciated that different subject matters may be variously grouped at different institutions, for example, Real Property and Personal Property may be combined to form one course in Property and for that reason this list should be regarded as indicating *areas* of the law which must be provided for in any curriculum before approval will be given and the list should not be regarded as necessarily establishing separate courses that must be taught under those labels in each institution.

It is prescribed that the courses in Contracts, Torts, Real Property, Personal Property and Criminal Law and Procedure be offered in the first year to ensure the laying of a sure foundation for the law course. There is no prescription concerning the sequence in which the remainder of the courses will be taught.⁹⁶

⁹⁵ *Supra* note 91 at Appendix D, pg 59-60.

⁹⁶ *Ibid.* at 60.

Throughout the 1950s and 1960s a series of approved law schools would open their doors in Ontario. In 1957 Osgoode Hall Law School, University of Toronto, Queen's University and the University of Ottawa all became officially 'approved' to teach the LL.B. programme, in accordance with the terms of the 1957 arrangement. The University of Western Ontario followed suit in 1958, and finally the University of Windsor in 1968.⁹⁷

This understanding that was arrived at between the law society and the universities in Ontario had an impact on the rest of Canada. As Kenneth Jarvis, former secretary of the law society noted in a 1984 letter to the federation regarding the approved Canadian LL.B. degree:

It is clear from the reports of 1957 that the original intention was simply to reshape legal education for Ontario. It soon became obvious, however, that universities in other parts of Canada expected that some of their graduates would want to be able to qualify to practise in Ontario. Also they approved of the direction in which Ontario was moving and were ready to move in the same direction themselves. Accordingly, the Law Society of Upper Canada made it clear that any university law faculty in Canada that was prepared to follow the format which had been adopted in Ontario could be approved for the purpose of having its graduates enter the Bar Admission Course in Ontario... There are at present sixteen universities across Canada which confer the approved LL.B. degree.⁹⁸

vi. 1969 Modifications to the 1957 Curriculum Requirements

In 1969 the Committee of Ontario Law Deans requested that the law society modify some of the requirements for the approved law school course.⁹⁹ After consultations and careful consideration of the proposed modifications, they were approved, and passed by the law society in March 1969. Members of the Legal Education Committee and the leadership of the law society "sought

⁹⁷ Letter from Kenneth Jarvis, Secretary, Law Society of Upper Canada to the Federation of Law Societies of Canada re. "Approved Canadian LL.B. Degrees" (February 20, 1984) (*Supra* note 1 at Appendix 2, pg. 823).

⁹⁸ *Ibid.* at Appendix 2, pg 823-824.

⁹⁹ *Supra* note 91 at Appendix D, pg 61.

it desirable to introduce a greater measure of flexibility into the stipulated requirements”.¹⁰⁰

These changes would reduce the 1957 list of compulsory courses from 23 to 7, giving “the law schools much greater freedom in curriculum development, but they did not affect the basic structure or the length of the program of legal education in the province.”¹⁰¹

The following are the changes made to the 1957 arrangement:

- (a) That the Law Schools should continue to offer major courses in the twenty-three subject areas listed in 1957, plus Labour Law and Conflict of Laws (probably omitted through clerical error in 1957)
- (b) The undertaking in sub-section (a) above is subject to the following understandings,
 - (1) The different subject areas may be variously combined or subdivided at different law schools, hence the list should be regarded as indicating areas of the law in which instruction will be regularly offered. The list should not be regarded as necessarily establishing courses that must be taught separately or in combination under these specific labels.
 - (2) Every student shall be required to take the major basic class offered in each of the following subject areas.
 - Civil Procedure
 - Constitutional Law of Canada
 - Contracts
 - Criminal Law and Procedure
 - Personal Property
 - Real Property
 - Torts
 - (3) Subject to paragraph (2), the academic planning authority of each University Faculty of Law may provide any or all courses to its students on a required or an optional basis; may require students to elect between alternative courses or groups of courses to attain either diversification or specialisation to an extent deemed desirable and may add courses to its curriculum on a required or an optional basis in subject areas other than those listed in subsection (a),
 - (4) The academic planning authority of each University Faculty of Law may determine the sequence in which courses are taught,
 - (5) The academic year shall extend for approximately thirty effective teaching weeks exclusive of examination periods. Each student shall be under instruction or supervision of the teaching staff for approximately fifteen hours per week in class sessions, seminars tutorial and legal writing or research projects,
 - (6) The academic planning authority of each University Faculty of Law may determine the hours allotted to the various courses offered.¹⁰²

¹⁰⁰ Letter from Kenneth Jarvis, Secretary, Law Society of Upper Canada to Thomas Feeney, Dean Faculty of Law, University of Ottawa (April 15, 1969) (*Supra* note 1 at Appendix 3, pg. 1).

¹⁰¹ *Supra* note 91 at 6 .

¹⁰² *Supra* note 91 at Appendix D, pgs 61-62.

The 1969 changes show a distinct change in tone from the law society that Wright fought with throughout the early part of the 20th century. In this document we see a profession that is in favour of greater freedom for the ‘academic planning authority’ of each university faculty of law to set their own curriculum (subject to the basic class requirements in paragraph 2). Thus the 1969 amendments represented an even further shift away from the law society’s maintenance of unfettered control over the regulation of legal education in Ontario. Deference was being shown to the autonomy of the legal academic community in an unprecedented manner.

IV. IMPLICATIONS OF THE FIERCEST DEBATE: WHEREIN LIES THE AUTHORITY TO REGULATE LEGAL EDUCATION?

In its submission to the federation, the law society stated that: “The Law Society has the responsibility for admission of lawyers to the bar and it has authority to articulate required competencies for those seeking to be licensed. The 1957/1969 document is evidence of this authority”.¹⁰³ This last statement invites the question about the meaning of the term ‘authority’. The *Law Society Act* does authorize the law society to license Ontario’s lawyers. This is clearly the sense of authority as administrative control. With respect, however, I disagree with the implication of the statement that the 1957/69 documents are ‘evidence’ of the law society’s authority over the law school curriculum itself. Instead, these documents represent an acknowledgement by the profession that the authority over the legal curriculum – authority in the sense of specialized knowledge of the law and legal education – rests with the legal academy.

¹⁰³ *Supra* note 8 at 3.

The 1957 compromise marked the “surrender of [the law society’s] monopoly over legal education” to the universities.¹⁰⁴ With the 1957 process, the law society’s sole control and authority over legal education gave way to a system of cooperation and compromise. Every aspect of the “understandings” of 1957 and 1969 were carefully crafted and negotiated. The law society sought agreement with the legal academy – they were no longer exerting unfettered control, a process which had failed to achieve any kind of constructive solutions in the past. The law society’s own website acknowledges the significance of the 1957 changes to the way the society controlled legal education: “Until 1957, the Law Society controlled entry to the Ontario legal profession through its exclusive jurisdiction over legal education [emphasis added]”.¹⁰⁵ In short, with the creation of the university-based law schools in the mid 20th century, the law society was in effect handing the reigns of authority over the academic curriculum to the legal academy.

Turning back to the *Law Society Act*, it should be acknowledged that the *Act* does explicitly give the law society the ability to regulate Ontario lawyers’ standards of learning, conduct and competence. 4.1(a) of the *Act* states that:

- 4.1 It is a function of the Society to ensure that,
- (a) 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;

It is not explicit that “standards of learning” are synonymous with the “law school curriculum”.

Nowhere in the *Act* does it clearly state that the law society has the power to regulate the curriculum at Canadian law schools. Only sections 60 and 62(23) of the *Act* mention legal

¹⁰⁴ *Supra* note 16 at 263.

¹⁰⁵ Law Society of Upper Canada website: *History, The Law Society and legal education* <<http://www.lsuc.on.ca/about/a/history/>>.

education (other than continuing legal education), and even then it does not refer to the law school curriculum:

- 60. (1) The Society may operate programs of pre-licensing education or training and programs of continuing legal education.
(2) The Society may grant degrees in law.
- 62. Convocation may make by-laws,
 - 23. respecting legal education, including programs of pre-licensing education or training;

It is also not clear whether the Federation of Law Societies of Canada – the body that has tasked itself with reviewing the Canadian common law degree – has any jurisdiction over the matter. The federation, which is not governed by a founding piece of legislation, refers to itself as the “national coordinating body of Canada’s 14 law societies”.¹⁰⁶ In addition to sponsoring continuing legal education programs, the federation’s main role is to assess and certify “the qualifications of individuals with international legal credentials who wish to apply for membership in a Canadian law society” through its National Committee on Accreditation.¹⁰⁷ Without any legislation to turn to, or any history of dealings between the federation and the universities concerning the law school curriculum, it is difficult to determine if this ‘national coordinating body’ has the administrative authority to dictate to universities how the law school curriculum should be structured.

V. CONCLUSION

A history of the regulation of legal education in Ontario reveals that only through a process of careful negotiation and compromise was an agreement able to be reached between the profession

¹⁰⁶ Federation of Law Societies of Canada website. *About Us* <<http://www.flsc.ca/en/about/about.asp>>.

¹⁰⁷ *Ibid.*

and the legal academic community, on matters relating to the management and control of legal education. The current work being undertaken by the Federation of Law Societies of Canada's Task Force on the Canadian Common Law Degree stands in stark contrast to this.

The short time frame that the task force gave for 'consultation' is far from adequate. Moreover, all of the submissions to the task force made by representatives of Canadian law faculties, universities, deans, professors, and students (of which there were only 12) expressed serious reservation – in one way or another – with the work of the task force and their methodology. It would be fair to say that the recommendations in the task force's October 2009 final report do not represent an 'agreement' or an 'understanding' between the profession and the legal academy, in the same way the 1957 and 1969 documents do. The tone of the task force's report does not suggest they even sought agreement with members of the legal academy in the first place. As Dean Feldthusen points out in his submission to the task force:

The first paragraph of the Task Force [Consultation] Paper suggests that for the Task Force, this is an "us and them" exercise. The rest of the paper makes it clear that when the authors of the report disagree with the legal educators, the legal educators lose. Period. Because the authors of the report say so.¹⁰⁸

The task force's proposed changes would mark a "radical departure from the relationship between the law societies and the law schools that has existed for the past half century".¹⁰⁹ Such a change should not be accepted lightly by the legal academy – not only because it is not in keeping with the established relationship and goes against all the achievements of the 'fiercest debate', but questions should be raised about whether the federation – or the law societies in general – still maintain sole authority to dictate to universities the law school curriculum.

¹⁰⁸ *Supra* note 11 at 3.

¹⁰⁹ Queen's University Faculty of Law, *Submission to the Federation of Law Societies of Canada Task Force on the Approved Common Law Degree* (November 3, 2008) at 7.

With the creation of the university-based law schools it is the universities who have the authority to regulate the curriculum of Canadian law schools. Constance Backhouse, in an unpublished article titled *The 'Approved' Common Law Degree*, makes the point that law schools are already strictly regulated by their universities: “Canadian law schools are...regulated by their universities. As with all academic units within university structures, law schools are regularly required to report, to meet stringent standards of peer review, and to achieve measured scholarly and pedagogical results”.¹¹⁰ The regulation of the law school curriculum by the universities does not mean that the 1957 understanding has not been adhered to – and in fact the opposite is true. But the very fact that the law society in 1957 sought ‘agreement’ for the law school curriculum as opposed to unilaterally dictating requirements to the universities is evidence that they were putting an end to their previously held unfettered control over legal education. The federation’s task force is disregarding this important history.

Members of the legal academic community must not be complacent and acquiesce to the task force’s requirements, requirements that, as history reveals, the federation as representatives of the profession do not have the sole authority to impose on law schools, and that stand to threaten the very academic freedom that Wright and other legal education reformers of the early 20th century fought so hard to obtain.

The issue now rests in the hands of the provincial law societies, who may choose to accept or decline the recommendations of the task force. It is my hope that the law societies, when considering this matter, do not forget to take into account the way the fiercest debate was

¹¹⁰ Constance Backhouse, *The “Approved” Common Law Degree* (February 2008) [unpublished] at 3.

resolved. The past is prologue. A measure of both practical training and the law societies' administrative authority to license lawyers, and academic authority that comes from an expert's knowledge of the law in legal education are of great value and importance in order to have a robust legal system. In the absence of this combined sense of 'authority', you are only left with authority in the sense of power. We need to find a constructive way to move beyond a simple power struggle to achieve an outcome that will benefit the legal profession and the society in which law is studied and practiced.

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

Common Law Degree Implementation Committee

Final Report

August 2011

This report is presented to the Council of the Federation of Law Societies of Canada for consideration. None of the recommendations contained herein is effective unless approved by the Federation and its member law societies.

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INTRODUCTION

The Federation of Law Societies of Canada's Common Law Degree Implementation Committee (the "Committee") is pleased to provide this final report to the Council of the Federation of Law Societies of Canada (the "Federation"). In accordance with its mandate, the Committee has developed a proposal to implement the uniform national requirement (the "national requirement") for entry to law society admission programs¹ in Canadian common law jurisdictions.

The Committee's 20 recommendations develop a coherent implementation structure that is detailed and appropriately balanced in its effect on law schools, the National Committee on Accreditation (the "NCA"), law societies and the body that will determine compliance with the national requirement. The recommendations ensure that the intent of the Federation's Task Force on the Canadian Common Law Degree (the "Task Force") and the manner in which the Task Force's recommendations are to be implemented are clear to:

- law schools that will meet the national requirement and report on their programs annually;
- the compliance body;
- the NCA, which will apply the requirements to applicants seeking Certificates of Qualification;
- law societies; and
- the public.

They reflect the principle underlying the Task Force's recommendations that its report should not interfere with innovation and flexibility in Canadian law school education.

As the Federation and its member law societies implement the national requirement there is a valuable opportunity to strengthen and advance the institutional relationship between law societies and Canadian law schools at a national level. The Committee's process has convinced all its members that such a collaborative national dialogue is both feasible and vital to the interests of furthering law societies and the legal academy's commitment to a legal profession that is learned, competent and dedicated to the public interest.

¹ The term "law society admission program" refers to and includes all the pre-licensing processes, however named, of law societies in the common law provinces and territories leading to admission to the profession.

RECOMMENDATIONS

Recommendation 1

The commentary set out in **TABLE A** regarding the competency requirements be approved.

Recommendation 2

The elaboration of the professionalism and ethics competency set out in **TABLE B** be approved.

Recommendation 3

“Course” relating to ethics and professionalism instruction be interpreted to allow for both:

- a single stand alone course devoted to ethics and professionalism that at a minimum addresses the required competencies set out at **TABLE B**, and
- a demonstrable course of study devoted to ethics and professionalism that could be delivered:
 - (1) within a single course that addresses other topics, provided there is a dedicated unit on ethics and professionalism that at a minimum addresses the required competencies set out in **TABLE B**; and/or
 - (2) in multiple years within courses that address other topics, provided there are dedicated units on ethics and professionalism that at a minimum address the required competencies set out in **TABLE B**.

Recommendation 4

By 2015, graduates seeking entry to law society admission programs be required to have taken a demonstrable course of study dedicated to ethics and professionalism that is a minimum of 24 hours, is formally assessed and, at a minimum, addresses the required competences set out in **TABLE B**.

Recommendation 5

The commentary and direction set out in **TABLE C** regarding the approved common law degree academic program requirements be approved.

Recommendation 6

The commentary and direction set out in **TABLE D** regarding the approved common law degree required learning resources be approved.

Recommendation 7

Law schools be entitled to comply with the national requirement by using the Program Approval Model or the Individual Student Approval Model for a given program, including joint degree programs.

Recommendation 8

A graduate from a school applying the Individual Student Approval Model to a given program be eligible for entry to law society admission programs if he or she provides an official transcript from the degree granting institution certifying that he or she has met the national requirement for entry to law society admission programs.

Recommendation 9

A graduate who has not met the national requirement who subsequently seeks entry to a law society admission program be required to obtain first a Certificate of Qualification from the NCA.

Recommendation 10

The Federation website identify whether schools apply the Program Approval Model or the Individual Student Approval Model to a given program.

Recommendation 11

The Canadian Common Law Program Approval Committee (the "Approval Committee") be authorized to make any changes, revisions or additions to the standardized annual report form set out in **Appendix 3** as it determines necessary, provided the changes, revisions or additions conform to the national requirement and reflect the purposes as described in this report.

Recommendation 12

The compliance process set out in **TABLE E** be approved.

Recommendation 13

The Approval Committee be authorized to make any changes, revisions or additions to the draft reporting timeline set out in **Appendix 4** and any other reporting timelines as it determines necessary to ensure that the compliance process operates in an effective manner.

Recommendation 14

Beginning in 2015 and annually thereafter the Approval Committee's final reports be public and posted on the Federation's website. These reports will set out the basis for the Approval Committee's findings respecting each law program for which approval is sought, provided that any information subject to privacy or other personal information will not appear in the public report. The Federation website will also identify each school's programs that apply the Program Approval Model and those that apply the Individual Student Approval Model.

To reflect that the national requirement does not come into effect until 2015, the progress reports in 2012, 2013 and 2014 not be public.

Recommendation 15

The Federation establish a new committee to be called the Canadian Common Law Program Approval Committee.

Recommendation 16

The Approval Committee have the following mandate:

- To determine law school program compliance with the national requirement for the purpose of entry of Canadian common law school graduates to Canadian law society admission programs. This will apply to the programs of established Canadian law schools and those of new Canadian law schools.

- To make any changes, revisions or additions to the annual law school report as it determines necessary, provided the changes, revisions or additions conform to the approved national requirement and reflect the purposes described in this report.
- To make any changes, revisions or additions to the draft reporting timeline set out in **Appendix 4** and any other reporting timelines as it determines necessary to ensure that the compliance process operates in an effective manner.
- To post its final annual reports on the Federation public website and to post information reports on the website, covering, at a minimum, the list of approved law school programs and issues of interest respecting the continuum of legal education.
- To participate in efforts and initiatives to enhance the institutional relationship between law societies and law schools at a national level. This could, for example, include efforts such as promoting a voluntary national collaboration on ethics and professionalism learning that would further enhance teaching, learning and practice in this area.
- To ensure appropriate training for its members.
- To undertake such other activities and make any necessary changes, additions or improvements to its processes as it determines necessary to ensure the effective implementation of the national requirement, provided these reflect the purposes described in this report.

Recommendation 17

The Federation, with the assistance of the Approval Committee, undertake regular evaluation of the national requirement and compliance process, the first to be completed at least by 2018 and no less frequently than every five years thereafter. The Federation should determine the timing and terms of reference for the evaluation and the reporting timeline and the Approval Committee should ensure that the evaluation is completed and any recommendations made within the timeline. Nothing in this recommendation should preclude adjustments and changes to the compliance process in the years between evaluations, as set out in the mandate in Recommendation 16. It should be open to the Approval Committee to recommend the timing of the evaluations.

Recommendation 18

The qualifications to be represented among the members of the Approval Committee set out in **TABLE F** be approved.

Recommendation 19

The appointment process, size, member composition and term of service for the Approval Committee set out in **TABLE G** be approved.

Recommendation 20

The Approval Committee be resourced forthwith and with sufficient professional and support staff and financial resources to enable it to fulfil its mandate. Law societies, through the Federation, fund the Approval Committee.

THE REPORT

BACKGROUND

The Federation's Task Force on the Canadian Common Law Degree (the "Task Force") issued its final report in October 2009. That Report recommends that law societies in common law jurisdictions in Canada adopt a uniform national requirement for entry to their admission programs (the "national requirement"). It further recommends that by no later than 2015, and thereafter, all applicants seeking entry to a law society admission program must have met the national requirement. The Task Force report recommends that the National Committee on Accreditation (the "NCA") apply the national requirement in assessing the qualifications of individuals with legal education and experience obtained outside Canada or in civil law degree programs in Canada who wish to be admitted to a law society in a common law jurisdiction. It also recommends that the national requirement be applied in considering applications for the approval of programs of new Canadian law schools.

The national requirement specifies the required competencies that graduates must have attained and the law school academic program and learning resource requirements that law schools must have in place to enable entry of graduates to law society admission programs. It applies to the J.D. or LL.B. programs of existing law schools and to applications for recognition of new common law programs.²

The Task Force report also recommends that the Federation establish a committee to implement its report and recommendations. The Task Force recommendations are set out in **Appendix 1**.³

All law societies in Canada approved the Task Force report and recommendations between December 2009 and March 2010. The Federation's model resolution, which law societies adapted to their individual use, contained a provision that the appointed

² "New common law programs" could include both those that are developed within a university setting and those that are not. "New common law programs" also includes those relating to a yet to be established Canadian law school and proposed new programs in established Canadian schools, including civil law schools proposing to establish common law programs.

³ The Task Force report is available at www.flsc.ca/_documents/Common-Law-Degree-Report-C.pdf.

implementation committee include appropriate representation from Canadian law schools.

In May 2010, a Federation working group reported to Federation Council with recommendations for the composition, mandate and reporting deadline of the Federation's Common Law Degree Implementation Committee (the Committee). Council approved the Working Group report, which is set out at **Appendix 2**. The Working Group report reflects the importance law societies place on including law school representatives on the Committee. It specifies two Law Deans as members. In addition, another member of the Committee is a law professor who is also a former law school Dean.

The members of the Committee are: Tom Conway (Chair), Professor Joost Blom, Dean Philip Bryden, John Campion, John Hunter, Dean Mayo Moran, Don Thompson, and Catherine Walker. The Managing Director of the NCA, Deborah Wolfe, also attended and participated in the meetings, as recommended in the Working Group report. Sophia Sperdakos and Alan Treleaven are staff to the Committee.

The Committee's mandate is

- (a) to determine how compliance with Section C (Approved Canadian Law Degree)⁴ of the recommendations of the Task Force on the Canadian Common Law Degree will be measured. Its mandate may include clarifying or elaborating on the recommendations, where appropriate, to ensure their effective implementation, but will not include altering the substance or purpose of them; and
- (b) to make recommendations as to the establishment of a monitoring body to assume ongoing responsibility for compliance measurement, including an evaluation of the compliance measurement program and the required competencies, and for maintaining the Federation of Law Societies of Canada's ("the Federation") relationship with Canadian law schools. The Implementation Committee should consider any role the National Committee on Accreditation might play in that monitoring process.

This report fulfills the Committee's responsibility to present its final report to Federation Council no later than September 2011. In accordance with its mandate, the Committee has made recommendations on implementation and on the establishment of a "compliance body." The report discusses the nature, structure and composition of that body with

⁴ Section C incorporates, by reference, the recommendations in Sections A and B. See Appendix 1.

a formal recommendation (Recommendation 15) that it be established and called the Canadian Common Law Program Approval Committee (the Approval Committee).⁵

Where appropriate, the Committee has clarified or elaborated on the Task Force recommendations to ensure their effective implementation, but has not altered the substance or purpose of them.

The Committee's goal has been to ensure that:

- the intent of the Task Force recommendations and the manner in which they are to be implemented are clear to:
 - o law schools that will meet the national requirement and report on their programs annually,
 - o the Approval Committee,
 - o the NCA, which will apply the requirements to applicants seeking Certificates of Qualification,
 - o law societies, and
 - o the public;
- the implementation structure is clear, effective and appropriately balanced in its effect on law schools, law societies, the NCA and the Approval Committee;
- the implementation approach reflects the principle underlying the Task Force's recommendations that its report should not interfere with innovation and flexibility in law school education; and
- the approach to implementation was developed following consultation with and input from law schools, beyond membership of two Law Deans and a former Law Dean on the Committee.

The Committee has benefited from the invaluable assistance and input of the Council of Canadian Law Deans (the CCLD). The CCLD established a Law Deans' Working Group consisting of Dean Mary Anne Bobinski (Faculty of Law - University of British Columbia), Dean Kim Brooks (Schulich School of Law at Dalhousie) and Dean Lorne Sossin (Osgoode Hall Law School) to provide initial comments on a variety of proposals the Committee developed during the course of its analysis. This allowed for refinement of proposals and

⁵ See Recommendations 15 – 20 and discussion beginning at page 39.

better understanding of the Deans' perspectives. The Committee also provided the CCLD with its proposal respecting the ethics and professionalism course requirement, the draft template for the annual report that Law Deans will complete and a memorandum outlining the Committee's proposals for implementation of the Task Force recommendations. The CCLD invited the Committee Chair to attend its meeting in Windsor, Ontario on May 6, 2011, which he did. The CCLD's input assisted in the refinement of the law school reporting process and annual report.

Because the Task Force's report includes a recommendation that graduates seeking to enter law society admission programs must have completed a course in ethics and professionalism at law school, the Committee invited law schools to provide input on implementation of the recommendation. An Ethics Professors' Working Group (EPWG) consisting of Adam Dodek (Faculty of Law - University of Ottawa), Jocelyn Downie (Schulich School of Law at Dalhousie), Trevor Farrow (Osgoode Hall Law School) and John Law (Faculty of Law - University of Alberta)⁶, met with members of the Committee to provide input and assistance in the development of the recommended approach.

The diversity of perspectives among the members of the Committee, the collaborative approach of its discussions and its external consultations have assisted the development of recommendations that will facilitate the effective implementation of the national requirement. The Committee has every confidence that the productive conversations about legal education that have occurred during this process will continue in the future, in the public interest.

THE COMPETENCIES

The approved Task Force recommendations specify minimum competencies for entry to law society admission programs.⁷ With the exception of the competency respecting "ethics and professionalism," which must be satisfied in "a course dedicated to those subjects and addressing the required competencies," each law school may determine how its students

⁶ The EPWG has acted as a liaison to the larger group of ethics and professionalism professors across the country.

⁷ See Section B of Appendix 1.

satisfy the competency requirements. As the Task Force notes, “this allows law schools the flexibility to address these competencies in the manner that best meets their academic objectives, while at the same time meeting the regulators’ requirements that will allow their graduates to enter law society admission programs.”⁸

The required competencies are part of “an academic and professional legal education that will prepare the student for entry to a law society admission program.” Law schools comply with specified requirements respecting the academic program and learning resources.

The requirements leave significant additional freedom within law school curricula and structure for students to develop their particular interests and for law schools to pursue innovative teaching and research.

In examining the competencies, the Committee’s goal has been:

- to determine whether any of the competencies requires clarification or elaboration to facilitate implementation and compliance; and
- to provide such direction in this regard as is necessary.

While the Committee is satisfied that the competencies are generally clear and do not require clarification, it has identified some instances where clarification or elaboration would be useful not only to law schools whose students must meet them, but also to the NCA, which must assess the qualifications of individuals with legal education and professional experience obtained outside of Canada, or in a civil law program in Canada, who wish to be admitted to a law society in a common law jurisdiction in Canada.

The Committee has also determined a number of instances where examples of how a competency could be satisfied would be useful and has included these. The Committee emphasizes that these are examples only and do not limit or circumscribe a law school’s ability to determine how its students satisfy the competency.

⁸ Task Force Report, p. 31.

For ease of understanding, the Task Force's competency requirements are set out in **TABLE A**, with the Committee's recommendations for clarification, elaboration or direction set out in an accompanying box. The ethics and professionalism competency is dealt with separately following the Table.

TABLE A
Competency Requirements

B. Competency Requirements

1. Skills Competencies

The applicant must have demonstrated the following competencies:

1.1 Problem-Solving

In solving legal problems, the applicant must have demonstrated the ability to,

- *identify relevant facts;*
- *identify and evaluate the appropriateness of alternatives for resolution of the issue or dispute.*
- *analyze the results of research;*
- *apply the law to the facts; and*
- *identify and evaluate the appropriateness of alternatives for resolution of the issue or dispute.*

No clarification necessary.

1.2 Legal Research

The applicant must have demonstrated the ability to,

- *identify legal issues;*
- *select sources and methods and conduct legal research relevant to Canadian law;*

Given that the skills addressed in this competency relate to legal research, the reference to "Canadian law" should be read in that context. It should not be seen as referring to substantive Canadian law, but rather to the types of legal

research resources that reflect the Canadian context (e.g. precedent-based research). This is relevant to the assessment of the qualifications of individuals with legal education and professional experience obtained outside of Canada or in a civil law program in Canada, who wish to be admitted to a law society in a common law jurisdiction in Canada and is also applicable to those educated in common law Canadian law schools.

- *use techniques of legal reasoning and argument, such as case analysis and statutory interpretation, to analyze legal issues;*
- *identify, interpret and apply results of research; and*
- *effectively communicate the results of research.*

No clarification necessary.

1.3 Oral and Written Legal Communication

The applicant must have demonstrated the ability to,

- *communicate clearly in the English or French language;*
- *identify the purpose of the proposed communication;*
- *use correct grammar, spelling and language suitable to the purpose of the communication and for its intended audience; and*
- *effectively formulate and present well reasoned and accurate legal argument, analysis, advice or submissions.*

No clarification necessary.

2. Ethics and Professionalism

The applicant must have demonstrated an awareness and understanding of the ethical requirements for the practice of law in Canada, including,

- a. *the duty to communicate with civility;*
- b. *the ability to identify and address ethical dilemmas in a legal context;*
- c. *familiarity with the general principles of ethics and professionalism applying to the practice of law in Canada, including those related to,*

- i. *circumstances that give rise to ethical problems;*
- ii. *the fiduciary nature of the lawyer's relationship with the client;*
- iii. *conflicts of interest;*
- iv. *duties to the administration of justice;*
- v. *duties relating to confidentiality and disclosure;*
- vi. *an awareness of the importance of professionalism in dealing with clients, other counsel, judges, court staff and members of the public; and*
- vii. *the importance and value of serving and promoting the public interest in the administration of justice.*

Discussed separately below.

3. *Substantive Legal Knowledge*

The applicant must have undertaken a sufficiently comprehensive program of study to obtain an understanding of the complexity of the law and the interrelationship between different areas of legal knowledge.

The Task Force recommendations specify minimum competencies required for entry to law society admission programs. The Task Force report recognizes that legal education in Canada is an enriched learning environment and agrees that it provides both a liberal legal education and a professional education. In law school students begin to “think like lawyers,” examine law critically and address deficiencies in legal systems and principles. The competencies that are included in the national requirement are therefore situated in this broader context.

This preamble to the section 3 competencies seeks Deans’ descriptions of how their school offers “a sufficiently comprehensive program of study” to enable graduates to “obtain an understanding of the complexity of the law and the interrelationship between different areas of legal knowledge.” Each Dean will be asked to address this in the annual report to the Approval Committee.

In the course of this program of study the applicant must have demonstrated a general understanding of the core legal concepts applicable to the practice of law in Canada, including as a minimum the following areas:

3.1 Foundations of Law

The applicant must have an understanding of the foundations of law, including,

- *principles of common law and equity;*

This competency could be addressed as part of courses in private law. It is open to schools to address this competency in other ways.

- *the process of statutory construction and analysis; and*

This competency could be addressed by any number of courses that are statute based (e.g. taxation, corporate, administrative, criminal, civil procedure, family, labour, etc.). It is open to schools to address this competency in other ways.

- *the administration of the law in Canada.*

This competency is directed at understanding the organization of the courts and tribunals **in Canada**, including appeal processes.

3.2 Public Law of Canada

The applicant must have an understanding of the core principles of public law in Canada, including,

The modifier “core” before “principles” is unnecessary and will not appear on the annual report to the Approval Committee law schools complete.

This section 3.2 requirement is fully addressed by the enumerated competencies below. All competencies under section 3.2 are intended to address public law **in Canada**.

- *the constitutional law of Canada, including federalism and the distribution of legislative powers, the Charter of Rights and Freedoms, human rights principles and the rights of Aboriginal peoples of Canada;*

The part of this competency requirement that states “the constitutional law of Canada, including...the rights of Aboriginal peoples of Canada” could be addressed in a number of ways, including, for example, in a constitutional law

course or as part of a property law course that addresses Aboriginal rights. It is open to schools to address this competency in other ways.

- *Canadian criminal law; and*

No clarification necessary.

- *the principles of Canadian administrative law.*

This competency contemplates the principles of **Canadian** administrative law. This competency could be addressed through a stand-alone administrative law course or through a course in which the subject matter is grounded in an administrative tribunal (e.g. labour/employment law, environmental law). It is open to schools to address this competency in other ways.

3.3 Private Law Principles

The applicant must demonstrate an understanding of the foundational legal principles that apply to private relationships, including,

The modifier “foundational legal” before “principles” is unnecessary and will not appear on the annual report to the Approval Committee law schools complete.

- *contracts, torts and property law; and*

No clarification necessary.

- *legal and fiduciary concepts in commercial relationships.*

This competency contemplates a conceptual overview of business organizations, including fiduciary relationships in a commercial context. It is open to schools to address this competency through a course in corporate law or in other ways.

Recommendation 1

The commentary set out in TABLE A regarding the competency requirements be approved.

Ethics and Professionalism Competency

The Task Force report places particular emphasis on the need for law school graduates who seek entry to law society admission programs to have an understanding of ethics and professionalism. It notes,

Ethics and professionalism lie at the core of the profession. The profession is both praised for adherence to ethical codes of conduct and vilified for egregious failures. Increasing evidence of external scrutiny of the profession in this area and internal professional debates about ethical failures point to the need for each lawyer to understand and reflect on the issues. In the Task Force's view, the earlier in a lawyer's education that inculcation in ethics and professionalism begins, the better.

The Task Force believes that more, not less, should be done in this area and that legal educators and law societies together should be identifying ways to ensure that law students, applicants for admission and lawyers engage in focused and frequent discussion of the issues. To ensure that law students receive this early, directed exposure the Task Force believes a stand-alone course is essential.⁹

In addition to setting out the components of the ethics and professionalism competency, the Task Force report recommends that this competency be acquired in a course dedicated to the subject and addressing the competencies. This is in contrast to the approach to all the other competencies in the national requirement in which the report recommends that it be left to law schools to determine how their students meet them. As the Task Force indicates, "ethics and professionalism lie at the core of the profession."

The unique approach the Task Force takes to this competency led the Committee to consult, as described above in the 'background' section to this report, to ensure that the Task Force's recommendations respecting ethics and professionalism are implemented as effectively as possible, in keeping with both the spirit and letter of the recommendations.

⁹ Task Force Report, p.35.

The Committee received invaluable input and assistance respecting both the implementation of the stand alone course requirement, which will be discussed later in this report, and on the language of the ethics and professionalism competency, which is discussed here.

In the course of its consultations the following points were drawn to the Committee's attention:

- The way in which the actual competency is stated in the Task Force report is more narrowly focused than the rest of the Task Force report on the topic appears to have intended. This is because the components of the competency, as originally worded, focus mainly on issues addressed in Rules of Professional Conduct, rather than also reflecting the greater Task Force goal that students understand and reflect on broader ethical and professionalism issues.
- Presenting the competencies as a "list" of components could have the unintended effect of freezing curricula at a point in time. Making it clear that the list is not exhaustive would minimize the concern.
- The Task Force's intent to recognize the importance of ethics and professionalism would be more effectively addressed if the implementation approach more accurately reflects that intent.

The Committee agrees with these points. While maintaining all the components of the ethics and professionalism competency set out in the Task Force's report, the Committee has added additional language that reflects the broader philosophy underlying the Task Force's reasons for placing special emphasis on professionalism and ethics in its report.

The ethics and professionalism competency described below is the point of departure for those who teach this subject. Its components do not constitute an exhaustive list that limits them to teaching only those components. It sets out the required minimum coverage only.

The proposed wording for the ethics and professionalism competency is set out in

TABLE B.

TABLE B
Ethics and Professionalism Competency

Ethics and Professionalism

The applicant must have demonstrated an awareness and understanding of the ethical dimensions of the practice of law in Canada and an ability to identify and address ethical dilemmas in a legal context, which includes,

1. Knowledge of,
 - a. the relevant legislation, regulations, rules of professional conduct and common or case law and general principles of ethics and professionalism applying to the practice of law in Canada. This includes familiarity with,
 1. circumstances that give rise to ethical problems;
 2. the fiduciary nature of the lawyer's relationship with the client;
 3. conflicts of interest;
 4. the administration of justice;
 5. duties relating to confidentiality, lawyer-client privilege and disclosure;
 6. the importance of professionalism, including civility and integrity, in dealing with clients, other counsel, judges, court staff and the public; and
 7. the importance and value of serving and promoting the public interest in the administration of justice;
 - b. the nature and scope of a lawyer's duties including to clients, the courts, other legal professionals, law societies, and the public;
 - c. the range of legal responses to unethical conduct and professional incompetence; and
 - d. the different models concerning the roles of lawyers, the legal profession, and the legal system, including their role in the securing access to justice.
2. Skills to,
 - a. identify and make informed and reasoned decisions about ethical problems in practice; and
 - b. identify and engage in critical thinking about ethical issues in legal practice.

For the NCA's assistance in assessing the competencies of international students, the Committee makes one additional comment on the ethics and professionalism competency. The reference to "Canada" in the competency's preamble and in section 1(a) reflects the requirement that the graduate must have acquired the competency in a course of study that addresses the subject in the Canadian context. Presently, there is no requirement that NCA candidates satisfy this competency in the Canadian context. The Canadian context requirement will mean that in future more NCA candidates may be required to meet this competency than is currently the case. Given the Task Force's emphasis on the importance of this topic in its Canadian context, the Committee is of the view that the applicability of the competency in the NCA context is in the public interest and therefore appropriate.

For Canadian law schools that have previously allowed students to obtain a compulsory ethics credit during an international exchange program by taking an ethics course that addresses ethics in the law of the country governing the exchange program, such a credit would not be eligible for the ethics and professionalism competency.

Recommendation 2

The elaboration of the professionalism and ethics competency set out in TABLE B be approved.

APPROVED COMMON LAW DEGREE - ACADEMIC PROGRAM AND LEARNING RESOURCES

The Task Force report specifies that for graduates of a Canadian law school to be eligible to enter a law society admission program their school must offer an academic program and learning resources that comply with the national requirement.

The Task Force specifically avoids an overly prescriptive approach to the academic program, reflecting its underlying philosophy that law schools should be able to pursue an innovative and flexible pedagogical approach, in keeping with the goals and objectives of their individual programs, subject only to meeting certain minimum requirements for the purposes of entry of their graduates to law society admission programs.

The Task Force report states that,

wherever possible the institutional requirements set out in the national requirement for entry to law society admission programs should reflect current practice in Canadian law schools. This balances the regulatory objectives with law schools' desire to maintain flexibility of approach. By stating current practices as much as possible the Task Force leaves open the door for law schools to advise the Federation if current practices are no longer appropriate.¹⁰

The Committee has examined the Task Force's required components of the academic program and the learning resources and determined whether any of them require comment, clarification or elaboration to facilitate implementation.

For ease of understanding, the required components of the academic program are set out in **TABLE C** with the Committee's clarification, elaboration or direction set out in an accompanying box.

TABLE C
Academic Program

The Federation will accept an LL.B. or J.D. degree from a Canadian law school as meeting the competency requirements if the law school offers an academic and professional legal education that will prepare the student for entry to a bar admission program and the law school meets the following criteria:

1. *Academic Program*

- 1.1 *The law school's academic program for the study of law consists of three academic years or its equivalent in course credits.*

The Committee provides three comments here for clarification and direction, based upon and following the Task Force's own approach.

1. In specifying "three academic years" the Task Force is referring to three full-time academic years. The Committee is advised that in law schools currently offering the common law degree the "equivalent in course credits" to three

¹⁰ Task Force Report, p. 39.

full-time academic years presumptively means 90 credit hours. The Task Force refers to this in its report.

The Committee adopts this clarification so that paragraph 1.1 of the Task Force recommendation should be clarified to read:

- 1.1 The law school's academic program for study of law consists of three full-time academic years or the equivalent in course credits, which, presumptively, is 90 course credits.
2. Many Canadian law schools offer joint degree programs in which students follow an integrated course of study with another related discipline, receiving a J.D. or LL.B. degree plus a degree from the other discipline. The typical joint degree program is four years, although some are three years. The Task Force discusses the joint degree in relation to the requirement set out in section 1.1 above:

In recent decades many Canadian law schools have introduced joint degree programs with related, but separate disciplines. The Task Force recognizes that interdisciplinary education is a rich and valuable part of law school education. Nothing in its recommendations should be interpreted to interfere with the capacity of law schools to offer such degrees. So long as the student has been engaged in a study of law for three years or its equivalent in course credits, and has acquired the competency requirements in so doing, joint degree programs should satisfy the national requirement. Law schools introducing major changes in their academic program, such as the introduction of a joint degree, should be encouraged to discuss them with the Federation to ensure that their graduates will continue to meet the competency requirements.¹¹

For graduates of joint law degree programs to be eligible to enter law society admission programs their degrees will have to meet the national requirement, which includes, among other components, the required competencies and a requirement that the graduate of the joint degree program has followed an academic program for the study of law consisting of three full-time academic years or the equivalent in course credits, which, presumptively, is 90 course credits.

The term “an academic program for the study of law” is broad enough to encompass joint degree programs **provided that** the study of law is integrated with another discipline sufficiently related to law **and** the interwoven content is specifically designed to enhance and enrich the learning in law. The eligibility of the joint degree program to satisfy the national requirement may be easier to accomplish in a four-year joint degree than in a three-year one, particularly in view of the need to satisfy the required competencies, but it will be open to schools that wish to have their

¹¹ Task Force Report, p. 41.

joint degree programs meet the national requirement for purposes of entry of their graduates to law society admission programs to satisfy the Approval Committee that they do.

Schools will report annually on each joint degree program for which they seek approval for the purposes of entry of their graduates to law society admission programs. It is important to note that schools may choose to offer some joint degree programs for which they do not seek approval. The Federation website will list only those programs for which approval has been obtained.

3. Some Canadian law schools accept transfer students from law schools outside of Canada. Each school determines whether transfer students will be entitled to apply any of their credits from their education outside Canada toward the degree requirements of the Canadian law school. With the introduction of the competency requirements, some of which address the competency in the Canadian context (e.g. principles of Canadian administrative law) schools will need to ensure that any credits for courses taken outside of Canada toward a competency requirement that must address the subject in the Canadian context actually do so. Schools will also need to ensure that graduates of their programs who take part of their program at another institution, either through an exchange or letter of permission, meet the national requirement.

1.2 The course of study consists primarily of in-person instruction and learning and/or instruction and learning that involves direct interaction between instructor and students.

Currently, Canadian law schools deliver most education through face-to-face instruction conducted with the instructor and students in the same classroom. At the same time, most Canadian law schools now supplement that face-to-face instruction to at least some extent by the use of a variety of instructional methods mediated by information technology. These methods can include electronic course management systems such as TWEN or Moodle or synchronous instruction via video-conference. Nevertheless, it is still the case that asynchronous on-line learning or traditional distance education is rarely employed in Canadian law school courses as the sole instructional method.

In its report, the Task Force recognizes that technology is having a significant impact on the delivery of legal information and legal education, and that innovation and experimentation are to be expected and encouraged. At the same time its recommendation focuses on the importance of face-to-face inter-personal connections in law school. Its report notes,

Technological advances for delivering information are moving rapidly. The Task Force does not wish to inhibit innovative delivery or experimentation

in this area. At the same time, however, it is of the view that Canadian law school education should, as it does today, provide a primarily in-person educational experience and/or one in which there is direct interaction between instructor and students. The use of the term "primarily" in the Task Force's recommendation is intended to allow for innovation and experimentation.¹²

From the Task Force's perspective, the in-person learning requirement is directed at the skills and abilities that graduates who seek entry to a law society admission program should have. The practice of law is an interpersonal endeavour. Problems are solved through interactions with others: clients, lawyers, witnesses, office staff, judges, and others. Some of these interactions may be written, but many of them are oral, and involve understanding how to deal with a person face-to-face. In particular, lawyers typically discuss legal problems with other lawyers. They need to understand how to do that. Those interactions involve legal problem solving and oral persuasion. The law school experience – involving face-to-face interactions with instructors as well as students – models that experience.

The Committee is satisfied that the Task Force's recommendation means that currently Canadian law schools are to deliver their programs mainly through in-person delivery methods. The clause "instruction and learning that involves direct interaction between instructor and students" modifies "in-person." This clause was inserted to address and permit some synchronous learning such as live videoconferencing, which is already being used to supplement the face-to-face in-person instruction that makes up most of law school education in Canada.

In the Committee's view the Task Force's reference to "primarily" in-person instruction should be considered in the context of:

- existing practices respecting face-to-face instruction in Canadian law schools;
- the extent to which some degree of alternative delivery is currently permitted; and
- the importance of allowing room for innovation in delivery approaches.

Given this context, the Committee recommends interpreting "primarily" in-person to mean that presumptively a minimum of two-thirds of instruction over the course of the law degree program must be face-to-face instruction conducted with the instructor and students in the same classroom.

The Committee recognizes the ongoing value of law schools developing innovative and dynamic delivery approaches. As legal education and delivery

¹² Task Force report, p. 41.

methods continue to evolve the re-examination of this requirement will be appropriate and advisable. It is beyond the scope of the Committee's mandate to undertake such an examination, but it recommends that the Federation broaden the discussion by engaging those with expertise in education delivery techniques, delivery of legal education and professional regulation to consider the issues.

1.3 Holders of the degree have met the competency requirements.

This refers to the competency requirements set out in section B of the Task Force recommendations as clarified in this report, particularly in **TABLES A and B**.

1.4 The academic program includes instruction in ethics and professionalism in a course dedicated to those subjects and addressing the required competencies.

The Task Force report emphasizes the importance of dedicated instruction in ethics and professionalism, beginning in law school. Although for all other competencies the Task Force recommends that it be left to law schools to determine how their students meet them, it specifies that respecting ethics and professionalism students must have acquired the competencies in "a course dedicated to those subjects and addressing the required competencies" defined in the Task Force report.

TABLE B reflects the clarification and elaboration of the ethics and professionalism competency that the Committee recommends.

As a further part of its mandate to implement the Task Force recommendations the Committee is clarifying what will satisfy the requirement for an ethics and professionalism "course." This is essential to effective implementation of the requirement so that:

- those who teach this subject matter understand the parameters of the requirement;
- Law Deans are in a position to address any resource implications and are able to report compliance;
- the Approval Committee is able to determine compliance; and
- the NCA is able to assess the qualifications of individuals with legal education and experience obtained outside Canada or in civil law degree programs in Canada who wish to be admitted to a law society in a common law jurisdiction in Canada.

The substantive goal of the Task Force recommendation is that serious attention be paid to ethics and professionalism in a way that is demonstrable and dedicated. At the same time it does not intend the language of the requirement to hamstring or interfere with innovative delivery. Indeed, from the Task Force's perspective, which the Committee echoes, the innovation in teaching that has been growing in a number of schools is to be encouraged.

Drawing on the valuable consultations it has had on this subject, the Committee is clarifying the recommendation in a manner that reflects the importance of the subject and the Federation's requirements, while allowing law schools to be innovative. Having considered the input it received and reflecting on the context of the Task Force's goals and recommendations on this subject, the Committee is of the view that to allow the best development of teaching in this area, the term "course" should be interpreted to mean "a demonstrable course of study" whose goal is to develop in students the ability to think about and analyze ethical and professionalism issues in the legal profession. The approved competencies would be taught as part of the demonstrable course of study, allowing freedom to go beyond those competencies to address additional content.

The "course of study" could be developed in any number of ways, for example as a single course or within an ethics curriculum taught over a number of years as units demonstrably devoted to ethics, but situated within other courses. The learning could build on the previous year's unit reflecting the increasing sophistication of the student over time.

The "demonstrable" language is meant to ensure that the dedicated approach to ethics education that the Task Force identifies as a priority can be measured.

Recommendation 3

"Course" relating to ethics and professionalism instruction be interpreted to allow for both:

- ***a single stand alone course devoted to ethics and professionalism that at a minimum addresses the required competencies set out in TABLE B, and***
- ***a demonstrable course of study devoted to ethics and professionalism that could be delivered,***

(1) within a single course that addresses other topics, provided there is a dedicated unit on ethics and professionalism that at a minimum addresses the required competencies set out in TABLE B; and/or

(2) in multiple years within courses that address other topics, provided there are dedicated units on ethics and professionalism that at a minimum address the required competencies set out in TABLE B.

While there are various criteria that could be applied to determine whether a school has met the requirement for a demonstrable course of study, the Committee is reluctant to be overly prescriptive, particularly since the Federation requirement for a “course” in this subject area is a new direction.

Accordingly, the Committee has concluded that articulating a minimum number of required hours would allow for certainty, while leaving significant freedom for schools in developing the course of study.

The Committee discussed 36 hours as the appropriate number of hours for the “course” requirement. Because, however, the ethics and professionalism course requirement is a new one that may have resource and staffing implications for some schools it is of the view that there should be some flexibility respecting this component.

The Committee recommends that the requirement be satisfied if a graduate has taken a “course” (as described above) that is a minimum of 24 hours. The Committee is also of the view, however, that the ultimate goal is for the requirement to be 36 hours, the implementation of this goal to be determined at a future date to be discussed with the law schools before actually being implemented.

As discussed, the required 24 hours could be acquired in a single course or in a course of study that spans two or three years of law school (e.g. 12 hours a year for 2 years, 8 hours a year over three years) or any other way the law school determines provided it satisfies the requirement for a “demonstrable course of study.”

Recommendation 4

By 2015, graduates seeking entry to law society admission programs be required to have taken a demonstrable course of study dedicated to ethics and professionalism that is a minimum of 24 hours, is formally assessed and, at a minimum, addresses the required competences set out in TABLE B.

1.5 Subject to special circumstances, the admission requirements for the law school include, at a minimum, successful completion of two years of postsecondary education at a recognized university or CEGEP.

No clarification necessary.

Recommendation 5

The commentary and direction set out in TABLE C regarding the approved common law degree academic program requirements be approved.

Learning Resources

In developing its recommendations respecting learning resources the Task Force notes the following:

The Task Force is reluctant to define in great detail the form law school must take, particularly given the role of provincial governments in approving degree granting institutions and the complex university-based decision making process that addresses many of the law schools' physical components. The Task Force does, however, recognize that there are certain necessities for an effective legal education whose graduates can serve the public. In the Task Force's view the most important consideration is that the law school be adequately resourced to fulfill its educational mission. At a time when all public resources are subject to financial pressures, the Task Force is reluctant to be too prescriptive in its recommendations, but has concluded that there are certain irreducible minima that must be maintained if law societies are to accept the law degree as evidence that the competency requirements are being achieved.¹³

An environment that supports learning is critical to the development of meaningful legal education. It may be easier to assess what is sufficient with respect to already established schools than with respect to new applicants for program recognition. At the same time, it is not appropriate to set a standard based on the resources that long-established schools have that would be impossible for a new school to meet.

It is necessary to provide additional guidance under "learning resources" to assist law schools to know what information they are expected to report on an annual basis. This will ensure consistency of information across schools and across years.

The Committee agrees with the Task Force's approach to resources that recognizes a connection between the resource requirements and a school's particular objectives. This allows for different types of law schools to exist that require different levels of resources. At the same time, however, the school's objectives and resources must be sufficient to meet the national requirement.

¹³ Task Force Report. p.42.

The Committee has consulted with the CCLD concerning the type of information that would elicit a reasonable picture of the learning resources to which the Task Force recommendations are directed. In addition, it has considered the approaches that other professional regulators take on this issue. Its goal is that law schools provide sufficient information to allow the Approval Committee to understand the learning resources context within which the national requirement is being met in each school.

To ensure that the information sought from law schools is both relevant and necessary it would be useful to use an iterative process to develop and refine the information to be provided under the learning resources section of the annual report. As the national requirement will not come into effect until 2015, the reports that law schools will file in 2012, 2013 and 2014 will be progress reports. The Committee considers these years as providing the opportunity for law schools and the Approval Committee to review the initial approach to the learning resources reporting and develop a standardized approach that will provide the most appropriate information and be applied as consistently as possible to all degree programs, whether established or new.

The guidance set out is intended for the responses in the 2012 report. Thereafter the Approval Committee should have the authority to adapt and change the required information as it considers appropriate flowing from the iterative approach.

For ease of understanding the required components of the learning resources are set out in **TABLE D** with the Committee's clarification, elaboration or direction set out in an accompanying box.

TABLE D Learning Resources

- 2.1 The law school is adequately resourced to enable it to meet its objectives, and in particular, has appropriate numbers of properly qualified academic staff to meet the needs of the academic program.*

The Committee recommends that the following information be provided in this section:

- General description of numbers of full-time faculty, contract instructors, sessional lecturers and support staff, including significant changes from previous year.
- General description of full-time faculty, contract instructor and sessional lecturer qualifications.
- Number of full-time equivalent students in each program.
- General description of student support services.
- Overview of law school operating budget for the academic program from all sources, and sources of funding.

2.2 The law school has adequate physical resources for both faculty and students to permit effective student learning.

The Committee recommends that the following information be provided in this section:

- Overall description of law school space, including whether the space is adequate for the law program(s), any space challenges faced by the school and their impact on the program and proposed or planned solutions.
- Description of space available to the law school to carry out the academic program offered, including seminar rooms, quiet study space for students, etc
- Description of accessibility of the current space.

2.3 The law school has adequate information and communication technology to support its academic program.

The Committee recommends that the following information be provided in this section:

- Description of what IT services are provided at the law school.
- Description of dedicated or shared staff and level of support provided to faculty, staff and students.

2.4 The law school maintains a law library in electronic and/or paper form that provides services and collections sufficient in quality and quantity to permit the law school to foster and attain its teaching, learning and research objectives.

(A useful reference for this requirement is the Canadian Academic Law Library Directors Association's standards.)

The Implementation Committee recommends that the following information be provided in this section:

- Overview of library staff complement, qualifications and reporting structure.
- Overview of library facilities and description of collection and collections policies.
- Overview of library acquisitions budget.
- General description of support services available to faculty, students and other library users.

Recommendation 6

The commentary and direction set out in TABLE D regarding the approved common law degree required learning resources be approved.

MEASURING COMPLIANCE

In considering an appropriate national compliance mechanism the Task Force states:

The requirement for a national compliance mechanism does not... necessitate an intrusive or onerous approach. Existing Canadian law schools offer a high standard of education and the Task Force is satisfied that compliance with the competency requirements will not pose difficulty for any of them. At the same time, however, the Task Force does recognize that the creation of requirements represents a change in current practices and any compliance mechanism, however modest, will require some adjustment. It also recognizes that the recommendation for a stand-alone course relating to ethics and professionalism and the requirements to address competencies may require adjustment by some law schools.

The Task Force recommends that the compliance mechanism for law schools should be a standardized annual report that each law school Dean completes and submits to the Federation or the body it designates to perform this function.

In the annual report the Dean would confirm that the law school has conformed to the academic program and the learning resources requirements and would explain how the program of study ensures that each graduate of the law school has met the competency requirements.¹⁴

¹⁴ Task Force Report, pp. 43-44.

Among other tasks the Task Force report recommends this Committee undertake are the development of “the form and substance of the standardized annual law school report” and a mechanism to address non-compliance.

In developing its recommendations for the compliance mechanism the Committee has been guided by the Task Force’s views and has addressed the following issues:

- Compliance Models
- Form and Content of the Standardized Annual Report
- Compliance Process
- Publication of the reports

COMPLIANCE MODELS

The Committee recommends that law schools be entitled to approach compliance using two possible models:

- Program Approval Model
- Individual Student Approval Model

Program Approval Model

Law schools in Canada offer a variety of programs, including the traditional three full-time academic years or equivalent in course credits (presumptively 90 credits) J.D. or LL.B. program and joint degree programs, discussed above.¹⁵

A law school that applies the Program Approval Model to a particular program will require that each graduate of that program meet the national requirement for entry to law society admission programs. These law schools will not permit students in these programs to have the option to graduate without having met the competency requirements.

In the annual report on these programs the Dean will describe the process the school follows to determine that graduates in each of these programs meet the competency

¹⁵ Law schools also offer LL.M. programs that are not relevant to the discussion here.

requirements, in accordance with the national requirement.¹⁶

In schools that apply the Program Approval Model to a given program, graduates from approved programs will by definition have met the competency requirements. In granting the degree the school will be confirming this.

Schools that apply the Program Approval Model, generally, may also have joint degree programs for which they do not seek approval. The Individual Student Approval Model may be relevant to these programs. The Federation website will list all the joint degree programs for which these schools have program approval.

Individual Student Approval Model

Traditionally, there are law school graduates who choose not to be licensed to practise law. There are myriad career paths for which a J.D. or LL.B. degree is invaluable, but for which a license to practise is unnecessary. Although the required competencies in the national requirement have been designed to allow for ample additional opportunity for students to pursue their academic and intellectual interests in law school, it is possible that some students who do not want to be licensed to practise law would prefer not to satisfy all the required competencies. The Individual Student Approval Model will allow for this approach.

The Committee respects law schools' right to foster this academic path for their students, which may be in keeping with the school's objectives and mandate. Its only concern is that law societies be in a position to easily verify whether graduates from those programs, who do seek entry to law society admission programs, have met the required competencies.

If a school chooses the Program Approval Model for a given program, by definition every student granted a J.D. or LL.B. degree in an approved program will have met the competencies. If a school chooses the Individual Student Approval Model for a given program it will be necessary for individual transcripts for each graduate to indicate whether

¹⁶ As part of their existing internal processes law schools already conduct a "degree audit" for each student to ensure he or she has met all the program requirements necessary to graduate, including having met the school's required number of credit hours and fulfilled its compulsory courses or other requirements. Where a school is following the Program Approval Model for a given program, this degree audit process will also include a determination that each student will have met the Federation's competency requirements upon graduation.

he or she has met the national requirement.

A graduate who has not met the national requirement and subsequently wishes to enter a law society admission program can fulfill the missing competencies through the NCA by obtaining a Certificate of Qualification. It will be necessary for that graduate to provide the NCA with an official document from its degree granting institution setting out which competencies must still be fulfilled.

Recommendation 7

Law schools be entitled to comply with the national requirement by using the Program Approval Model or the Individual Student Approval Model for a given program, including joint degree programs.

Recommendation 8

A graduate from a school applying the Individual Student Approval Model to a given program be eligible for entry to law society admission programs if he or she provides an official transcript from the degree granting institution certifying that he or she has met the national requirement for entry to law society admission programs.

Recommendation 9

A graduate who has not met the national requirement who subsequently seeks entry to a law society admission program be required to obtain first a Certificate of Qualification from the NCA.

Recommendation 10

The Federation website identify whether schools apply the Program Approval Model or the Individual Student Approval Model to a given program.

FORM AND CONTENT OF THE STANDARDIZED ANNUAL REPORT

The standardized annual report is the mechanism by which a law school will report compliance with the national requirement.

A standardized annual report:

- provides a template by which the Approval Committee will determine compliance with the national requirement;
- addresses each of the components of the national requirement with sufficient information and supporting documentation to allow compliance to be determined;
- enables a law school to report compliance in a transparent and efficient way;
- identifies the degree programs for which a school seeks approval for entry of graduates to law society admission programs and demonstrates how each program meets the requirements;
- identifies law school programs as following the Program Approval Model or the Individual Student Approval Model;
- provides overview information on the law school to situate the report in the context of the school's objectives and approach;
- documents changes to individual law school programs. Each year each law school report will comment on changes to any previously approved programs and the effective date of such changes. With annual reporting it will be essential that any changes to previously approved programs are identified and also approved. Schools will be encouraged to discuss proposed changes with the Approval Committee before they are implemented to ensure they will meet the national requirement; and
- documents the application of the national requirement.

The Committee has developed a draft form for the standardized annual report that addresses these purposes. The draft form, which was provided to the CCLD, is set out at **Appendix 3.**

The draft form is a living document that will evolve over the years as law schools and the Approval Committee seek to ensure its continued relevance and effectiveness. The Approval Committee should be authorized to make any changes, revisions or additions to the form as it determines necessary so long as the changes, revisions or additions conform to the approved national requirement and reflect the purposes described above.

Recommendation 11

The Canadian Common Law Program Approval Committee (the Approval Committee) be authorized to make any changes, revisions or additions to the standardized annual report form set out in Appendix 3 as it determines necessary, provided the changes, revisions or additions conform to the national requirement and reflect the purposes as described in this report.

COMPLIANCE PROCESS**a) Existing Canadian Common Law Programs**

The national requirement applies to graduates from Canadian common law schools beginning in 2015 and annually thereafter.

Programs whose students graduate in 2012, 2013 and 2014 will continue to be recognized under the current processes and are not subject to the national requirement. Law societies will continue to accept 2012, 2013 and 2014 Canadian common law school graduates into their admissions programs on the pre-national requirement criteria.

The annual report on their programs that law schools file in 2012, 2013 and 2014, will, therefore, be progress reports leading to determination of compliance in 2015. Reports submitted in 2012, 2013 and 2014 will describe the program actually followed by the students to the date of the report, as well as reporting on plans for the program to 2015 directed at meeting the national requirement. The Approval Committee will provide feedback to schools on their progress towards meeting the national requirement for 2015.

From 2015 and annually thereafter the annual reports will report on the program the graduates of that year will have completed. The Approval Committee will determine compliance with the national requirement.

It is expected that, typically, a program approved for graduates of 2015 will continue to be approved thereafter, unless there are significant changes to the program in the areas subject to the national requirement. In such cases, the Approval Committee will undertake the inquiry necessary to ensure that the program continues to meet the national requirement.

b) New Canadian Common Law Programs

Where a new program is being proposed, either by an established Canadian law school that already offers J.D. /LL.B. programs and wishes to add additional programs or by a Canadian institution that does not yet offer any J.D. /LL.B. programs but seeks to do so,¹⁷ the school will go through a two stage process. The first stage is the consideration of the proposal for a new program. That proposal will include a plan for implementing the new program, in which, typically, parts of the program are put in place over time.

The second stage begins once the proposal and plan have been approved, and implementation is underway. During this second stage, the school will report annually on the implementation of the plan, using a modified version of the annual report.

TABLE E sets out the Committee's recommended compliance process respecting new and existing programs to determine compliance with the national requirement.

¹⁷ This would also include a Canadian institution already offering a civil law degree that seeks to offer a J.D. /LL.B.

TABLE E
Compliance Process

a) Existing Canadian Common Law Programs

1. Upon receipt of a law school's completed annual report, the Approval Committee reviews it and any supporting documents in accordance with a specified timeline, a sample of which is set out in **Appendix 4**.¹⁸
2. The Approval Committee determines compliance with the national requirement and provides a draft report to the law school, setting out the Committee's conclusions and the basis for those conclusions. The law school is invited to provide comments on the draft report.
3. If the Approval Committee is satisfied that the school's program(s) meets the national requirement, the Approval Committee's draft report is finalized and provided to the law school and posted on the Federation website.
4. If the Approval Committee is of the view that the annual report raises issues regarding compliance, its draft report identifies the issues using one or more of the following rating categories:
 - o **Deficiency** - indicates non-compliance with one or more requirements. If a "deficiency" has been identified and the school and the Approval Committee cannot agree on how to address it, the Approval Committee issues its final report.

The compliance process will be an iterative one, the goal of which is to resolve deficiencies wherever possible before the Approval Committee issues a final report. The iterative process ensures that, if useful and directed, discussion toward a solution continues in an attempt to resolve the issues. It will be important to keep in mind, however, that there are annual time lines that must be met for issuing the Approval Committee's report. The Approval Committee ends discussion if it determines no further progress is being made.
 - o **Concern** - indicates that although one or more requirements is currently met, it is at a minimum level that could deteriorate to become a deficiency. A school may note the "concern" without acting upon it, but it may be advisable for the school to resolve the concern, since it would be noted in the Approval Committee's final report. The iterative process described under "deficiency" could be used to resolve the "concern" if the parties agree.
 - o **Comment** - this addresses a missing detail, a question, or a suggestion for more information. A school may take note of a "comment" without taking action upon it, but if it wishes to clarify or respond the Approval Committee can then re-issue its report reflecting this.

¹⁸ **Appendix 4** sets out the sample timeline for the 2012 report. That report will be a progress report. The basic timeline would also apply in 2013 and 2014 and in 2015 and thereafter when the national requirement is in force.

5. As set out above, the school has the opportunity to respond to the draft report within a specified period of time. If the Approval Committee seeks more information or other action, the school may provide it or agree to undertake to do what is requested of it.
6. The conclusion of the Approval Committee's final report sets out one of the following ratings:
 - o "The law program has complied with the national requirements. *Approved.*"
 - o "The law program has mostly complied with the national requirements, except for deficiencies in the following areas... *Approved with notice to remedy specified areas of non-compliance.*"

The notice to remedy specifies that for the program to retain approved status the deficiencies must be addressed by the next reporting period, or in exceptional cases, by a subsequent reporting period.

 - o "The law program has not complied with the national requirement. *Not approved.*"
7. Only the final report of the Approval Committee will be public. All draft reports and ongoing discussions will not be public. The progress reports prepared in 2012, 2013 and 2014 will also not be public.

b) New Canadian Common Law Programs

Proposal Stage

8. Using the annual report format, the school provides its proposal for a new program. The proposal includes a plan describing how and when the program will achieve each of the provisions of the national requirement. The proposal is to be provided before the school takes steps to commence the program.
9. The Approval Committee determines prospectively whether the proposal, including implementation plan, if implemented, would comply with the national requirement. It provides a draft report to the law school, setting out its conclusions and the basis for those conclusions. The law school is invited to provide comments on the draft report.
10. When the Approval Committee issues a draft report respecting a new program it may contain "comments," "concerns" and/or "deficiencies" for the proposed new law school program to address before the Approval Committee issues a final report, and the school may respond as set out above. As in the case of the compliance process for established programs the process will be an iterative one leading to the final report.

11. Approval for a new program will be prospective because the first students will not graduate from the program until a number of years in the future. Accordingly the ratings for such programs will be:
 - o “The proposal and implementation plan for a law program, if followed, will comply with the national requirement. *Preliminary Approval, subject to implementation of the program as proposed.*”
 - o The law program as proposed will not comply with the national requirement. *Not Approved.*”
 12. Only the final report of the Approval Committee will be public. All draft reports and ongoing discussions will not be public.
- Reporting Stage**
13. The process in paragraphs 1-7, modified to measure progress against the implementation plan, continues to be followed annually until the first graduates of the program are in their final year. Thereafter the process in paragraphs 1-7 applies, without modification.

The Approval Committee should be authorized to make any changes, revisions or additions to the reporting timeline as it determines necessary to ensure that the compliance process in **TABLE E** operates in an effective manner.

Recommendation 12

The compliance process set out in TABLE E be approved.

Recommendation 13

The Approval Committee be authorized to make any changes, revisions or additions to the draft reporting timeline set out in Appendix 4 and any other reporting timelines as it determines necessary to ensure that the compliance process operates in an effective manner.

PUBLICATION OF REPORTS

Beginning in 2015 when the national requirement comes into effect and annually thereafter the Approval Committee's final reports will be public and posted on the Federation's website. These reports will set out the basis for the Approval Committee's findings respecting each law program for which approval is sought. This recommendation is subject to the proviso that any information subject to privacy provisions or other personal or confidential information will not appear in the public report.

The Federation website will also identify each school's programs that apply the Program Approval Model and those that apply the Individual Student Approval Model. This will be important information for law societies, the NCA and law students.

Because the national requirement does not come into effect until 2015, the reports in 2012, 2013 and 2014 will be progress reports and will not be public.

Recommendation 14

Beginning in 2015 and annually thereafter the Approval Committee's final reports be public and posted on the Federation's website. These reports will set out the basis for the Approval Committee's findings respecting each law program for which approval is sought, provided that any information subject to privacy or other personal information will not appear in the public report. The Federation website will also identify each school's programs that apply the Program Approval Model and those that apply the Individual Student Approval Model.

To reflect that the national requirement does not come into effect until 2015, the progress reports in 2012, 2013 and 2014 not be public.

THE CANADIAN COMMON LAW PROGRAM APPROVAL COMMITTEE

As discussed above, the Committee recommends that the "monitoring body to assume ongoing responsibility for compliance measurement, including an evaluation of the compliance measurement program and the required competencies, and for maintaining

the Federation's relationship with Canadian law schools," be called the Canadian Common Law Program Approval Committee ("the Approval Committee"). The name identifies the committee's primary responsibility, but is not intended to limit the Approval Committee's role to this single area. To fulfill the Committee's mandate to make recommendations about the monitoring body this report addresses the following:

- Structure of the Approval Committee
- Jurisdiction and Mandate
- Committee Member Qualifications and Committee Composition
- Resourcing

STRUCTURE OF THE APPROVAL COMMITTEE

Given that law societies have put in place a national requirement for entry to law society admission programs, it is logical that the Approval Committee be part of the Federation. As a national committee it will ensure a coherent approach to the implementation of the national requirement.

The Working Group report establishing the Committee directed that it consider the possible role of the NCA in the compliance process. While it may make sense in the future to bring the two bodies together, the Committee is of the view that it is important at this stage for the Approval Committee to be an entity structurally separate from the NCA. This will allow the national requirement compliance process to establish a unique profile that will be important, particularly in the early years of implementation.

In addition, the NCA has an established profile as the body that assesses the qualifications of individuals with legal education and professional experience obtained outside of Canada, or in a civil law program in Canada, who wish to be admitted to a law society in a common law jurisdiction in Canada. Its mandate and workload are already demanding. At this stage it should not be required to take on a new function.

The Approval Committee should be established and populated forthwith to ensure that it is in place to assess the first law school compliance reports that will be due in 2012.

Recommendation 15

The Federation establish a new committee to be called the Canadian Common Law Program Approval Committee (the Approval Committee).

JURISDICTION AND MANDATE

The creation of the Approval Committee offers an opportunity to go beyond the required compliance function that was only one of the Task Force's interests. While this compliance function must be a central responsibility, the Approval Committee also has an important role to play in enhancing the institutional relationship between law societies and law schools at a national level. As the Federation continues to develop national approaches to regulatory issues (e.g. national standards for admission to law societies, model codes of conduct etc.), there will be increasing opportunities to advance the discussion of the continuum of legal education. The Approval Committee should play a role in this discussion.

Given that recommended membership of the Approval Committee will include both Law Deans and law society regulators from across the country, the opportunity for a meaningful exchange of ideas is significant.

Recommendation 16

The Approval Committee have the following mandate:

- ***To determine law school program compliance with the national requirement for the purpose of entry of Canadian common law school graduates to Canadian law society admission programs. This will apply to the programs of established Canadian law schools and those of new Canadian law schools.***
- ***To make any changes, revisions or additions to the annual law school report as it determines necessary, provided the changes, revisions or additions conform to the approved national requirement and reflect the purposes described in this report.***
- ***To make any changes, revisions or additions to the draft reporting timeline set out in Appendix 4 and any other reporting timelines as it determines necessary to ensure that the compliance process operates in an effective manner.***
- ***To post its final annual reports on the Federation public website and to post information reports on the website, covering, at a minimum, the list of approved law school programs and issues of interest respecting the continuum of legal education.***

- ***To participate in efforts and initiatives to enhance the institutional relationship between law societies and law schools at a national level. This could, for example, include efforts such as promoting a voluntary national collaboration on ethics and professionalism learning that would further enhance teaching, learning and practice in this area.***
- ***To ensure appropriate training for its members.***
- ***To undertake such other activities and make any necessary changes, additions or improvements to its processes as it determines necessary to ensure the effective implementation of the national requirement, provided these reflect the purposes described in this report.***

To ensure that the national requirement and the compliance process remain relevant and effective it is essential that the Federation, with the assistance of the Approval Committee, undertake regular evaluation of the national requirement and compliance process. The first evaluation should be completed at least by 2018 and no less frequently than every five years thereafter. The Federation should determine the timing and terms of reference for the evaluation and the reporting time line and the Approval Committee should ensure that the evaluation is completed and any recommendations made within the time line.

Nothing in this recommendation should be seen as precluding adjustments and changes to the compliance process in the years between evaluations, as set out in the mandate above. It should be open to the Approval Committee to recommend the timing of the evaluations.

Recommendation 17

The Federation, with the assistance of the Approval Committee, undertake regular evaluation of the national requirement and compliance process, the first to be completed at least by 2018 and no less frequently than every five years thereafter. The Federation should determine the timing and terms of reference for the evaluation and the reporting timeline and the Approval Committee should ensure that the evaluation is completed and any recommendations made within the timeline. Nothing in this recommendation should preclude adjustments and changes to the compliance process in the years between evaluations, as set out in the mandate in Recommendation 16. It should be open to the Approval Committee to recommend the timing of the evaluations.

COMMITTEE MEMBER QUALIFICATIONS AND COMMITTEE COMPOSITION

The Approval Committee's size should reflect both the need for a cross section of qualifications and the advantage of establishing a relatively small group to develop a coherent and expert approach to the issues.

The Committee has considered the qualifications that should be represented on the Approval Committee and the appointment process, size, member composition and term of service for this new body.

TABLE F contains the recommended qualifications.

TABLE F
Qualifications for Members of the Approval Committee

The members of the Approval Committee should be chosen with a view to competence and involvement with and understanding of the issues. The following qualifications should be represented on the Approval Committee, although there should not be a requirement that each member possess all the qualifications:

- Institutional knowledge concerning law societies and the Federation.
- Diversity of experience and perspective.
- Understanding of the regulation of lawyers and the operation of law societies.
- Experience with the regulation of lawyers and the operation of law societies and admission to the profession.
- Experience as a Law Dean or law school administrator (includes Associate, Assistant and Vice Deans).
- Bencher experience.
- Bilingualism, coupled with a common law background.

All members of the Approval Committee should,

- have sufficient time to devote to the work;
- have sound judgment; and
- the ability and willingness to work cooperatively and in a team for the effective implementation of the national requirement.

TABLE G contains the recommended appointment process, size, member composition and term of service for the Approval Committee.

TABLE G
Approval Committee Composition

- The Approval Committee will have seven members, to be appointed by the Federation Council as follows:
 - o Three current or former Law Deans or Law School Administrators (includes Associate, Assistant and Vice Deans), to be recommended by the CCLD.
 - o One Law Society CEO or designate of the CEO.
 - o Three lawyers with experience in law society regulation.
 - o The Chair of the Approval Committee will be one of the three lawyers or the CEO or staff designate, and will be named as Chair by the Federation Council.
 - o If none of the three lawyers is a Federation Council member, the Federation Council may appoint one of its members as a non-voting liaison.
 - o The Managing Director of the NCA will be invited to attend the meetings, without being a member or having a vote.
- Staff to the Approval Committee who attends the meetings will not be a member or have a vote.

- The term for each of the seven members will be three years, renewable once in the sole discretion of Federation Council. The term appointments will be made on a staggered basis, so that the terms of no more than three members will expire in any year. Some of the initial appointments may be made for shorter terms to enable the establishment of the staggered terms, as the Federation Council deems appropriate.

Recommendation 18

The qualifications to be represented among the members of the Approval Committee set out in TABLE F be approved.

Recommendation 19

The appointment process, size, member composition and term of service for the Approval Committee set out in TABLE G be approved.

RESOURCING

The Committee is not in a position to state with certainty what the administrative and other resource needs of the Approval Committee will be. Clearly it will be essential to its effective operation that there be sufficient resources to support its work, including professional and support staff, office space and financial resources. It will be important that staffing be determined forthwith to support the Approval Committee.

The Committee recommends that law societies, through the Federation, fund the Approval Committee.

Recommendation 20

The Approval Committee be resourced forthwith and with sufficient professional and support staff and financial resources to enable it to fulfil its mandate. Law societies, through the Federation, fund the Approval Committee.

CONCLUSION

This report and its recommendations are the blueprint for implementing the Task Force recommendations, providing the guidance and direction necessary for law schools, law societies, the NCA and the Approval Committee. The recommendations have been developed in a spirit of collaboration and with a view to establishing an implementation structure that is clear, effective and appropriately balanced in its effect on law schools, law societies, the NCA and the Approval Committee.

The recommendations recognize that the implementation process must be adaptable to changing conditions and realities in law societies and law schools. The composition of the Approval Committee ensures that discussion on the issues will include both law schools and law societies with the goal of ensuring the ongoing relevance of the national requirement in the public interest and recognizing the importance of Canadian law school education that is innovative and flexible.

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

APPENDIX 1

Recommendations from the Task Force on the Canadian Law Degree

October 2009

FEDERATION OF LAW SOCIETIES OF CANADA'S TASK FORCE ON THE CANADIAN COMMON LAW DEGREE

RECOMMENDATIONS

1. The Task Force recommends that the law societies in common law jurisdictions in Canada adopt forthwith a uniform national requirement for entry to their bar admission programs ("national requirement").
2. The Task Force recommends that the National Committee on Accreditation ("NCA") apply this national requirement in assessing the credentials of applicants educated outside Canada.
3. The Task Force recommends that this national requirement be applied in considering applications for new Canadian law schools.
4. The Task Force recommends that the following constitute the national requirement:

A. Statement of Standard

1. Definitions

In this standard,

- a. "bar admission program" refers to any bar admission program or licensing process operated under the auspices of a provincial or territorial law society leading to admission as a lawyer in a Canadian common law jurisdiction;
- b. "competency requirements" refers to the competency requirements, more fully described in section B, that each student must possess for entry to a bar admission program; and
- c. "law school" refers to any educational institution in Canada that has been granted the power to award an LL.B. or J.D. degree by the appropriate provincial or territorial educational authority.

2. General Standard

An applicant for entry to a bar admission program ("the applicant") must satisfy the competency requirements by either,

- a. successful completion of an LL.B. or J.D. degree that has been accepted by the Federation of Law Societies of Canada ("the Federation"); or
- b. possessing a Certificate of Qualification from the Federation's National Committee on Accreditation.

B. Competency Requirements

1. Skills Competencies

The applicant must have demonstrated the following competencies:

1.1 Problem-Solving

In solving legal problems, the applicant must have demonstrated the ability to,

- identify relevant facts;
- identify legal, practical, and policy issues and conduct the necessary research arising from those issues;
- analyze the results of research;
- apply the law to the facts; and
- identify and evaluate the appropriateness of alternatives for resolution of the issue or dispute.

1.2 Legal Research

The applicant must have demonstrated the ability to,

- identify legal issues;
- select sources and methods and conduct legal research relevant to Canadian law;
- use techniques of legal reasoning and argument, such as case analysis and statutory interpretation, to analyze legal issues;
- identify, interpret and apply results of research; and
- effectively communicate the results of research.

1.3 Oral and Written Legal Communication

The applicant must have demonstrated the ability to,

- communicate clearly in the English or French language;
- identify the purpose of the proposed communication;
- use correct grammar, spelling and language suitable to the purpose of the communication and for its intended audience; and

- effectively formulate and present well reasoned and accurate legal argument, analysis, advice or submissions.

2. Ethics and Professionalism

The applicant must have demonstrated an awareness and understanding of the ethical requirements for the practice of law in Canada, including,

- d. the duty to communicate with civility;
- e. the ability to identify and address ethical dilemmas in a legal context;
- f. familiarity with the general principles of ethics and professionalism applying to the practice of law in Canada, including those related to,
 - i. circumstances that give rise to ethical problems;
 - ii. the fiduciary nature of the lawyer's relationship with the client;
 - iii. conflicts of interest;
 - iv. duties to the administration of justice;
 - v. duties relating to confidentiality and disclosure;
 - vi. an awareness of the importance of professionalism in dealing with clients, other counsel, judges, court staff and members of the public; and
 - vii. the importance and value of serving and promoting the public interest in the administration of justice.

3. Substantive Legal Knowledge

The applicant must have undertaken a sufficiently comprehensive program of study to obtain an understanding of the complexity of the law and the interrelationship between different areas of legal knowledge. In the course of this program of study the applicant must have demonstrated a general understanding of the core legal concepts applicable to the practice of law in Canada, including as a minimum the following areas:

3.1 Foundations of Law

The applicant must have an understanding of the foundations of law, including,

- principles of common law and equity;
- the process of statutory construction and analysis; and
- the administration of the law in Canada.

3.2 Public Law of Canada

The applicant must have an understanding of the core principles of public law in Canada, including,

- the constitutional law of Canada, including federalism and the distribution of legislative powers, the Charter of Rights and Freedoms, human rights principles and the rights of Aboriginal peoples of Canada;
- Canadian criminal law; and
- the principles of Canadian administrative law.

3.3 Private Law Principles

The applicant must demonstrate an understanding of the foundational legal principles that apply to private relationships, including,

- contracts, torts and property law; and
- legal and fiduciary concepts in commercial relationships.

C. Approved Canadian Law Degree

The Federation will accept an LL.B. or J.D. degree from a Canadian law school as meeting the competency requirements if the law school offers an academic and professional legal education that will prepare the student for entry to a bar admission program and the law school meets the following criteria:

1. Academic Program
 - 1.1 The law school's academic program for the study of law consists of three academic years or its equivalent in course credits.
 - 1.2 The course of study consists primarily of in-person instruction and learning and/or instruction and learning that involves direct interaction between instructor and students.
 - 1.3 Holders of the degree have met the competency requirements.
 - 1.4 The academic program includes instruction in ethics and professionalism in a course dedicated to those subjects and addressing the required competencies.
 - 1.5 Subject to special circumstances, the admission requirements for the law school include, at a minimum, successful completion of two years of postsecondary education at a recognized university or CEGEP.

2. Learning Resources

2.1 The law school is adequately resourced to enable it to meet its objectives, and in particular, has appropriate numbers of properly qualified academic staff to meet the needs of the academic program.

2.2 The law school has adequate physical resources for both faculty and students to permit effective student learning.

2.3 The law school has adequate information and communication technology to support its academic program.

2.4 The law school maintains a law library in electronic and/or paper form that provides services and collections sufficient in quality and quantity to permit the law school to foster and attain its teaching, learning and research objectives.

5. The Task Force recommends that the compliance mechanism for law schools be a standardized annual report that each law school Dean completes and submits to the Federation or the body it designates to perform this function. In the annual report the Dean will confirm that the law school has conformed to the academic program and learning resources requirements and will explain how the program of study ensures that each graduate of the law school has met the competency requirements.
6. The Task Force recommends that the Federation, or the body it designates to consider proposals for new Canadian law schools, be entitled to approve a proposal with such conditions as it thinks appropriate, relevant to the national requirement.
7. The Task Force recommends that by no later than 2015, and thereafter, all applicants seeking entry to a bar admission program must meet the national requirement.
8. The Task Force recommends that the Federation establish a committee to implement the Task Force's recommendations.

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

APPENDIX 2

Working Group Report on the Establishment of the Implementation Committee

May 2010

RECOMMENDED PROCESS FOR ESTABLISHING THE IMPLEMENTATION COMMITTEE

1. An Implementation Committee should be established to be known as the Federation of Law Societies of Canada's Common Law Degree Implementation Committee ("the Implementation Committee").
2. The Implementation Committee's mandate should be,
 - a. to determine how compliance with Section C (Approved Canadian Law Degree)¹ of the recommendations of the Task Force on the Canadian Common Law Degree will be measured. Its mandate may include clarifying or elaborating on the recommendations, where appropriate, to ensure their effective implementation, but will not include altering the substance or purpose of them; and
 - b. to make recommendations as to the establishment of a monitoring body to assume ongoing responsibility for compliance measurement, including an evaluation of the compliance measurement program and the required competencies, and for maintaining the Federation of Law Societies of Canada's ("the Federation") relationship with Canadian law schools. The Implementation Committee should consider any role the National Committee on Accreditation might play in that monitoring process.
3. The Implementation Committee should have seven members, as follows:
 - a. Two law school deans chosen, where possible, from among those deans currently serving on Federation committees.
 - b. At least one law society member who served on the Task Force on the Canadian Common Law degree.

¹ Section C incorporates by reference the recommendations in Sections A and B. The Task Force Recommendations are attached at the end of this report.

- c. At least one law society member who sits on the current Executive of the Federation.
 - d. At least one law society member who did not sit on the Task Force on the Canadian Common Law Degree.
 - e. At least one sitting benchler, either elected or appointed.
4. The Chair of the Implementation Committee should be one of the law society members. The Managing Director of the National Committee on Accreditation should be invited to attend the Implementation Committee meetings, without being a member of the Committee. The Federation of Law Societies Executive should appoint the Implementation Committee members and name the Chair.
5. Subject to the Federation's approval, the Implementation Committee should be entitled and encouraged to seek assistance from individuals in law societies, law school faculties and elsewhere as it considers appropriate to ensure the effective carrying out of its mandate.
6. To ensure that the Implementation Committee can carry out its mandate effectively, it should receive appropriate resourcing and funding, including staff and research assistance.
7. The Implementation Committee should present its final report to Federation Council no later than September 2011, with approval sought from law societies by December 2011. The Implementation Committee should begin meeting no later than June 2010.

*Federation of Law Societies
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APPENDIX 3

Canadian Common Law Degree Law School Report Form

Common Law Degree
Implementation Committee

August 2011

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

Canadian Common Law Degree Law School Report Form

Submitted by:

Name of institution

Faculty name

Date

Canadian Common Law Degree Law School Report Form

PREFACE AND PURPOSE OF PROCESS:

Each Canadian law school with a common law degree program is to complete the following report form to enable the Canadian Common Law Program Approval Committee (Approval Committee) to determine that the law school's graduates have earned degrees that meet the Federation of Law Societies of Canada's national requirement (national requirement) for entry to the admission programs of law societies in Canadian common law jurisdictions. The form contains two parts. Part 1 seeks information common to all the law school's programs and Part 2 seeks information respecting each program for which the law school seeks approval. Law schools will complete a Part 2 for each program, including joint programs, for which approval is sought.

Beginning in 2015 and annually thereafter the Approval Committee's final reports will be public and posted on the Federation's website. These reports will set out the basis for the Approval Committee's findings respecting each law program for which approval is sought, provided that any information subject to privacy or other personal information will not appear in the public report. Because the national requirement does not come into effect until 2015, the reports in 2012, 2013 and 2014 will be progress reports and will not be public.

The Federation website will also identify each school's programs that apply the Program Approval Model and those that apply the Individual Student Approval Model.



Canadian Common Law Degree
Law School Report Form

Contact Information

Name of Faculty/School:

Address:

Telephone: _____

Fax: _____

Web Site Address (URL):

Contact Person

Name: _____

Title: _____

Telephone: _____

Fax: _____

E-mail: _____



Canadian Common Law Degree
Law School Report Form

Signature Form

(Name of Institution and Faculty/School)

submits the following documentation to the Federation of Law Societies of Canada in accordance with the requirements for approval of the common law degree for purposes of entry of their graduates to the admission programs of law societies in Canadian common law jurisdictions.

The information submitted in this Report is a true and accurate description of the law faculty/school's academic program and learning resources on which information is requested.

Signature of Dean or other Administrative Head of the Faculty/School

Name

Title

Date

Canadian Common Law Degree Law School Report Form

GLOSSARY OF TERMS - TBD

GENERAL INSTRUCTIONS - TBD

[The commentary and elaboration on the competencies and any other guidance will be provided here.]

CALENDARS

Electronic copies of the latest calendar must be included. In cases where the latest calendar information does not correspond to the curriculum of the upcoming graduation class, an appropriate explanation must be part of the documentation provided.

EXHIBITS

The following supplemental information should be attached at the end of the completed report.

- Exhibit 1: Documents describing the processes and policies for student admission, promotion, and graduation
- Exhibit 2: Copies of degree certificates and transcript entries for all variations of the program [This might need an explanation / examples – such as joint degrees with other professional faculties, joint degrees with other universities etc.]
- Exhibit 3: The program may wish to include a matrix of course and other offerings against the national requirements. See example at xxxx.
- Exhibit 4: Any other document that the program deems relevant for evaluation.

WHERE TO SEND YOUR MATERIALS

[Contact information for Approval Committee will be inserted.]

Canadian Common Law Degree Law School Report Form

PART 1: INFORMATION COMMON TO ALL THE LAW SCHOOL'S PROGRAMS

Please provide a general description of the law school/faculty and any other introductory material.

Please list below all programs, including joint programs, offered by the law school and which compliance model will be followed for each, if any:

Names of Programs	Compliance Model (program approval, individual student approval, or no approval will be sought)

Canadian Common Law Degree Law School Report Form

1. Learning Resources:

- 1.1 *The law school is adequately resourced to enable it to meet its objectives, and in particular, has appropriate numbers of properly qualified academic staff to meet the needs of the academic program.*

The Implementation Committee recommends that the following information be provided in this section:

- General description of numbers of full-time faculty, contract instructors, sessional lecturers and support staff, including significant changes from previous year.
- General description of full-time faculty, contract instructor and sessional lecturer qualifications.
- Number of full-time equivalent students in each program.
- General description of student support services.
- Overview of law school operating budget for the academic program from all sources, and sources of funding.

- 1.2 *The law school has adequate physical resources for both faculty and students to permit effective student learning.*

The Implementation Committee recommends that the following information be provided in this section:

- Overall description of law school space, including whether the space is adequate for the law program(s), any space challenges faced by the school and their impact on the program and proposed or planned solutions.
- Description of space available to the law school to carry out the academic program offered, including seminar rooms, quiet study space for students, etc.
- Description of accessibility of the current space.

- 1.3 *The law school has adequate information and communication technology to support its academic program.*

The Implementation Committee recommends that the following information be provided in this section:

- Description of what IT services are provided at the law school.
- Description of dedicated or shared staff and level of support provided to faculty, staff and students.

Canadian Common Law Degree Law School Report Form

- 1.4 *The law school maintains a law library in electronic and/or paper form that provides services and collections sufficient in quality and quantity to permit the law school to foster and attain its teaching, learning and research objectives.*

(A useful reference for this requirement is the Canadian Academic Law Library Directors Association's standards.)

The Implementation Committee recommends that the following information be provided in this section:

- Overview of library staff complement, qualifications and reporting structure.
- Overview of library facilities and description of collection and collections policies.
- Overview of library acquisitions budget.
- General description of support services available to faculty, students and other library users.

PART 2: INFORMATION SPECIFIC TO EACH PROGRAM

Please indicate under which of the following your program is applying for approval, for this reporting period:

- ☐ Program Approval Model: Each graduate must have obtained an approved law degree for purpose of entry to law society bar admission/licensing programs
- ☐ Individual Student Approval Model: The law school will individually evaluate each student and determine which graduates will have an approved law degree for purpose of entry to law society bar admission/licensing programs.

COMPETENCY REQUIREMENTS

1. Skills Competencies

The applicant must have demonstrated the following competencies:

Canadian Common Law Degree Law School Report Form

1.1 Problem Solving

In solving legal problems, the applicant must have demonstrated the ability to,

- a. identify relevant facts;*
- b. identify legal, practical, and policy issues and conduct the necessary research arising from those issues;*
- c. analyze the results of research;*
- d. apply the law to the facts; and*
- e. identify and evaluate the appropriateness of alternatives for resolution of the issue or dispute.*

Please describe how your graduates will meet this requirement (supporting documents may be attached):

1.2 Legal Research

The applicant must have demonstrated the ability to,

- a. identify legal issues;*
- b. select sources and methods and conduct legal research relevant to Canadian law;*
- c. use techniques of legal reasoning and argument, such as case analysis and statutory interpretation, to analyze legal issues;*
- d. identify, interpret and apply results of research; and*
- e. effectively communicate the results of research.*

Canadian Common Law Degree Law School Report Form

Please describe how your graduates will meet this requirement (supporting documents may be attached):

1.3 Oral and Written Legal Communication

The applicant must have demonstrated the ability to,

- a. communicate clearly in the English or French language;*
- b. identify the purpose of the proposed communication;*
- c. use correct grammar, spelling and language suitable to the purpose of the communication and for its intended audience; and*
- d. effectively formulate and present well reasoned and accurate legal argument, analysis, advice or submissions.*

Please describe how your graduates will meet this requirement (supporting documents may be attached):

2. Ethics and Professionalism

The applicant must have demonstrated an awareness and understanding of the ethical dimensions of the practice of law in Canada and an ability to identify and address ethical dilemmas in a legal context, which includes,

- 1. *Knowledge of,*
 - a. the relevant legislation, regulations, rules of professional conduct and common or case law and general principles of ethics and professionalism applying to the practice of law in Canada. This includes familiarity with,*
 - 1. *circumstances that give rise to ethical problems;*

Canadian Common Law Degree
Law School Report Form

2. *the fiduciary nature of the lawyer's relationship with the client;*
 3. *conflicts of interest;*
 4. *the administration of justice;*
 5. *duties relating to confidentiality, lawyer-client privilege and disclosure;*
 6. *the importance of professionalism, including civility and integrity, in dealing with clients, other counsel, judges, court staff and the public; and*
 7. *the importance and value of serving and promoting the public interest in the administration of justice.*
- b. *The nature and scope of a lawyer's duties including to clients, the courts, other legal professionals, law societies, and the public.*
- c. *The range of legal responses to unethical conduct and professional incompetence;*
- d. *The different models concerning the roles of lawyers, the legal profession, and the legal system, including their role in the securing access to justice.*
2. *Skills to,*
- a. *identify and make informed and reasoned decisions about ethical problems in practice; and*
 - b. *identify and engage in critical thinking about ethical issues in legal practice.*

Please describe how your graduates will meet this requirement (supporting documents may be attached):

3. Substantive Legal Knowledge

The applicant must have undertaken a sufficiently comprehensive program of study to obtain an understanding of the complexity of the law and the interrelationship between different areas of legal knowledge. In the course of this program of study the applicant must have demonstrated a general understanding of the core legal concepts applicable to the practice of law in Canada, including as a minimum the following areas:

Please describe how your graduates will have undertaken a sufficiently comprehensive program of study to obtain an understanding of the complexity of the law and the interrelationship between different areas of legal knowledge. (Supporting documents may be attached):

3.1 Foundations of Law

The applicant must have an understanding of the foundations of law, including,

- a. principles of common law and equity;*
- b. the process of statutory construction and analysis; and*
- c. the administration of the law in Canada.*

Please describe how your graduates will meet this requirement (supporting documents may be attached):

Canadian Common Law Degree Law School Report Form

3.2 Public Law of Canada

The applicant must have an understanding of the principles of public law in Canada, including,

- a. the constitutional law of Canada, including federalism and the distribution of legislative powers, the Charter of Rights and Freedoms, human rights principles and the rights of Aboriginal peoples of Canada;*
- b. Canadian criminal law; and*
- c. the principles of Canadian administrative law.*

Please describe how your graduates will meet this requirement (supporting documents may be attached):

3.3 Private Law Principles

The applicant must demonstrate an understanding of the principles that apply to private relationships, including,

- a. contracts, torts and property law; and*
- b. legal and fiduciary concepts in commercial relationships*

Please describe how your graduates will meet this requirement (supporting documents may be attached):

Canadian Common Law Degree
Law School Report Form

APPROVED CANADIAN LAW DEGREE

The Federation will accept an LL.B. or J.D. degree from a Canadian law school as meeting the competency requirements if the law school offers an academic and professional legal education that will prepare the student for entry to a bar admission program and the law school meets the following criteria;¹⁹

4. Academic Program

4.1 The law school's academic program for the study of law consists of three full-time academic years or the equivalent in course credits, which, presumptively, is 90 course credits.

Please describe how your graduates will meet this requirement (supporting documents may be attached):

4.2 The course of study consists primarily of in-person instruction and learning and/or instruction and learning that involves direct interaction between instructor and students.

Please describe how your graduates will meet this requirement (supporting documents may be attached):

4.3 Holders of the degree have met the competency requirements.

Please add any comments in addition to the responses to the competency requirements, above:

¹⁹ The Approved Canadian Law Degree criteria include both the Academic Program, in Part 2 of this form, and the Learning Resources, in Part 1 of this form.

Canadian Common Law Degree
Law School Report Form

Please describe how your program will ensure that transfer students from programs other than a Federation approved Canadian common law program will meet the national requirement:

Please describe how your program will ensure that graduates of your program who take part of their program at another institution (either through an exchange or letter of permission) will meet the national requirement:

Canadian Common Law Degree
Law School Report Form

4.4 The academic program includes instruction in ethics and professionalism in a course dedicated to those subjects and addressing the required competencies. ("Course" is properly interpreted to allow for both,

- a single stand alone course devoted to ethics and professionalism that at a minimum addresses the required competencies, and*
- a demonstrable course of study devoted to ethics that could be delivered,*
 - (1) within a single course that addresses other topics, provided there is a dedicated unit on ethics and professionalism that at a minimum addresses the required competencies; and/or*
 - (2) in multiple years within courses that address other topics, provided there are dedicated units on ethics and professionalism that at a minimum address the required competencies.*

Please describe how your graduates will meet this requirement (supporting documents may be attached):

4.5 Subject to special, circumstances, the admission requirements for the law school include, at a minimum, successful completion of two years of postsecondary education at a recognized university or CEGEP.

Please describe how your graduates will meet this requirement (supporting documents may be attached):

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

APPENDIX 4

Common Law Program Approval Timelines

Common Law Degree
Implementation Committee

August 2011

Canadian Common Law Program Approval Timelines

Draft for 2012 Process

This calendar is an approximate timeline of the approval process. The dates may vary depending on your situation.

Transition note: The Canadian Common Law Program National Requirement comes into effect for 2015 graduates. Therefore, the 2012, 2013 and 2014 approval processes will be prospective. That is, the Committee will be evaluating, at least in part, the future plans for the law programs, for which approval is being sought. As of 2015, and every year thereafter, the Committee will evaluate the program followed by the graduates of that year.

<i>Date</i>	<i>Event</i>	<i>Action by</i>
October - November 2011	Draft reporting form and instructions are distributed to the law schools for advance information.	Staff
November 2011	Dean acknowledges receipt of documentation and timelines for report completion.	Dean
December 2011	Preparation of report begins.	Dean/Law School Faculty and Staff
January 2012	Final version of reporting form is sent to the Dean.	Staff
February/ March 2012	Completed report is sent to Staff.	Dean
March 2012	Staff review form, seek any clarification required from the law school, and distributes it to the Committee members.	Staff
April 2012	Committee meets to consider the reports.	Committee and Staff

<i>Date</i>	<i>Event</i>	<i>Action by</i>
May 2012	<p>Draft decision is sent to Dean for comment.</p> <p>Dean sends his/her comments/responses, if any, to Staff.</p> <p>Dean's comments, if any, are sent to Committee for review and response. Discussions on any deficiencies take place and involve the Dean, Committee Chair or his/her delegate.</p> <p>Committee finalizes decisions.</p>	<p>Staff</p> <p>Dean</p> <p>Staff</p> <p>Committee</p>
June 2012	<p>Committee Final Report is prepared and reviewed.</p> <p>Committee Final Report is sent to Dean by June 30, 2012.</p>	<p>Committee Chair and Staff</p> <p>Committee Chair and Staff</p>
July 2012	Report on 2012 reviews is forwarded to Federation and law societies for information. No website posting because 2012 is a progress report.	Staff



Report to Convocation October 27, 2011

Professional Development & Competence Committee

COMMITTEE MEMBERS

Thomas Conway (Chair)
Mary Louise Dickson (V-Chair)
Alan Silverstein (V-Chair)
Constance Backhouse
Larry Banack
Jack Braithwaite
John Callaghan
Cathy Corsetti
Adriana Doyle
Larry Eustace
Alan Gold
Howard Goldblatt
Susan Hare
Jacqueline Horvat
George Hunter

Vern Krishna
Michael Lerner
Dow Marmur
Wendy Matheson
Susan McGrath
Janet Minor
Barbara Murchie
Judith Potter
Nicholas Pustina
Jack Rabinovitch
Linda Rothstein
Catherine Strosberg
Joseph Sullivan
Robert Wadden
Peter Wardle

**Purpose of Report: Decision
Information**

**Prepared by the Policy Secretariat
(Sophia Sperdakos 416-947-5209)**

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COMMITTEE PROCESS

1. The Committee met on October 13, 2011. Committee members Tom Conway (Chair), Mary Louise Dickson (Vice-Chair), Alan Silverstein (Vice-Chair), Constance Backhouse, John Callaghan, Cathy Corsetti, Adriana Doyle, Larry Eustace, Howard Goldblatt, Jacqueline Horvat, Vern Krishna, Michael Lerner, Dow Marmur, Wendy Matheson, Barbara Murchie, Judith Potter, Nicholas Pustina, Jack Rabinovitch, Linda Rothstein, Cathy Strosberg and Robert Wadden attended. Staff members Diana Miles and Sophia Sperdakos also attended.

FOR DECISION

**FEDERATION OF LAW SOCIETIES OF CANADA'S COMMON LAW
DEGREE IMPLEMENTATION COMMITTEE - FINAL REPORT FOR
APPROVAL**

MOTION

2. That Convocation approve the final report and recommendations of the Federation of Law Societies of Canada's Common Law Degree Implementation Committee, set out at APPENDIX 3.

Introduction and Background

3. In 2009 and early 2010 all law societies, including the Law Society of Upper Canada, approved the final report and recommendations of the Federation of Law Societies of Canada's Task Force on the Canadian Common Law Degree. The Report developed a national requirement for entry to bar admission and licensing programs of law societies in the common law jurisdictions. The Executive Summary and Recommendations of the 2009 Task Force Report are set out at **APPENDIX 1**. The complete Task Force Report is available at [http://www.flsc.ca/documents/Common-Law-Degree-Report-C\(1\).pdf](http://www.flsc.ca/documents/Common-Law-Degree-Report-C(1).pdf).
4. In May 2010 a Federation working group reported to Federation Council with recommendations for the composition, mandate and reporting deadline of the Federation's Common Law Degree Implementation Committee whose task would be to develop an implementation plan for the 2009 recommendations.
5. The Federation's Implementation Committee, chaired by Tom Conway, began meeting in September 2010. It presented its final report to Federation Council in August 2011. Council approved the Report at its semi-annual meeting in September 2011. The Report is now being provided to all law societies for their individual consideration and approval.
6. In approving the establishment of the Implementation Committee law societies emphasized the importance of Law Dean representation on the Committee. The

Implementation Committee members were Tom Conway (Chair) (Law Society of Upper Canada benchers and Ontario's Council Member appointee to the Federation), John Campion (Law Society of Upper Canada benchers and Past President of the Federation), John Hunter (British Columbia's Council Member appointee to the Federation and the Federation Vice President), Catherine Walker (Nova Scotia's Council Member at the Federation), Don Thompson (Executive Director of the Law Society of Alberta), Dean Philip Bryden, (University of Alberta Faculty of Law), Dean Mayo Moran (University of Toronto Faculty of Law), and Professor Joost Blom (Professor and former Dean, University of British Columbia Faculty of Law). The staff members to the Committee were Sophia Sperdakos (Policy Counsel, Law Society of Upper Canada) and Alan Treleaven (Director of Education and Practice, Law Society of British Columbia). Deborah Wolfe, the Managing Director of the National Committee on Accreditation, participated in the meetings.

7. In its final report the Implementation Committee commented on the input it received from the legal academy in the course of its deliberations as follows:

The Committee has benefited from the invaluable assistance and input of the Council of Canadian Law Deans (the CCLD). The CCLD established a Law Deans' Working Group consisting of Dean Mary Anne Bobinski (Faculty of Law - University of British Columbia), Dean Kim Brooks (Schulich School of Law at Dalhousie) and Dean Lorne Sossin (Osgoode Hall Law School) to provide initial comments on a variety of proposals the Committee developed during the course of its analysis. This allowed for refinement of proposals and better understanding of the Deans' perspectives. The Committee also provided the CCLD with its proposal respecting the ethics and professionalism course requirement, the draft template for the annual report that Law Deans will complete and a memorandum outlining the Committee's proposals for implementation of the Task Force recommendations. The CCLD invited the Committee Chair to attend its meeting in Windsor, Ontario on May 6, 2011, which he did. The CCLD's input assisted in the refinement of the law school reporting process and annual report.

Because the Task Force's report includes a recommendation that graduates seeking to enter law society admission programs must have completed a course in ethics and professionalism at law school, the Committee invited law schools to provide input on implementation of the recommendation. An Ethics Professors' Working Group (EPWG) consisting of Adam Dodek (Faculty of Law - University of Ottawa), Jocelyn Downie

(Schulich School of Law at Dalhousie), Trevor Farrow (Osgoode Hall Law School) and John Law (Faculty of Law - University of Alberta), met with members of the Committee to provide input and assistance in the development of the recommended approach.

The diversity of perspectives among the members of the Committee, the collaborative approach of its discussions and its external consultations have assisted the development of recommendations that will facilitate the effective implementation of the national requirement. The Committee has every confidence that the productive conversations about legal education that have occurred during this process will continue in the future, in the public interest.

8. The Implementation Committee Chair's covering letter to the Federation and the Implementation Committee's Report are set out at **APPENDICES 2** and **3**, respectively.

APPENDIX 1

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

TASK FORCE ON THE CANADIAN COMMON LAW DEGREE

FINAL REPORT

October 2009

EXECUTIVE SUMMARY

The provincial and territorial law societies of Canada have the statutory responsibility to regulate the legal profession in the public interest. This responsibility includes the task of admitting lawyers to the profession. In all common law provinces and territories there are three requirements for admission to the bar: a Canadian law degree or its equivalent, successful completion of a bar admission or licensing program and completion of an apprenticeship known as articling. For applicants who receive their legal training outside Canada the determination of what constitutes qualifications "equivalent to" a Canadian law degree is made by the National Committee on Accreditation ("NCA"), a committee of the Federation of Law Societies of Canada ("the Federation").

Unlike other common law jurisdictions, Canada has never had a national standard for academic requirements of a Canadian law degree. The closest *de facto* standard has been a set of requirements the Law Society of Upper Canada approved in 1957 and revised in 1969. These have not been reviewed in 40 years and in any event have never been explicitly accepted by other law societies.

The regulatory landscape has changed greatly since 1969. Public scrutiny of regulated professions has increased. Recent events have converged to focus particular attention on the need for transparent regulatory processes and on the implications of government initiatives to harmonize regulatory requirements across the country:

- Three provinces have enacted legislation respecting access to regulated professions that require regulators to ensure that admission processes for domestic and internationally trained applicants are transparent, objective, impartial and fair.
- The number of internationally trained applicants for entry to bar admission programs has greatly increased and the requirement for equivalency has created a need to articulate what law societies regard as the essential features of a lawyer's academic preparation.
- New law schools are being proposed for the first time in more than 25 years and recognition of their degrees as meeting the academic requirements for entry to bar admission programs requires a more explicit statement of what is required.
- Federal and provincial governments have made clear their commitment to national labour mobility and harmonized standards. A 2007 Canadian Competition Bureau ("CCB") Study on regulated professions questioned the rationale behind the different admissions requirements of various law societies. Recent amendments to the Agreement on Internal Trade ("AIT") have made it clear that all levels of government view professions as national entities that must have the same admission standards. Anyone certified for an occupation by a regulator in one province or territory must be recognized to practise that occupation in all other provinces and territories. The legal profession has had national mobility for a number of years, beginning with the negotiation of the

National Mobility Agreement in 2002. A national academic requirement would further enhance national mobility by providing a common, transparent method for entry to any of the common law bar admission programs in Canada.

The Federation appointed this Task Force in June 2007 to review the existing academic requirements for entry to bar admission programs and to recommend any modifications that might be necessary.

The Task Force's recommendations follow this Executive Summary. The Task Force recommends that the Federation adopt a national academic requirement for entry to the bar admission programs of the common law jurisdictions. The intent behind developing a requirement that applies equally to applicants educated in Canada and internationally is to ensure that all those seeking to enter bar admission programs in Canadian common law jurisdictions have demonstrated certain essential and predefined competencies in the academic portion of their legal education.

In developing the recommended content of this national requirement the Task Force has had the benefit of input from the legal academy, the profession and other interested parties. In particular, the Council of Canadian Law Deans has been of considerable assistance as the Task Force has addressed the difficult challenge of creating a national requirement while at the same time preserving the flexibility Canadian law schools require to continue the innovation in legal education that positions graduates for valuable and diverse roles in society.

Accrediting bodies in jurisdictions similar to Canada commonly use one of two approaches to determine that an applicant for admission meets the necessary academic requirements: successful completion of specified courses or passage of a substantive law bar examination. In recent years, however, there has been increasing focus on learning outcomes, rather than prescriptive input requirements. The Task Force is of the view that this focus represents the appropriate regulatory approach.

Accordingly, the Task Force proposes a national requirement expressed in terms of competencies in basic skills, awareness of appropriate ethical values and core legal knowledge that law students can reasonably be expected to have acquired during the academic component of their education.

The skills competencies the Task Force recommends are in problem solving, legal research and oral and written communication skills. These skills are fundamental to any work a lawyer undertakes in the profession.

In general the Task Force recommends that the Federation leave it to law schools to determine how their graduates accomplish the required competencies. It has concluded, however, that the Federation should require applicants seeking entry to bar admission programs to demonstrate that they have had specific instruction in ethics and professionalism, in a stand-alone course dedicated to the subject. Ethics and professionalism lie at the core of the legal profession. It is important that students begin to appreciate this early in their legal education.

In determining the required substantive legal knowledge, the Task Force considered the continued relevance of the current first-year curriculum of the 16 law schools offering a common law degree, the importance of students having foundational knowledge in both public and private law, the competency research undertaken by various law societies in Canada, the regulatory approach in other comparable common law jurisdictions and the importance of ensuring that the requirements do not interfere with the flexibility and innovation in current law school education.

The Task Force's recommendations reflect its view that every Canadian law school graduate entering a bar admission program or a recipient of an NCA Certificate of Qualification should understand,

- the foundations of law, including principles of common law and equity, the process of statutory construction and analysis and the administration of the law in Canada;
- the constitutional law of Canada that frames the legal system; and
- the principles of criminal, contract, tort, property and Canadian administrative law and legal and fiduciary principles in commercial relationships.

In addition to the competencies set out in the national requirement the Task Force recommends that law schools meet certain institutional requirements, as follows:

- The prerequisite for entry to law school must at a minimum include successful completion of two years of postsecondary education at a recognized university or CEGEP, subject to special circumstances.
- The law school's program for the study of law must consist of three academic years or its equivalent in course credits.
- The program of study must consist primarily of in-person instruction and learning and/or instruction and learning that involves direct interaction between instructor and students.
- The law school must be adequately resourced to meet its objectives.
- The law school must have appropriate numbers of qualified academic staff to meet the needs of the academic program.
- The law school must have adequate physical resources for both faculty and students to permit effective student learning.
- The law school must have adequate information and communication technology to support its academic program.
- The law school must maintain a law library in electronic and/or paper form that permits it to foster and attain its teaching, learning and research objectives.

The national requirement will be applied to all applicants for entry to bar admission programs whether educated in Canada or internationally.

Where a Canadian law school offers an academic and professional legal education that meets the national requirement, its graduates will have met the requirements for entry to bar admission programs.

For applicants trained outside Canada the Task Force recommends that the NCA continue to assess them individually. The national requirement will provide appropriate guidance and result in NCA applicants being assessed in a manner consistent with the requirements for graduates from Canadian law schools.

The Task Force also recommends that the Federation apply the national requirement when considering proposals for new Canadian law schools.

The Task Force recommends that Canadian law school compliance with the national requirement, including the competencies, be determined by a standardized annual report. Each law school Dean will complete the report confirming that the law school has conformed to the academic program and learning resources requirements and explaining how the program of study ensures that each graduate of the law school has met the competency requirements.

If the law societies of Canada approve these recommendations, the Task Force recommends that the Federation establish a committee to implement them.

The Task Force recommends that by no later than 2015, and thereafter, all applicants seeking to enter a bar admission program must meet the national requirement. This transition period accommodates students who have already begun their studies, applicants currently in the NCA process and law schools that will require modifications to their programs.

The proposed national requirements and the Task Force's more detailed discussion of the issues follow this Executive Summary.

THE TASK FORCE'S RECOMMENDATIONS

1. The Task Force recommends that the law societies in common law jurisdictions in Canada adopt forthwith a uniform national requirement for entry to their bar admission programs ("national requirement").
2. The Task Force recommends that the National Committee on Accreditation ("NCA") apply this national requirement in assessing the credentials of applicants educated outside Canada.
3. The Task Force recommends that this national requirement be applied in considering applications for new Canadian law schools.
4. The Task Force recommends that the following constitute the national requirement:

A. *Statement of Standard*

1. *Definitions*

In this standard,

- a. *"bar admission program" refers to any bar admission program or licensing process operated under the auspices of a provincial or territorial law society leading to admission as a lawyer in a Canadian common law jurisdiction;*
- b. *"competency requirements" refers to the competency requirements, more fully described in section B, that each student must possess for entry to a bar admission program; and*
- c. *"law school" refers to any educational institution in Canada that has been granted the power to award an LL.B. or J.D. degree by the appropriate provincial or territorial educational authority.*

2. *General Standard*

An applicant for entry to a bar admission program ("the applicant") must satisfy the competency requirements by either,

- a. *successful completion of an LL.B. or J.D. degree that has been accepted by the Federation of Law Societies of Canada ("the Federation"); or*

- b. possessing a Certificate of Qualification from the Federation's National Committee on Accreditation.*

B. Competency Requirements

1. Skills Competencies

The applicant must have demonstrated the following competencies:

1.1 Problem-Solving

In solving legal problems, the applicant must have demonstrated the ability to,

- a. identify relevant facts;*
- b. identify legal, practical, and policy issues and conduct the necessary research arising from those issues;*
- c. analyze the results of research;*
- d. apply the law to the facts; and*
- e. identify and evaluate the appropriateness of alternatives for resolution of the issue or dispute.*

1.2 Legal Research

The applicant must have demonstrated the ability to,

- a. identify legal issues;*
- b. select sources and methods and conduct legal research relevant to Canadian law;*
- c. use techniques of legal reasoning and argument, such as case analysis and statutory interpretation, to analyze legal issues;*
- d. identify, interpret and apply results of research; and*
- e. effectively communicate the results of research.*

1.3 Oral and Written Legal Communication

The applicant must have demonstrated the ability to,

- a. communicate clearly in the English or French language;*

- b. identify the purpose of the proposed communication;*
- c. use correct grammar, spelling and language suitable to the purpose of the communication and for its intended audience; and*
- d. effectively formulate and present well reasoned and accurate legal argument, analysis, advice or submissions.*

2. *Ethics and Professionalism*

The applicant must have demonstrated an awareness and understanding of the ethical requirements for the practice of law in Canada, including,

- a. the duty to communicate with civility;*
- b. the ability to identify and address ethical dilemmas in a legal context;*
- c. familiarity with the general principles of ethics and professionalism applying to the practice of law in Canada, including those related to,*
 - i. circumstances that give rise to ethical problems;*
 - ii. the fiduciary nature of the lawyer's relationship with the client;*
 - iii. conflicts of interest;*
 - iv. duties to the administration of justice;*
 - v. duties relating to confidentiality and disclosure;*
 - vi. an awareness of the importance of professionalism in dealing with clients, other counsel, judges, court staff and members of the public; and*
 - vii. the importance and value of serving and promoting the public interest in the administration of justice.*

3. *Substantive Legal Knowledge*

The applicant must have undertaken a sufficiently comprehensive program of study to obtain an understanding of the complexity of

the law and the interrelationship between different areas of legal knowledge. In the course of this program of study the applicant must have demonstrated a general understanding of the core legal concepts applicable to the practice of law in Canada, including as a minimum the following areas:

3.1 Foundations of Law

The applicant must have an understanding of the foundations of law, including,

- a. principles of common law and equity;*
- b. the process of statutory construction and analysis; and*
- c. the administration of the law in Canada.*

3.2 Public Law of Canada

The applicant must have an understanding of the core principles of public law in Canada, including,

- a. the constitutional law of Canada, including federalism and the distribution of legislative powers, the Charter of Rights and Freedoms, human rights principles and the rights of Aboriginal peoples of Canada;*
- b. Canadian criminal law; and*
- c. the principles of Canadian administrative law.*

3.3 Private Law Principles

The applicant must demonstrate an understanding of the foundational legal principles that apply to private relationships, including,

- a. contracts, torts and property law; and*
- b. legal and fiduciary concepts in commercial relationships.*

C. Approved Canadian Law Degree

The Federation will accept an LL.B. or J.D. degree from a Canadian law school as meeting the competency requirements if the law school offers an academic

and professional legal education that will prepare the student for entry to a bar admission program and the law school meets the following criteria:

- 1. Academic Program:*
 - 1.1 The law school's academic program for the study of law consists of three academic years or its equivalent in course credits.*
 - 1.2 The course of study consists primarily of in-person instruction and learning and/or instruction and learning that involves direct interaction between instructor and students.*
 - 1.3 Holders of the degree have met the competency requirements.*
 - 1.4 The academic program includes instruction in ethics and professionalism in a course dedicated to those subjects and addressing the required competencies.*
 - 1.5 Subject to special circumstances, the admission requirements for the law school include, at a minimum, successful completion of two years of postsecondary education at a recognized university or CEGEP.*
 - 2. Learning Resources:*
 - 2.1 The law school is adequately resourced to enable it to meet its objectives, and in particular, has appropriate numbers of properly qualified academic staff to meet the needs of the academic program.*
 - 2.2 The law school has adequate physical resources for both faculty and students to permit effective student learning.*
 - 2.3 The law school has adequate information and communication technology to support its academic program.*
 - 2.4 The law school maintains a law library in electronic and/or paper form that provides services and collections sufficient in quality and quantity to permit the law school to foster and attain its teaching, learning and research objectives.*
5. The Task Force recommends that the compliance mechanism for law schools be a standardized annual report that each law school Dean completes and submits to the

Federation or the body it designates to perform this function. In the annual report the Dean will confirm that the law school has conformed to the academic program and learning resources requirements and will explain how the program of study ensures that each graduate of the law school has met the competency requirements.

6. The Task Force recommends that the Federation, or the body it designates to consider proposals for new Canadian law schools, be entitled to approve a proposal with such conditions as it thinks appropriate, relevant to the national requirement.
7. The Task Force recommends that by no later than 2015, and thereafter, all applicants seeking entry to a bar admission program must meet the national requirement.
8. The Task Force recommends that the Federation establish a committee to implement the Task Force's recommendations.

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

August 10, 2011

Ronald J. MacDonald, Q.C.
President
Federation of Law Societies of Canada
45 O'Connor Street, Suite 1810
Ottawa, Ontario K1P 1A4

Re: Final Report - Common Law Degree Implementation Committee

Dear Mr. MacDonald,

As Chair of the Federation of Law Societies of Canada's Common Law Degree Implementation Committee (the "Committee"), I am pleased to provide you with the Committee's final report.

In accordance with its mandate, the Committee has developed a proposal to implement the uniform national requirement (the "national requirement") for entry to law society admission programs in Canadian common law jurisdictions. Our 20 recommendations develop a coherent implementation structure that is detailed and appropriately balanced in its effect on law schools, the National Committee on Accreditation (the "NCA"), law societies and the Canadian Common Law Program Approval Committee, the body that will determine compliance with the national requirement.

As the Federation of Law Societies of Canada (the "Federation") and its member law societies implement the national requirement there is a valuable opportunity to strengthen and advance the institutional relationship between law societies and Canadian law schools at a national level.

The Committee's process has convinced all its members that such a collaborative national dialogue is both feasible and vital to the interests of furthering law societies and the legal academy's commitment to a legal profession that is learned, competent and dedicated to the public interest.

There are a few considerations that were beyond the scope or time frame of the Implementation Committee's mandate, but the Committee wishes to identify them for the Federation as relevant to the ongoing relevance of the national requirement and the continued enhancement of the continuum of legal education.

1. Law School Learning Methodologies

The 2009 Report of the Task Force on the Canadian Common Law Degree recommends that as part of the approval process a law school's course of study must consist

“primarily of in-person instruction and learning and/or instruction and learning that involves direct interaction between instructor and students”.

The Committee’s Report recommends interpreting “primarily” in-person to mean that presumptively a minimum of two-thirds of instruction over the course of the law degree program must be face-to-face instruction conducted with the instructor and students in the same classroom.

The Committee is aware of the rapidly changing nature of educational delivery methods. As such, it has included in the text of its report the following comment:

The Committee recognizes the ongoing value of law schools developing innovative and dynamic delivery approaches. As legal education and delivery methods continue to evolve the re-examination of this requirement will be appropriate and advisable. It is beyond the scope of the Committee’s mandate to undertake such an examination, but it recommends that the Federation broaden the discussion by engaging those with expertise in education delivery techniques, delivery of legal education and professional regulation to consider the issues.

This issue is relevant not only to the Federation’s national requirement, but to the NCA’s assessment of international credentials.

2. National Collaboration on Ethics and Professionalism

In the course of the Committee’s discussions with law school representatives on the importance of ethics and professionalism to the legal profession the idea of promoting a voluntary national collaboration on ethics and professionalism among the Federation, law firms and law schools was raised. The Committee has recommended that the Approval Committee’s mandate include participating in efforts to enhance the relationship between law societies and law schools, including promoting such a voluntary collaboration on ethics and professionalism. (See Recommendation 16)

For the Federation’s information, I am setting out here the ideas that the Committee members discussed with the Ethics Professors Working Group in the course of its discussions on the ethics and professionalism course.

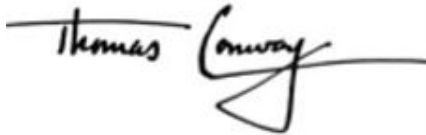
- The Federation/law societies/law firms could create a summer institute (even for a time limited period (e.g. three years)) to bring together ethics professors and representatives from law societies and law firms to discuss ethical issues and the teaching of ethics. This would go a long way to fostering relations between the Federation and the legal academy and would also encourage law schools whose teaching in this area is relatively recent to become more innovative in their approaches. Given that there is a group of ethics professors across the country that interacts regularly on issues related to teaching ethics, a summer institute would also enhance their ability to interact in person.
- Canada is hosting the International Legal Ethics Conference on July 12-14, 2012 in Banff. This might be a good opportunity for all involved to come together for professional development on issues of legal ethics.

- Law firm initiatives supporting law school teaching in this area should be encouraged. Law firm sponsorships/recognition is very important. This could also have a salutary effect on encouraging law schools to innovate in this area. Innovation could be celebrated with awards.
- Groups already in existence to support the teaching of ethics in law schools could be engaged further and efforts to find funding for initiatives like the summer institutes could be stepped up to ensure schools are represented.
- The Federation could devote the educational portion of one of its semi-annual conferences to ethics and professionalism and invite representatives who teach the subject at the law school to participate.

If the collaborative approach and the thoughtful dialogue in which our committee members engaged throughout our deliberations are any indication, I believe we may well be ushering in a renewed and productive relationship between the legal academy and the law societies of Canada in the sphere of our mutual concern, that is the education and training of the legal profession in Canada.

I wish to thank and acknowledge all of the members of our committee for their many hours of thoughtful work and, in particular, to thank each of the staff members who supported our work. My job as chair was made very easy by their collective efforts.

Thank you for the opportunity to work on this important issue.



Thomas G. Conway, Chair
Common Law Degree Implementation Committee

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

Common Law Degree Implementation Committee

Final Report

August 2011

This report is presented to the Council of the Federation of Law Societies of Canada for consideration. None of the recommendations contained herein is effective unless approved by the Federation and its member law societies.

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INTRODUCTION

The Federation of Law Societies of Canada's Common Law Degree Implementation Committee (the "Committee") is pleased to provide this final report to the Council of the Federation of Law Societies of Canada (the "Federation"). In accordance with its mandate, the Committee has developed a proposal to implement the uniform national requirement (the "national requirement") for entry to law society admission programs¹ in Canadian common law jurisdictions.

The Committee's 20 recommendations develop a coherent implementation structure that is detailed and appropriately balanced in its effect on law schools, the National Committee on Accreditation (the "NCA"), law societies and the body that will determine compliance with the national requirement. The recommendations ensure that the intent of the Federation's Task Force on the Canadian Common Law Degree (the "Task Force") and the manner in which the Task Force's recommendations are to be implemented are clear to:

- law schools that will meet the national requirement and report on their programs annually;
- the compliance body;
- the NCA, which will apply the requirements to applicants seeking Certificates of Qualification;
- law societies; and
- the public.

They reflect the principle underlying the Task Force's recommendations that its report should not interfere with innovation and flexibility in Canadian law school education.

As the Federation and its member law societies implement the national requirement there is a valuable opportunity to strengthen and advance the institutional relationship between law societies and Canadian law schools at a national level. The Committee's process has convinced all its members that such a collaborative national dialogue is both feasible and vital to the interests of furthering law societies and the legal academy's commitment to a legal profession that is learned, competent and dedicated to the public interest.

¹ The term "law society admission program" refers to and includes all the pre-licensing processes, however named, of law societies in the common law provinces and territories leading to admission to the profession.

RECOMMENDATIONS

Recommendation 1

The commentary set out in **TABLE A** regarding the competency requirements be approved.

Recommendation 2

The elaboration of the professionalism and ethics competency set out in **TABLE B** be approved.

Recommendation 3

“Course” relating to ethics and professionalism instruction be interpreted to allow for both:

- a single stand alone course devoted to ethics and professionalism that at a minimum addresses the required competencies set out at **TABLE B**, and
- a demonstrable course of study devoted to ethics and professionalism that could be delivered:
 - (1) within a single course that addresses other topics, provided there is a dedicated unit on ethics and professionalism that at a minimum addresses the required competencies set out in **TABLE B**; and/or
 - (2) in multiple years within courses that address other topics, provided there are dedicated units on ethics and professionalism that at a minimum address the required competencies set out in **TABLE B**.

Recommendation 4

By 2015, graduates seeking entry to law society admission programs be required to have taken a demonstrable course of study dedicated to ethics and professionalism that is a minimum of 24 hours, is formally assessed and, at a minimum, addresses the required competences set out in **TABLE B**.

Recommendation 5

The commentary and direction set out in **TABLE C** regarding the approved common law degree academic program requirements be approved.

Recommendation 6

The commentary and direction set out in **TABLE D** regarding the approved common law degree required learning resources be approved.

Recommendation 7

Law schools be entitled to comply with the national requirement by using the Program Approval Model or the Individual Student Approval Model for a given program, including joint degree programs.

Recommendation 8

A graduate from a school applying the Individual Student Approval Model to a given program be eligible for entry to law society admission programs if he or she provides an official transcript from the degree granting institution certifying that he or she has met the national requirement for entry to law society admission programs.

Recommendation 9

A graduate who has not met the national requirement who subsequently seeks entry to a law society admission program be required to obtain first a Certificate of Qualification from the NCA.

Recommendation 10

The Federation website identify whether schools apply the Program Approval Model or the Individual Student Approval Model to a given program.

Recommendation 11

The Canadian Common Law Program Approval Committee (the "Approval Committee") be authorized to make any changes, revisions or additions to the standardized annual report form set out in **Appendix 3** as it determines necessary, provided the changes, revisions or additions conform to the national requirement and reflect the purposes as described in this report.

Recommendation 12

The compliance process set out in **TABLE E** be approved.

Recommendation 13

The Approval Committee be authorized to make any changes, revisions or additions to the draft reporting timeline set out in **Appendix 4** and any other reporting timelines as it determines necessary to ensure that the compliance process operates in an effective manner.

Recommendation 14

Beginning in 2015 and annually thereafter the Approval Committee's final reports be public and posted on the Federation's website. These reports will set out the basis for the Approval Committee's findings respecting each law program for which approval is sought, provided that any information subject to privacy or other personal information will not appear in the public report. The Federation website will also identify each school's programs that apply the Program Approval Model and those that apply the Individual Student Approval Model.

To reflect that the national requirement does not come into effect until 2015, the progress reports in 2012, 2013 and 2014 not be public.

Recommendation 15

The Federation establish a new committee to be called the Canadian Common Law Program Approval Committee.

Recommendation 16

The Approval Committee have the following mandate:

- To determine law school program compliance with the national requirement for the purpose of entry of Canadian common law school graduates to Canadian law society admission programs. This will apply to the programs of established Canadian law schools and those of new Canadian law schools.

- To make any changes, revisions or additions to the annual law school report as it determines necessary, provided the changes, revisions or additions conform to the approved national requirement and reflect the purposes described in this report.
- To make any changes, revisions or additions to the draft reporting timeline set out in **Appendix 4** and any other reporting timelines as it determines necessary to ensure that the compliance process operates in an effective manner.
- To post its final annual reports on the Federation public website and to post information reports on the website, covering, at a minimum, the list of approved law school programs and issues of interest respecting the continuum of legal education.
- To participate in efforts and initiatives to enhance the institutional relationship between law societies and law schools at a national level. This could, for example, include efforts such as promoting a voluntary national collaboration on ethics and professionalism learning that would further enhance teaching, learning and practice in this area.
- To ensure appropriate training for its members.
- To undertake such other activities and make any necessary changes, additions or improvements to its processes as it determines necessary to ensure the effective implementation of the national requirement, provided these reflect the purposes described in this report.

Recommendation 17

The Federation, with the assistance of the Approval Committee, undertake regular evaluation of the national requirement and compliance process, the first to be completed at least by 2018 and no less frequently than every five years thereafter. The Federation should determine the timing and terms of reference for the evaluation and the reporting timeline and the Approval Committee should ensure that the evaluation is completed and any recommendations made within the timeline. Nothing in this recommendation should preclude adjustments and changes to the compliance process in the years between evaluations, as set out in the mandate in Recommendation 16. It should be open to the Approval Committee to recommend the timing of the evaluations.

Recommendation 18

The qualifications to be represented among the members of the Approval Committee set out in **TABLE F** be approved.

Recommendation 19

The appointment process, size, member composition and term of service for the Approval Committee set out in **TABLE G** be approved.

Recommendation 20

The Approval Committee be resourced forthwith and with sufficient professional and support staff and financial resources to enable it to fulfil its mandate. Law societies, through the Federation, fund the Approval Committee.

THE REPORT

BACKGROUND

The Federation's Task Force on the Canadian Common Law Degree (the "Task Force") issued its final report in October 2009. That Report recommends that law societies in common law jurisdictions in Canada adopt a uniform national requirement for entry to their admission programs (the "national requirement"). It further recommends that by no later than 2015, and thereafter, all applicants seeking entry to a law society admission program must have met the national requirement. The Task Force report recommends that the National Committee on Accreditation (the "NCA") apply the national requirement in assessing the qualifications of individuals with legal education and experience obtained outside Canada or in civil law degree programs in Canada who wish to be admitted to a law society in a common law jurisdiction. It also recommends that the national requirement be applied in considering applications for the approval of programs of new Canadian law schools.

The national requirement specifies the required competencies that graduates must have attained and the law school academic program and learning resource requirements that law schools must have in place to enable entry of graduates to law society admission programs. It applies to the J.D. or LL.B. programs of existing law schools and to applications for recognition of new common law programs.²

The Task Force report also recommends that the Federation establish a committee to implement its report and recommendations. The Task Force recommendations are set out in **Appendix 1**.³

All law societies in Canada approved the Task Force report and recommendations between December 2009 and March 2010. The Federation's model resolution, which law societies adapted to their individual use, contained a provision that the appointed

² "New common law programs" could include both those that are developed within a university setting and those that are not. "New common law programs" also includes those relating to a yet to be established Canadian law school and proposed new programs in established Canadian schools, including civil law schools proposing to establish common law programs.

³ The Task Force report is available at www.flsc.ca/_documents/Common-Law-Degree-Report-C.pdf.

implementation committee include appropriate representation from Canadian law schools.

In May 2010, a Federation working group reported to Federation Council with recommendations for the composition, mandate and reporting deadline of the Federation's Common Law Degree Implementation Committee (the Committee). Council approved the Working Group report, which is set out at **Appendix 2**. The Working Group report reflects the importance law societies place on including law school representatives on the Committee. It specifies two Law Deans as members. In addition, another member of the Committee is a law professor who is also a former law school Dean.

The members of the Committee are: Tom Conway (Chair), Professor Joost Blom, Dean Philip Bryden, John Campion, John Hunter, Dean Mayo Moran, Don Thompson, and Catherine Walker. The Managing Director of the NCA, Deborah Wolfe, also attended and participated in the meetings, as recommended in the Working Group report. Sophia Sperdakos and Alan Treleaven are staff to the Committee.

The Committee's mandate is

- (a) to determine how compliance with Section C (Approved Canadian Law Degree)⁴ of the recommendations of the Task Force on the Canadian Common Law Degree will be measured. Its mandate may include clarifying or elaborating on the recommendations, where appropriate, to ensure their effective implementation, but will not include altering the substance or purpose of them; and
- (b) to make recommendations as to the establishment of a monitoring body to assume ongoing responsibility for compliance measurement, including an evaluation of the compliance measurement program and the required competencies, and for maintaining the Federation of Law Societies of Canada's ("the Federation") relationship with Canadian law schools. The Implementation Committee should consider any role the National Committee on Accreditation might play in that monitoring process.

This report fulfills the Committee's responsibility to present its final report to Federation Council no later than September 2011. In accordance with its mandate, the Committee has made recommendations on implementation and on the establishment of a "compliance body." The report discusses the nature, structure and composition of that body with

⁴ Section C incorporates, by reference, the recommendations in Sections A and B. See Appendix 1.

a formal recommendation (Recommendation 15) that it be established and called the Canadian Common Law Program Approval Committee (the Approval Committee).⁵

Where appropriate, the Committee has clarified or elaborated on the Task Force recommendations to ensure their effective implementation, but has not altered the substance or purpose of them.

The Committee's goal has been to ensure that:

- the intent of the Task Force recommendations and the manner in which they are to be implemented are clear to:
 - o law schools that will meet the national requirement and report on their programs annually,
 - o the Approval Committee,
 - o the NCA, which will apply the requirements to applicants seeking Certificates of Qualification,
 - o law societies, and
 - o the public;
- the implementation structure is clear, effective and appropriately balanced in its effect on law schools, law societies, the NCA and the Approval Committee;
- the implementation approach reflects the principle underlying the Task Force's recommendations that its report should not interfere with innovation and flexibility in law school education; and
- the approach to implementation was developed following consultation with and input from law schools, beyond membership of two Law Deans and a former Law Dean on the Committee.

The Committee has benefited from the invaluable assistance and input of the Council of Canadian Law Deans (the CCLD). The CCLD established a Law Deans' Working Group consisting of Dean Mary Anne Bobinski (Faculty of Law - University of British Columbia), Dean Kim Brooks (Schulich School of Law at Dalhousie) and Dean Lorne Sossin (Osgoode Hall Law School) to provide initial comments on a variety of proposals the Committee developed during the course of its analysis. This allowed for refinement of proposals and

⁵ See Recommendations 15 – 20 and discussion beginning at page 39.

better understanding of the Deans' perspectives. The Committee also provided the CCLD with its proposal respecting the ethics and professionalism course requirement, the draft template for the annual report that Law Deans will complete and a memorandum outlining the Committee's proposals for implementation of the Task Force recommendations. The CCLD invited the Committee Chair to attend its meeting in Windsor, Ontario on May 6, 2011, which he did. The CCLD's input assisted in the refinement of the law school reporting process and annual report.

Because the Task Force's report includes a recommendation that graduates seeking to enter law society admission programs must have completed a course in ethics and professionalism at law school, the Committee invited law schools to provide input on implementation of the recommendation. An Ethics Professors' Working Group (EPWG) consisting of Adam Dodek (Faculty of Law - University of Ottawa), Jocelyn Downie (Schulich School of Law at Dalhousie), Trevor Farrow (Osgoode Hall Law School) and John Law (Faculty of Law - University of Alberta)⁶, met with members of the Committee to provide input and assistance in the development of the recommended approach.

The diversity of perspectives among the members of the Committee, the collaborative approach of its discussions and its external consultations have assisted the development of recommendations that will facilitate the effective implementation of the national requirement. The Committee has every confidence that the productive conversations about legal education that have occurred during this process will continue in the future, in the public interest.

THE COMPETENCIES

The approved Task Force recommendations specify minimum competencies for entry to law society admission programs.⁷ With the exception of the competency respecting "ethics and professionalism," which must be satisfied in "a course dedicated to those subjects and addressing the required competencies," each law school may determine how its students

⁶ The EPWG has acted as a liaison to the larger group of ethics and professionalism professors across the country.

⁷ See Section B of Appendix 1.

satisfy the competency requirements. As the Task Force notes, “this allows law schools the flexibility to address these competencies in the manner that best meets their academic objectives, while at the same time meeting the regulators’ requirements that will allow their graduates to enter law society admission programs.”⁸

The required competencies are part of “an academic and professional legal education that will prepare the student for entry to a law society admission program.” Law schools comply with specified requirements respecting the academic program and learning resources.

The requirements leave significant additional freedom within law school curricula and structure for students to develop their particular interests and for law schools to pursue innovative teaching and research.

In examining the competencies, the Committee’s goal has been:

- to determine whether any of the competencies requires clarification or elaboration to facilitate implementation and compliance; and
- to provide such direction in this regard as is necessary.

While the Committee is satisfied that the competencies are generally clear and do not require clarification, it has identified some instances where clarification or elaboration would be useful not only to law schools whose students must meet them, but also to the NCA, which must assess the qualifications of individuals with legal education and professional experience obtained outside of Canada, or in a civil law program in Canada, who wish to be admitted to a law society in a common law jurisdiction in Canada.

The Committee has also determined a number of instances where examples of how a competency could be satisfied would be useful and has included these. The Committee emphasizes that these are examples only and do not limit or circumscribe a law school’s ability to determine how its students satisfy the competency.

⁸ Task Force Report, p. 31.

For ease of understanding, the Task Force's competency requirements are set out in **TABLE A**, with the Committee's recommendations for clarification, elaboration or direction set out in an accompanying box. The ethics and professionalism competency is dealt with separately following the Table.

TABLE A
Competency Requirements

B. Competency Requirements

1. Skills Competencies

The applicant must have demonstrated the following competencies:

1.1 Problem-Solving

In solving legal problems, the applicant must have demonstrated the ability to,

- *identify relevant facts;*
- *identify and evaluate the appropriateness of alternatives for resolution of the issue or dispute.*
- *analyze the results of research;*
- *apply the law to the facts; and*
- *identify and evaluate the appropriateness of alternatives for resolution of the issue or dispute.*

No clarification necessary.

1.2 Legal Research

The applicant must have demonstrated the ability to,

- *identify legal issues;*
- *select sources and methods and conduct legal research relevant to Canadian law;*

Given that the skills addressed in this competency relate to legal research, the reference to "Canadian law" should be read in that context. It should not be seen as referring to substantive Canadian law, but rather to the types of legal

research resources that reflect the Canadian context (e.g. precedent-based research). This is relevant to the assessment of the qualifications of individuals with legal education and professional experience obtained outside of Canada or in a civil law program in Canada, who wish to be admitted to a law society in a common law jurisdiction in Canada and is also applicable to those educated in common law Canadian law schools.

- *use techniques of legal reasoning and argument, such as case analysis and statutory interpretation, to analyze legal issues;*
- *identify, interpret and apply results of research; and*
- *effectively communicate the results of research.*

No clarification necessary.

1.3 Oral and Written Legal Communication

The applicant must have demonstrated the ability to,

- *communicate clearly in the English or French language;*
- *identify the purpose of the proposed communication;*
- *use correct grammar, spelling and language suitable to the purpose of the communication and for its intended audience; and*
- *effectively formulate and present well reasoned and accurate legal argument, analysis, advice or submissions.*

No clarification necessary.

2. Ethics and Professionalism

The applicant must have demonstrated an awareness and understanding of the ethical requirements for the practice of law in Canada, including,

- a. *the duty to communicate with civility;*
- b. *the ability to identify and address ethical dilemmas in a legal context;*
- c. *familiarity with the general principles of ethics and professionalism applying to the practice of law in Canada, including those related to,*

- i. *circumstances that give rise to ethical problems;*
- ii. *the fiduciary nature of the lawyer's relationship with the client;*
- iii. *conflicts of interest;*
- iv. *duties to the administration of justice;*
- v. *duties relating to confidentiality and disclosure;*
- vi. *an awareness of the importance of professionalism in dealing with clients, other counsel, judges, court staff and members of the public; and*
- vii. *the importance and value of serving and promoting the public interest in the administration of justice.*

Discussed separately below.

3. *Substantive Legal Knowledge*

The applicant must have undertaken a sufficiently comprehensive program of study to obtain an understanding of the complexity of the law and the interrelationship between different areas of legal knowledge.

The Task Force recommendations specify minimum competencies required for entry to law society admission programs. The Task Force report recognizes that legal education in Canada is an enriched learning environment and agrees that it provides both a liberal legal education and a professional education. In law school students begin to “think like lawyers,” examine law critically and address deficiencies in legal systems and principles. The competencies that are included in the national requirement are therefore situated in this broader context.

This preamble to the section 3 competencies seeks Deans’ descriptions of how their school offers “a sufficiently comprehensive program of study” to enable graduates to “obtain an understanding of the complexity of the law and the interrelationship between different areas of legal knowledge.” Each Dean will be asked to address this in the annual report to the Approval Committee.

In the course of this program of study the applicant must have demonstrated a general understanding of the core legal concepts applicable to the practice of law in Canada, including as a minimum the following areas:

3.1 Foundations of Law

The applicant must have an understanding of the foundations of law, including,

- *principles of common law and equity;*

This competency could be addressed as part of courses in private law. It is open to schools to address this competency in other ways.

- *the process of statutory construction and analysis; and*

This competency could be addressed by any number of courses that are statute based (e.g. taxation, corporate, administrative, criminal, civil procedure, family, labour, etc.). It is open to schools to address this competency in other ways.

- *the administration of the law in Canada.*

This competency is directed at understanding the organization of the courts and tribunals **in Canada**, including appeal processes.

3.2 Public Law of Canada

The applicant must have an understanding of the core principles of public law in Canada, including,

The modifier “core” before “principles” is unnecessary and will not appear on the annual report to the Approval Committee law schools complete.

This section 3.2 requirement is fully addressed by the enumerated competencies below. All competencies under section 3.2 are intended to address public law **in Canada**.

- *the constitutional law of Canada, including federalism and the distribution of legislative powers, the Charter of Rights and Freedoms, human rights principles and the rights of Aboriginal peoples of Canada;*

The part of this competency requirement that states “the constitutional law of Canada, including...the rights of Aboriginal peoples of Canada” could be addressed in a number of ways, including, for example, in a constitutional law

course or as part of a property law course that addresses Aboriginal rights. It is open to schools to address this competency in other ways.

- *Canadian criminal law; and*

No clarification necessary.

- *the principles of Canadian administrative law.*

This competency contemplates the principles of **Canadian** administrative law. This competency could be addressed through a stand-alone administrative law course or through a course in which the subject matter is grounded in an administrative tribunal (e.g. labour/employment law, environmental law). It is open to schools to address this competency in other ways.

3.3 Private Law Principles

The applicant must demonstrate an understanding of the foundational legal principles that apply to private relationships, including,

The modifier “foundational legal” before “principles” is unnecessary and will not appear on the annual report to the Approval Committee law schools complete.

- *contracts, torts and property law; and*

No clarification necessary.

- *legal and fiduciary concepts in commercial relationships.*

This competency contemplates a conceptual overview of business organizations, including fiduciary relationships in a commercial context. It is open to schools to address this competency through a course in corporate law or in other ways.

Recommendation 1

The commentary set out in TABLE A regarding the competency requirements be approved.

Ethics and Professionalism Competency

The Task Force report places particular emphasis on the need for law school graduates who seek entry to law society admission programs to have an understanding of ethics and professionalism. It notes,

Ethics and professionalism lie at the core of the profession. The profession is both praised for adherence to ethical codes of conduct and vilified for egregious failures. Increasing evidence of external scrutiny of the profession in this area and internal professional debates about ethical failures point to the need for each lawyer to understand and reflect on the issues. In the Task Force's view, the earlier in a lawyer's education that inculcation in ethics and professionalism begins, the better.

The Task Force believes that more, not less, should be done in this area and that legal educators and law societies together should be identifying ways to ensure that law students, applicants for admission and lawyers engage in focused and frequent discussion of the issues. To ensure that law students receive this early, directed exposure the Task Force believes a stand-alone course is essential.⁹

In addition to setting out the components of the ethics and professionalism competency, the Task Force report recommends that this competency be acquired in a course dedicated to the subject and addressing the competencies. This is in contrast to the approach to all the other competencies in the national requirement in which the report recommends that it be left to law schools to determine how their students meet them. As the Task Force indicates, "ethics and professionalism lie at the core of the profession."

The unique approach the Task Force takes to this competency led the Committee to consult, as described above in the 'background' section to this report, to ensure that the Task Force's recommendations respecting ethics and professionalism are implemented as effectively as possible, in keeping with both the spirit and letter of the recommendations.

⁹ Task Force Report, p.35.

The Committee received invaluable input and assistance respecting both the implementation of the stand alone course requirement, which will be discussed later in this report, and on the language of the ethics and professionalism competency, which is discussed here.

In the course of its consultations the following points were drawn to the Committee's attention:

- The way in which the actual competency is stated in the Task Force report is more narrowly focused than the rest of the Task Force report on the topic appears to have intended. This is because the components of the competency, as originally worded, focus mainly on issues addressed in Rules of Professional Conduct, rather than also reflecting the greater Task Force goal that students understand and reflect on broader ethical and professionalism issues.
- Presenting the competencies as a “list” of components could have the unintended effect of freezing curricula at a point in time. Making it clear that the list is not exhaustive would minimize the concern.
- The Task Force's intent to recognize the importance of ethics and professionalism would be more effectively addressed if the implementation approach more accurately reflects that intent.

The Committee agrees with these points. While maintaining all the components of the ethics and professionalism competency set out in the Task Force's report, the Committee has added additional language that reflects the broader philosophy underlying the Task Force's reasons for placing special emphasis on professionalism and ethics in its report.

The ethics and professionalism competency described below is the point of departure for those who teach this subject. Its components do not constitute an exhaustive list that limits them to teaching only those components. It sets out the required minimum coverage only.

The proposed wording for the ethics and professionalism competency is set out in

TABLE B.

TABLE B
Ethics and Professionalism Competency

Ethics and Professionalism

The applicant must have demonstrated an awareness and understanding of the ethical dimensions of the practice of law in Canada and an ability to identify and address ethical dilemmas in a legal context, which includes,

1. Knowledge of,
 - a. the relevant legislation, regulations, rules of professional conduct and common or case law and general principles of ethics and professionalism applying to the practice of law in Canada. This includes familiarity with,
 1. circumstances that give rise to ethical problems;
 2. the fiduciary nature of the lawyer's relationship with the client;
 3. conflicts of interest;
 4. the administration of justice;
 5. duties relating to confidentiality, lawyer-client privilege and disclosure;
 6. the importance of professionalism, including civility and integrity, in dealing with clients, other counsel, judges, court staff and the public; and
 7. the importance and value of serving and promoting the public interest in the administration of justice;
 - b. the nature and scope of a lawyer's duties including to clients, the courts, other legal professionals, law societies, and the public;
 - c. the range of legal responses to unethical conduct and professional incompetence; and
 - d. the different models concerning the roles of lawyers, the legal profession, and the legal system, including their role in the securing access to justice.
2. Skills to,
 - a. identify and make informed and reasoned decisions about ethical problems in practice; and
 - b. identify and engage in critical thinking about ethical issues in legal practice.

For the NCA's assistance in assessing the competencies of international students, the Committee makes one additional comment on the ethics and professionalism competency. The reference to "Canada" in the competency's preamble and in section 1(a) reflects the requirement that the graduate must have acquired the competency in a course of study that addresses the subject in the Canadian context. Presently, there is no requirement that NCA candidates satisfy this competency in the Canadian context. The Canadian context requirement will mean that in future more NCA candidates may be required to meet this competency than is currently the case. Given the Task Force's emphasis on the importance of this topic in its Canadian context, the Committee is of the view that the applicability of the competency in the NCA context is in the public interest and therefore appropriate.

For Canadian law schools that have previously allowed students to obtain a compulsory ethics credit during an international exchange program by taking an ethics course that addresses ethics in the law of the country governing the exchange program, such a credit would not be eligible for the ethics and professionalism competency.

Recommendation 2

The elaboration of the professionalism and ethics competency set out in TABLE B be approved.

APPROVED COMMON LAW DEGREE - ACADEMIC PROGRAM AND LEARNING RESOURCES

The Task Force report specifies that for graduates of a Canadian law school to be eligible to enter a law society admission program their school must offer an academic program and learning resources that comply with the national requirement.

The Task Force specifically avoids an overly prescriptive approach to the academic program, reflecting its underlying philosophy that law schools should be able to pursue an innovative and flexible pedagogical approach, in keeping with the goals and objectives of their individual programs, subject only to meeting certain minimum requirements for the purposes of entry of their graduates to law society admission programs.

The Task Force report states that,

wherever possible the institutional requirements set out in the national requirement for entry to law society admission programs should reflect current practice in Canadian law schools. This balances the regulatory objectives with law schools' desire to maintain flexibility of approach. By stating current practices as much as possible the Task Force leaves open the door for law schools to advise the Federation if current practices are no longer appropriate.¹⁰

The Committee has examined the Task Force's required components of the academic program and the learning resources and determined whether any of them require comment, clarification or elaboration to facilitate implementation.

For ease of understanding, the required components of the academic program are set out in **TABLE C** with the Committee's clarification, elaboration or direction set out in an accompanying box.

TABLE C
Academic Program

The Federation will accept an LL.B. or J.D. degree from a Canadian law school as meeting the competency requirements if the law school offers an academic and professional legal education that will prepare the student for entry to a bar admission program and the law school meets the following criteria:

1. *Academic Program*

- 1.1 *The law school's academic program for the study of law consists of three academic years or its equivalent in course credits.*

The Committee provides three comments here for clarification and direction, based upon and following the Task Force's own approach.

1. In specifying "three academic years" the Task Force is referring to three full-time academic years. The Committee is advised that in law schools currently offering the common law degree the "equivalent in course credits" to three

¹⁰ Task Force Report, p. 39.

full-time academic years presumptively means 90 credit hours. The Task Force refers to this in its report.

The Committee adopts this clarification so that paragraph 1.1 of the Task Force recommendation should be clarified to read:

1.1 The law school's academic program for study of law consists of three full-time academic years or the equivalent in course credits, which, presumptively, is 90 course credits.

2. Many Canadian law schools offer joint degree programs in which students follow an integrated course of study with another related discipline, receiving a J.D. or LL.B. degree plus a degree from the other discipline. The typical joint degree program is four years, although some are three years. The Task Force discusses the joint degree in relation to the requirement set out in section 1.1 above:

In recent decades many Canadian law schools have introduced joint degree programs with related, but separate disciplines. The Task Force recognizes that interdisciplinary education is a rich and valuable part of law school education. Nothing in its recommendations should be interpreted to interfere with the capacity of law schools to offer such degrees. So long as the student has been engaged in a study of law for three years or its equivalent in course credits, and has acquired the competency requirements in so doing, joint degree programs should satisfy the national requirement. Law schools introducing major changes in their academic program, such as the introduction of a joint degree, should be encouraged to discuss them with the Federation to ensure that their graduates will continue to meet the competency requirements.¹¹

For graduates of joint law degree programs to be eligible to enter law society admission programs their degrees will have to meet the national requirement, which includes, among other components, the required competencies and a requirement that the graduate of the joint degree program has followed an academic program for the study of law consisting of three full-time academic years or the equivalent in course credits, which, presumptively, is 90 course credits.

The term “an academic program for the study of law” is broad enough to encompass joint degree programs **provided that** the study of law is integrated with another discipline sufficiently related to law **and** the interwoven content is specifically designed to enhance and enrich the learning in law. The eligibility of the joint degree program to satisfy the national requirement may be easier to accomplish in a four-year joint degree than in a three-year one, particularly in view of the need to satisfy the required competencies, but it will be open to schools that wish to have their

¹¹ Task Force Report, p. 41.

joint degree programs meet the national requirement for purposes of entry of their graduates to law society admission programs to satisfy the Approval Committee that they do.

Schools will report annually on each joint degree program for which they seek approval for the purposes of entry of their graduates to law society admission programs. It is important to note that schools may choose to offer some joint degree programs for which they do not seek approval. The Federation website will list only those programs for which approval has been obtained.

3. Some Canadian law schools accept transfer students from law schools outside of Canada. Each school determines whether transfer students will be entitled to apply any of their credits from their education outside Canada toward the degree requirements of the Canadian law school. With the introduction of the competency requirements, some of which address the competency in the Canadian context (e.g. principles of Canadian administrative law) schools will need to ensure that any credits for courses taken outside of Canada toward a competency requirement that must address the subject in the Canadian context actually do so. Schools will also need to ensure that graduates of their programs who take part of their program at another institution, either through an exchange or letter of permission, meet the national requirement.

1.2 The course of study consists primarily of in-person instruction and learning and/or instruction and learning that involves direct interaction between instructor and students.

Currently, Canadian law schools deliver most education through face-to-face instruction conducted with the instructor and students in the same classroom. At the same time, most Canadian law schools now supplement that face-to-face instruction to at least some extent by the use of a variety of instructional methods mediated by information technology. These methods can include electronic course management systems such as TWEN or Moodle or synchronous instruction via video-conference. Nevertheless, it is still the case that asynchronous on-line learning or traditional distance education is rarely employed in Canadian law school courses as the sole instructional method.

In its report, the Task Force recognizes that technology is having a significant impact on the delivery of legal information and legal education, and that innovation and experimentation are to be expected and encouraged. At the same time its recommendation focuses on the importance of face-to-face inter-personal connections in law school. Its report notes,

Technological advances for delivering information are moving rapidly. The Task Force does not wish to inhibit innovative delivery or experimentation

in this area. At the same time, however, it is of the view that Canadian law school education should, as it does today, provide a primarily in-person educational experience and/or one in which there is direct interaction between instructor and students. The use of the term "primarily" in the Task Force's recommendation is intended to allow for innovation and experimentation.¹²

From the Task Force's perspective, the in-person learning requirement is directed at the skills and abilities that graduates who seek entry to a law society admission program should have. The practice of law is an interpersonal endeavour. Problems are solved through interactions with others: clients, lawyers, witnesses, office staff, judges, and others. Some of these interactions may be written, but many of them are oral, and involve understanding how to deal with a person face-to-face. In particular, lawyers typically discuss legal problems with other lawyers. They need to understand how to do that. Those interactions involve legal problem solving and oral persuasion. The law school experience – involving face-to-face interactions with instructors as well as students – models that experience.

The Committee is satisfied that the Task Force's recommendation means that currently Canadian law schools are to deliver their programs mainly through in-person delivery methods. The clause "instruction and learning that involves direct interaction between instructor and students" modifies "in-person." This clause was inserted to address and permit some synchronous learning such as live videoconferencing, which is already being used to supplement the face-to-face in-person instruction that makes up most of law school education in Canada.

In the Committee's view the Task Force's reference to "primarily" in-person instruction should be considered in the context of:

- existing practices respecting face-to-face instruction in Canadian law schools;
- the extent to which some degree of alternative delivery is currently permitted; and
- the importance of allowing room for innovation in delivery approaches.

Given this context, the Committee recommends interpreting "primarily" in-person to mean that presumptively a minimum of two-thirds of instruction over the course of the law degree program must be face-to-face instruction conducted with the instructor and students in the same classroom.

The Committee recognizes the ongoing value of law schools developing innovative and dynamic delivery approaches. As legal education and delivery

¹² Task Force report, p. 41.

methods continue to evolve the re-examination of this requirement will be appropriate and advisable. It is beyond the scope of the Committee's mandate to undertake such an examination, but it recommends that the Federation broaden the discussion by engaging those with expertise in education delivery techniques, delivery of legal education and professional regulation to consider the issues.

1.3 Holders of the degree have met the competency requirements.

This refers to the competency requirements set out in section B of the Task Force recommendations as clarified in this report, particularly in **TABLES A and B**.

1.4 The academic program includes instruction in ethics and professionalism in a course dedicated to those subjects and addressing the required competencies.

The Task Force report emphasizes the importance of dedicated instruction in ethics and professionalism, beginning in law school. Although for all other competencies the Task Force recommends that it be left to law schools to determine how their students meet them, it specifies that respecting ethics and professionalism students must have acquired the competencies in "a course dedicated to those subjects and addressing the required competencies" defined in the Task Force report.

TABLE B reflects the clarification and elaboration of the ethics and professionalism competency that the Committee recommends.

As a further part of its mandate to implement the Task Force recommendations the Committee is clarifying what will satisfy the requirement for an ethics and professionalism "course." This is essential to effective implementation of the requirement so that:

- those who teach this subject matter understand the parameters of the requirement;
- Law Deans are in a position to address any resource implications and are able to report compliance;
- the Approval Committee is able to determine compliance; and
- the NCA is able to assess the qualifications of individuals with legal education and experience obtained outside Canada or in civil law degree programs in Canada who wish to be admitted to a law society in a common law jurisdiction in Canada.

The substantive goal of the Task Force recommendation is that serious attention be paid to ethics and professionalism in a way that is demonstrable and dedicated. At the same time it does not intend the language of the requirement to hamstring or interfere with innovative delivery. Indeed, from the Task Force's perspective, which the Committee echoes, the innovation in teaching that has been growing in a number of schools is to be encouraged.

Drawing on the valuable consultations it has had on this subject, the Committee is clarifying the recommendation in a manner that reflects the importance of the subject and the Federation's requirements, while allowing law schools to be innovative. Having considered the input it received and reflecting on the context of the Task Force's goals and recommendations on this subject, the Committee is of the view that to allow the best development of teaching in this area, the term "course" should be interpreted to mean "a demonstrable course of study" whose goal is to develop in students the ability to think about and analyze ethical and professionalism issues in the legal profession. The approved competencies would be taught as part of the demonstrable course of study, allowing freedom to go beyond those competencies to address additional content.

The "course of study" could be developed in any number of ways, for example as a single course or within an ethics curriculum taught over a number of years as units demonstrably devoted to ethics, but situated within other courses. The learning could build on the previous year's unit reflecting the increasing sophistication of the student over time.

The "demonstrable" language is meant to ensure that the dedicated approach to ethics education that the Task Force identifies as a priority can be measured.

Recommendation 3

"Course" relating to ethics and professionalism instruction be interpreted to allow for both:

- ***a single stand alone course devoted to ethics and professionalism that at a minimum addresses the required competencies set out in TABLE B, and***
- ***a demonstrable course of study devoted to ethics and professionalism that could be delivered,***

(1) within a single course that addresses other topics, provided there is a dedicated unit on ethics and professionalism that at a minimum addresses the required competencies set out in TABLE B; and/or

(2) in multiple years within courses that address other topics, provided there are dedicated units on ethics and professionalism that at a minimum address the required competencies set out in TABLE B.

While there are various criteria that could be applied to determine whether a school has met the requirement for a demonstrable course of study, the Committee is reluctant to be overly prescriptive, particularly since the Federation requirement for a “course” in this subject area is a new direction.

Accordingly, the Committee has concluded that articulating a minimum number of required hours would allow for certainty, while leaving significant freedom for schools in developing the course of study.

The Committee discussed 36 hours as the appropriate number of hours for the “course” requirement. Because, however, the ethics and professionalism course requirement is a new one that may have resource and staffing implications for some schools it is of the view that there should be some flexibility respecting this component.

The Committee recommends that the requirement be satisfied if a graduate has taken a “course” (as described above) that is a minimum of 24 hours. The Committee is also of the view, however, that the ultimate goal is for the requirement to be 36 hours, the implementation of this goal to be determined at a future date to be discussed with the law schools before actually being implemented.

As discussed, the required 24 hours could be acquired in a single course or in a course of study that spans two or three years of law school (e.g. 12 hours a year for 2 years, 8 hours a year over three years) or any other way the law school determines provided it satisfies the requirement for a “demonstrable course of study.”

Recommendation 4

By 2015, graduates seeking entry to law society admission programs be required to have taken a demonstrable course of study dedicated to ethics and professionalism that is a minimum of 24 hours, is formally assessed and, at a minimum, addresses the required competences set out in TABLE B.

1.5 Subject to special circumstances, the admission requirements for the law school include, at a minimum, successful completion of two years of postsecondary education at a recognized university or CEGEP.

No clarification necessary.

Recommendation 5

The commentary and direction set out in TABLE C regarding the approved common law degree academic program requirements be approved.

Learning Resources

In developing its recommendations respecting learning resources the Task Force notes the following:

The Task Force is reluctant to define in great detail the form law school must take, particularly given the role of provincial governments in approving degree granting institutions and the complex university-based decision making process that addresses many of the law schools' physical components. The Task Force does, however, recognize that there are certain necessities for an effective legal education whose graduates can serve the public. In the Task Force's view the most important consideration is that the law school be adequately resourced to fulfill its educational mission. At a time when all public resources are subject to financial pressures, the Task Force is reluctant to be too prescriptive in its recommendations, but has concluded that there are certain irreducible minima that must be maintained if law societies are to accept the law degree as evidence that the competency requirements are being achieved.¹³

An environment that supports learning is critical to the development of meaningful legal education. It may be easier to assess what is sufficient with respect to already established schools than with respect to new applicants for program recognition. At the same time, it is not appropriate to set a standard based on the resources that long-established schools have that would be impossible for a new school to meet.

It is necessary to provide additional guidance under "learning resources" to assist law schools to know what information they are expected to report on an annual basis. This will ensure consistency of information across schools and across years.

The Committee agrees with the Task Force's approach to resources that recognizes a connection between the resource requirements and a school's particular objectives. This allows for different types of law schools to exist that require different levels of resources. At the same time, however, the school's objectives and resources must be sufficient to meet the national requirement.

¹³ Task Force Report. p.42.

The Committee has consulted with the CCLD concerning the type of information that would elicit a reasonable picture of the learning resources to which the Task Force recommendations are directed. In addition, it has considered the approaches that other professional regulators take on this issue. Its goal is that law schools provide sufficient information to allow the Approval Committee to understand the learning resources context within which the national requirement is being met in each school.

To ensure that the information sought from law schools is both relevant and necessary it would be useful to use an iterative process to develop and refine the information to be provided under the learning resources section of the annual report. As the national requirement will not come into effect until 2015, the reports that law schools will file in 2012, 2013 and 2014 will be progress reports. The Committee considers these years as providing the opportunity for law schools and the Approval Committee to review the initial approach to the learning resources reporting and develop a standardized approach that will provide the most appropriate information and be applied as consistently as possible to all degree programs, whether established or new.

The guidance set out is intended for the responses in the 2012 report. Thereafter the Approval Committee should have the authority to adapt and change the required information as it considers appropriate flowing from the iterative approach.

For ease of understanding the required components of the learning resources are set out in **TABLE D** with the Committee's clarification, elaboration or direction set out in an accompanying box.

TABLE D Learning Resources

- 2.1 The law school is adequately resourced to enable it to meet its objectives, and in particular, has appropriate numbers of properly qualified academic staff to meet the needs of the academic program.*

The Committee recommends that the following information be provided in this section:

- General description of numbers of full-time faculty, contract instructors, sessional lecturers and support staff, including significant changes from previous year.
- General description of full-time faculty, contract instructor and sessional lecturer qualifications.
- Number of full-time equivalent students in each program.
- General description of student support services.
- Overview of law school operating budget for the academic program from all sources, and sources of funding.

2.2 The law school has adequate physical resources for both faculty and students to permit effective student learning.

The Committee recommends that the following information be provided in this section:

- Overall description of law school space, including whether the space is adequate for the law program(s), any space challenges faced by the school and their impact on the program and proposed or planned solutions.
- Description of space available to the law school to carry out the academic program offered, including seminar rooms, quiet study space for students, etc
- Description of accessibility of the current space.

2.3 The law school has adequate information and communication technology to support its academic program.

The Committee recommends that the following information be provided in this section:

- Description of what IT services are provided at the law school.
- Description of dedicated or shared staff and level of support provided to faculty, staff and students.

2.4 The law school maintains a law library in electronic and/or paper form that provides services and collections sufficient in quality and quantity to permit the law school to foster and attain its teaching, learning and research objectives.

(A useful reference for this requirement is the Canadian Academic Law Library Directors Association's standards.)

The Implementation Committee recommends that the following information be provided in this section:

- Overview of library staff complement, qualifications and reporting structure.
- Overview of library facilities and description of collection and collections policies.
- Overview of library acquisitions budget.
- General description of support services available to faculty, students and other library users.

Recommendation 6

The commentary and direction set out in TABLE D regarding the approved common law degree required learning resources be approved.

MEASURING COMPLIANCE

In considering an appropriate national compliance mechanism the Task Force states:

The requirement for a national compliance mechanism does not... necessitate an intrusive or onerous approach. Existing Canadian law schools offer a high standard of education and the Task Force is satisfied that compliance with the competency requirements will not pose difficulty for any of them. At the same time, however, the Task Force does recognize that the creation of requirements represents a change in current practices and any compliance mechanism, however modest, will require some adjustment. It also recognizes that the recommendation for a stand-alone course relating to ethics and professionalism and the requirements to address competencies may require adjustment by some law schools.

The Task Force recommends that the compliance mechanism for law schools should be a standardized annual report that each law school Dean completes and submits to the Federation or the body it designates to perform this function.

In the annual report the Dean would confirm that the law school has conformed to the academic program and the learning resources requirements and would explain how the program of study ensures that each graduate of the law school has met the competency requirements.¹⁴

¹⁴ Task Force Report, pp. 43-44.

Among other tasks the Task Force report recommends this Committee undertake are the development of “the form and substance of the standardized annual law school report” and a mechanism to address non-compliance.

In developing its recommendations for the compliance mechanism the Committee has been guided by the Task Force’s views and has addressed the following issues:

- Compliance Models
- Form and Content of the Standardized Annual Report
- Compliance Process
- Publication of the reports

COMPLIANCE MODELS

The Committee recommends that law schools be entitled to approach compliance using two possible models:

- Program Approval Model
- Individual Student Approval Model

Program Approval Model

Law schools in Canada offer a variety of programs, including the traditional three full-time academic years or equivalent in course credits (presumptively 90 credits) J.D. or LL.B. program and joint degree programs, discussed above.¹⁵

A law school that applies the Program Approval Model to a particular program will require that each graduate of that program meet the national requirement for entry to law society admission programs. These law schools will not permit students in these programs to have the option to graduate without having met the competency requirements.

In the annual report on these programs the Dean will describe the process the school follows to determine that graduates in each of these programs meet the competency

¹⁵ Law schools also offer LL.M. programs that are not relevant to the discussion here.

requirements, in accordance with the national requirement.¹⁶

In schools that apply the Program Approval Model to a given program, graduates from approved programs will by definition have met the competency requirements. In granting the degree the school will be confirming this.

Schools that apply the Program Approval Model, generally, may also have joint degree programs for which they do not seek approval. The Individual Student Approval Model may be relevant to these programs. The Federation website will list all the joint degree programs for which these schools have program approval.

Individual Student Approval Model

Traditionally, there are law school graduates who choose not to be licensed to practise law. There are myriad career paths for which a J.D. or LL.B. degree is invaluable, but for which a license to practise is unnecessary. Although the required competencies in the national requirement have been designed to allow for ample additional opportunity for students to pursue their academic and intellectual interests in law school, it is possible that some students who do not want to be licensed to practise law would prefer not to satisfy all the required competencies. The Individual Student Approval Model will allow for this approach.

The Committee respects law schools' right to foster this academic path for their students, which may be in keeping with the school's objectives and mandate. Its only concern is that law societies be in a position to easily verify whether graduates from those programs, who do seek entry to law society admission programs, have met the required competencies.

If a school chooses the Program Approval Model for a given program, by definition every student granted a J.D. or LL.B. degree in an approved program will have met the competencies. If a school chooses the Individual Student Approval Model for a given program it will be necessary for individual transcripts for each graduate to indicate whether

¹⁶ As part of their existing internal processes law schools already conduct a "degree audit" for each student to ensure he or she has met all the program requirements necessary to graduate, including having met the school's required number of credit hours and fulfilled its compulsory courses or other requirements. Where a school is following the Program Approval Model for a given program, this degree audit process will also include a determination that each student will have met the Federation's competency requirements upon graduation.

he or she has met the national requirement.

A graduate who has not met the national requirement and subsequently wishes to enter a law society admission program can fulfill the missing competencies through the NCA by obtaining a Certificate of Qualification. It will be necessary for that graduate to provide the NCA with an official document from its degree granting institution setting out which competencies must still be fulfilled.

Recommendation 7

Law schools be entitled to comply with the national requirement by using the Program Approval Model or the Individual Student Approval Model for a given program, including joint degree programs.

Recommendation 8

A graduate from a school applying the Individual Student Approval Model to a given program be eligible for entry to law society admission programs if he or she provides an official transcript from the degree granting institution certifying that he or she has met the national requirement for entry to law society admission programs.

Recommendation 9

A graduate who has not met the national requirement who subsequently seeks entry to a law society admission program be required to obtain first a Certificate of Qualification from the NCA.

Recommendation 10

The Federation website identify whether schools apply the Program Approval Model or the Individual Student Approval Model to a given program.

FORM AND CONTENT OF THE STANDARDIZED ANNUAL REPORT

The standardized annual report is the mechanism by which a law school will report compliance with the national requirement.

A standardized annual report:

- provides a template by which the Approval Committee will determine compliance with the national requirement;
- addresses each of the components of the national requirement with sufficient information and supporting documentation to allow compliance to be determined;
- enables a law school to report compliance in a transparent and efficient way;
- identifies the degree programs for which a school seeks approval for entry of graduates to law society admission programs and demonstrates how each program meets the requirements;
- identifies law school programs as following the Program Approval Model or the Individual Student Approval Model;
- provides overview information on the law school to situate the report in the context of the school's objectives and approach;
- documents changes to individual law school programs. Each year each law school report will comment on changes to any previously approved programs and the effective date of such changes. With annual reporting it will be essential that any changes to previously approved programs are identified and also approved. Schools will be encouraged to discuss proposed changes with the Approval Committee before they are implemented to ensure they will meet the national requirement; and
- documents the application of the national requirement.

The Committee has developed a draft form for the standardized annual report that addresses these purposes. The draft form, which was provided to the CCLD, is set out at **Appendix 3.**

The draft form is a living document that will evolve over the years as law schools and the Approval Committee seek to ensure its continued relevance and effectiveness. The Approval Committee should be authorized to make any changes, revisions or additions to the form as it determines necessary so long as the changes, revisions or additions conform to the approved national requirement and reflect the purposes described above.

Recommendation 11

The Canadian Common Law Program Approval Committee (the Approval Committee) be authorized to make any changes, revisions or additions to the standardized annual report form set out in Appendix 3 as it determines necessary, provided the changes, revisions or additions conform to the national requirement and reflect the purposes as described in this report.

COMPLIANCE PROCESS

a) Existing Canadian Common Law Programs

The national requirement applies to graduates from Canadian common law schools beginning in 2015 and annually thereafter.

Programs whose students graduate in 2012, 2013 and 2014 will continue to be recognized under the current processes and are not subject to the national requirement. Law societies will continue to accept 2012, 2013 and 2014 Canadian common law school graduates into their admissions programs on the pre-national requirement criteria.

The annual report on their programs that law schools file in 2012, 2013 and 2014, will, therefore, be progress reports leading to determination of compliance in 2015. Reports submitted in 2012, 2013 and 2014 will describe the program actually followed by the students to the date of the report, as well as reporting on plans for the program to 2015 directed at meeting the national requirement. The Approval Committee will provide feedback to schools on their progress towards meeting the national requirement for 2015.

From 2015 and annually thereafter the annual reports will report on the program the graduates of that year will have completed. The Approval Committee will determine compliance with the national requirement.

It is expected that, typically, a program approved for graduates of 2015 will continue to be approved thereafter, unless there are significant changes to the program in the areas subject to the national requirement. In such cases, the Approval Committee will undertake the inquiry necessary to ensure that the program continues to meet the national requirement.

b) New Canadian Common Law Programs

Where a new program is being proposed, either by an established Canadian law school that already offers J.D. /LL.B. programs and wishes to add additional programs or by a Canadian institution that does not yet offer any J.D. /LL.B. programs but seeks to do so,¹⁷ the school will go through a two stage process. The first stage is the consideration of the proposal for a new program. That proposal will include a plan for implementing the new program, in which, typically, parts of the program are put in place over time.

The second stage begins once the proposal and plan have been approved, and implementation is underway. During this second stage, the school will report annually on the implementation of the plan, using a modified version of the annual report.

TABLE E sets out the Committee's recommended compliance process respecting new and existing programs to determine compliance with the national requirement.

¹⁷ This would also include a Canadian institution already offering a civil law degree that seeks to offer a J.D. /LL.B.

TABLE E
Compliance Process

a) Existing Canadian Common Law Programs

1. Upon receipt of a law school's completed annual report, the Approval Committee reviews it and any supporting documents in accordance with a specified timeline, a sample of which is set out in **Appendix 4**.¹⁸
2. The Approval Committee determines compliance with the national requirement and provides a draft report to the law school, setting out the Committee's conclusions and the basis for those conclusions. The law school is invited to provide comments on the draft report.
3. If the Approval Committee is satisfied that the school's program(s) meets the national requirement, the Approval Committee's draft report is finalized and provided to the law school and posted on the Federation website.
4. If the Approval Committee is of the view that the annual report raises issues regarding compliance, its draft report identifies the issues using one or more of the following rating categories:
 - o **Deficiency** - indicates non-compliance with one or more requirements. If a "deficiency" has been identified and the school and the Approval Committee cannot agree on how to address it, the Approval Committee issues its final report.

The compliance process will be an iterative one, the goal of which is to resolve deficiencies wherever possible before the Approval Committee issues a final report. The iterative process ensures that, if useful and directed, discussion toward a solution continues in an attempt to resolve the issues. It will be important to keep in mind, however, that there are annual time lines that must be met for issuing the Approval Committee's report. The Approval Committee ends discussion if it determines no further progress is being made.
 - o **Concern** - indicates that although one or more requirements is currently met, it is at a minimum level that could deteriorate to become a deficiency. A school may note the "concern" without acting upon it, but it may be advisable for the school to resolve the concern, since it would be noted in the Approval Committee's final report. The iterative process described under "deficiency" could be used to resolve the "concern" if the parties agree.
 - o **Comment** - this addresses a missing detail, a question, or a suggestion for more information. A school may take note of a "comment" without taking action upon it, but if it wishes to clarify or respond the Approval Committee can then re-issue its report reflecting this.

¹⁸ **Appendix 4** sets out the sample timeline for the 2012 report. That report will be a progress report. The basic timeline would also apply in 2013 and 2014 and in 2015 and thereafter when the national requirement is in force.

5. As set out above, the school has the opportunity to respond to the draft report within a specified period of time. If the Approval Committee seeks more information or other action, the school may provide it or agree to undertake to do what is requested of it.
6. The conclusion of the Approval Committee's final report sets out one of the following ratings:
 - o "The law program has complied with the national requirements. *Approved.*"
 - o "The law program has mostly complied with the national requirements, except for deficiencies in the following areas... *Approved with notice to remedy specified areas of non-compliance.*"

The notice to remedy specifies that for the program to retain approved status the deficiencies must be addressed by the next reporting period, or in exceptional cases, by a subsequent reporting period.

 - o "The law program has not complied with the national requirement. *Not approved.*"
7. Only the final report of the Approval Committee will be public. All draft reports and ongoing discussions will not be public. The progress reports prepared in 2012, 2013 and 2014 will also not be public.

b) New Canadian Common Law Programs

Proposal Stage

8. Using the annual report format, the school provides its proposal for a new program. The proposal includes a plan describing how and when the program will achieve each of the provisions of the national requirement. The proposal is to be provided before the school takes steps to commence the program.
9. The Approval Committee determines prospectively whether the proposal, including implementation plan, if implemented, would comply with the national requirement. It provides a draft report to the law school, setting out its conclusions and the basis for those conclusions. The law school is invited to provide comments on the draft report.
10. When the Approval Committee issues a draft report respecting a new program it may contain "comments," "concerns" and/or "deficiencies" for the proposed new law school program to address before the Approval Committee issues a final report, and the school may respond as set out above. As in the case of the compliance process for established programs the process will be an iterative one leading to the final report.

11. Approval for a new program will be prospective because the first students will not graduate from the program until a number of years in the future. Accordingly the ratings for such programs will be:
 - o “The proposal and implementation plan for a law program, if followed, will comply with the national requirement. *Preliminary Approval, subject to implementation of the program as proposed.*”
 - o The law program as proposed will not comply with the national requirement. *Not Approved.*”
 12. Only the final report of the Approval Committee will be public. All draft reports and ongoing discussions will not be public.
- Reporting Stage**
13. The process in paragraphs 1-7, modified to measure progress against the implementation plan, continues to be followed annually until the first graduates of the program are in their final year. Thereafter the process in paragraphs 1-7 applies, without modification.

The Approval Committee should be authorized to make any changes, revisions or additions to the reporting timeline as it determines necessary to ensure that the compliance process in **TABLE E** operates in an effective manner.

Recommendation 12

The compliance process set out in TABLE E be approved.

Recommendation 13

The Approval Committee be authorized to make any changes, revisions or additions to the draft reporting timeline set out in Appendix 4 and any other reporting timelines as it determines necessary to ensure that the compliance process operates in an effective manner.

PUBLICATION OF REPORTS

Beginning in 2015 when the national requirement comes into effect and annually thereafter the Approval Committee's final reports will be public and posted on the Federation's website. These reports will set out the basis for the Approval Committee's findings respecting each law program for which approval is sought. This recommendation is subject to the proviso that any information subject to privacy provisions or other personal or confidential information will not appear in the public report.

The Federation website will also identify each school's programs that apply the Program Approval Model and those that apply the Individual Student Approval Model. This will be important information for law societies, the NCA and law students.

Because the national requirement does not come into effect until 2015, the reports in 2012, 2013 and 2014 will be progress reports and will not be public.

Recommendation 14

Beginning in 2015 and annually thereafter the Approval Committee's final reports be public and posted on the Federation's website. These reports will set out the basis for the Approval Committee's findings respecting each law program for which approval is sought, provided that any information subject to privacy or other personal information will not appear in the public report. The Federation website will also identify each school's programs that apply the Program Approval Model and those that apply the Individual Student Approval Model.

To reflect that the national requirement does not come into effect until 2015, the progress reports in 2012, 2013 and 2014 not be public.

THE CANADIAN COMMON LAW PROGRAM APPROVAL COMMITTEE

As discussed above, the Committee recommends that the "monitoring body to assume ongoing responsibility for compliance measurement, including an evaluation of the compliance measurement program and the required competencies, and for maintaining

the Federation's relationship with Canadian law schools," be called the Canadian Common Law Program Approval Committee ("the Approval Committee"). The name identifies the committee's primary responsibility, but is not intended to limit the Approval Committee's role to this single area. To fulfill the Committee's mandate to make recommendations about the monitoring body this report addresses the following:

- Structure of the Approval Committee
- Jurisdiction and Mandate
- Committee Member Qualifications and Committee Composition
- Resourcing

STRUCTURE OF THE APPROVAL COMMITTEE

Given that law societies have put in place a national requirement for entry to law society admission programs, it is logical that the Approval Committee be part of the Federation. As a national committee it will ensure a coherent approach to the implementation of the national requirement.

The Working Group report establishing the Committee directed that it consider the possible role of the NCA in the compliance process. While it may make sense in the future to bring the two bodies together, the Committee is of the view that it is important at this stage for the Approval Committee to be an entity structurally separate from the NCA. This will allow the national requirement compliance process to establish a unique profile that will be important, particularly in the early years of implementation.

In addition, the NCA has an established profile as the body that assesses the qualifications of individuals with legal education and professional experience obtained outside of Canada, or in a civil law program in Canada, who wish to be admitted to a law society in a common law jurisdiction in Canada. Its mandate and workload are already demanding. At this stage it should not be required to take on a new function.

The Approval Committee should be established and populated forthwith to ensure that it is in place to assess the first law school compliance reports that will be due in 2012.

Recommendation 15

The Federation establish a new committee to be called the Canadian Common Law Program Approval Committee (the Approval Committee).

JURISDICTION AND MANDATE

The creation of the Approval Committee offers an opportunity to go beyond the required compliance function that was only one of the Task Force's interests. While this compliance function must be a central responsibility, the Approval Committee also has an important role to play in enhancing the institutional relationship between law societies and law schools at a national level. As the Federation continues to develop national approaches to regulatory issues (e.g. national standards for admission to law societies, model codes of conduct etc.), there will be increasing opportunities to advance the discussion of the continuum of legal education. The Approval Committee should play a role in this discussion.

Given that recommended membership of the Approval Committee will include both Law Deans and law society regulators from across the country, the opportunity for a meaningful exchange of ideas is significant.

Recommendation 16

The Approval Committee have the following mandate:

- ***To determine law school program compliance with the national requirement for the purpose of entry of Canadian common law school graduates to Canadian law society admission programs. This will apply to the programs of established Canadian law schools and those of new Canadian law schools.***
- ***To make any changes, revisions or additions to the annual law school report as it determines necessary, provided the changes, revisions or additions conform to the approved national requirement and reflect the purposes described in this report.***
- ***To make any changes, revisions or additions to the draft reporting timeline set out in Appendix 4 and any other reporting timelines as it determines necessary to ensure that the compliance process operates in an effective manner.***
- ***To post its final annual reports on the Federation public website and to post information reports on the website, covering, at a minimum, the list of approved law school programs and issues of interest respecting the continuum of legal education.***

- ***To participate in efforts and initiatives to enhance the institutional relationship between law societies and law schools at a national level. This could, for example, include efforts such as promoting a voluntary national collaboration on ethics and professionalism learning that would further enhance teaching, learning and practice in this area.***
- ***To ensure appropriate training for its members.***
- ***To undertake such other activities and make any necessary changes, additions or improvements to its processes as it determines necessary to ensure the effective implementation of the national requirement, provided these reflect the purposes described in this report.***

To ensure that the national requirement and the compliance process remain relevant and effective it is essential that the Federation, with the assistance of the Approval Committee, undertake regular evaluation of the national requirement and compliance process. The first evaluation should be completed at least by 2018 and no less frequently than every five years thereafter. The Federation should determine the timing and terms of reference for the evaluation and the reporting time line and the Approval Committee should ensure that the evaluation is completed and any recommendations made within the time line.

Nothing in this recommendation should be seen as precluding adjustments and changes to the compliance process in the years between evaluations, as set out in the mandate above. It should be open to the Approval Committee to recommend the timing of the evaluations.

Recommendation 17

The Federation, with the assistance of the Approval Committee, undertake regular evaluation of the national requirement and compliance process, the first to be completed at least by 2018 and no less frequently than every five years thereafter. The Federation should determine the timing and terms of reference for the evaluation and the reporting timeline and the Approval Committee should ensure that the evaluation is completed and any recommendations made within the timeline. Nothing in this recommendation should preclude adjustments and changes to the compliance process in the years between evaluations, as set out in the mandate in Recommendation 16. It should be open to the Approval Committee to recommend the timing of the evaluations.

COMMITTEE MEMBER QUALIFICATIONS AND COMMITTEE COMPOSITION

The Approval Committee's size should reflect both the need for a cross section of qualifications and the advantage of establishing a relatively small group to develop a coherent and expert approach to the issues.

The Committee has considered the qualifications that should be represented on the Approval Committee and the appointment process, size, member composition and term of service for this new body.

TABLE F contains the recommended qualifications.

TABLE F
Qualifications for Members of the Approval Committee

The members of the Approval Committee should be chosen with a view to competence and involvement with and understanding of the issues. The following qualifications should be represented on the Approval Committee, although there should not be a requirement that each member possess all the qualifications:

- Institutional knowledge concerning law societies and the Federation.
- Diversity of experience and perspective.
- Understanding of the regulation of lawyers and the operation of law societies.
- Experience with the regulation of lawyers and the operation of law societies and admission to the profession.
- Experience as a Law Dean or law school administrator (includes Associate, Assistant and Vice Deans).
- Bencher experience.
- Bilingualism, coupled with a common law background.

All members of the Approval Committee should,

- have sufficient time to devote to the work;
- have sound judgment; and
- the ability and willingness to work cooperatively and in a team for the effective implementation of the national requirement.

TABLE G contains the recommended appointment process, size, member composition and term of service for the Approval Committee.

TABLE G
Approval Committee Composition

- The Approval Committee will have seven members, to be appointed by the Federation Council as follows:
 - o Three current or former Law Deans or Law School Administrators (includes Associate, Assistant and Vice Deans), to be recommended by the CCLD.
 - o One Law Society CEO or designate of the CEO.
 - o Three lawyers with experience in law society regulation.
 - o The Chair of the Approval Committee will be one of the three lawyers or the CEO or staff designate, and will be named as Chair by the Federation Council.
 - o If none of the three lawyers is a Federation Council member, the Federation Council may appoint one of its members as a non-voting liaison.
 - o The Managing Director of the NCA will be invited to attend the meetings, without being a member or having a vote.
- Staff to the Approval Committee who attends the meetings will not be a member or have a vote.

- The term for each of the seven members will be three years, renewable once in the sole discretion of Federation Council. The term appointments will be made on a staggered basis, so that the terms of no more than three members will expire in any year. Some of the initial appointments may be made for shorter terms to enable the establishment of the staggered terms, as the Federation Council deems appropriate.

Recommendation 18

The qualifications to be represented among the members of the Approval Committee set out in TABLE F be approved.

Recommendation 19

The appointment process, size, member composition and term of service for the Approval Committee set out in TABLE G be approved.

RESOURCING

The Committee is not in a position to state with certainty what the administrative and other resource needs of the Approval Committee will be. Clearly it will be essential to its effective operation that there be sufficient resources to support its work, including professional and support staff, office space and financial resources. It will be important that staffing be determined forthwith to support the Approval Committee.

The Committee recommends that law societies, through the Federation, fund the Approval Committee.

Recommendation 20

The Approval Committee be resourced forthwith and with sufficient professional and support staff and financial resources to enable it to fulfil its mandate. Law societies, through the Federation, fund the Approval Committee.

CONCLUSION

This report and its recommendations are the blueprint for implementing the Task Force recommendations, providing the guidance and direction necessary for law schools, law societies, the NCA and the Approval Committee. The recommendations have been developed in a spirit of collaboration and with a view to establishing an implementation structure that is clear, effective and appropriately balanced in its effect on law schools, law societies, the NCA and the Approval Committee.

The recommendations recognize that the implementation process must be adaptable to changing conditions and realities in law societies and law schools. The composition of the Approval Committee ensures that discussion on the issues will include both law schools and law societies with the goal of ensuring the ongoing relevance of the national requirement in the public interest and recognizing the importance of Canadian law school education that is innovative and flexible.

*Federation of Law Societies
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APPENDIX 1

Recommendations from the Task Force on the Canadian Law Degree

October 2009

FEDERATION OF LAW SOCIETIES OF CANADA'S TASK FORCE ON THE CANADIAN COMMON LAW DEGREE

RECOMMENDATIONS

1. The Task Force recommends that the law societies in common law jurisdictions in Canada adopt forthwith a uniform national requirement for entry to their bar admission programs ("national requirement").
2. The Task Force recommends that the National Committee on Accreditation ("NCA") apply this national requirement in assessing the credentials of applicants educated outside Canada.
3. The Task Force recommends that this national requirement be applied in considering applications for new Canadian law schools.
4. The Task Force recommends that the following constitute the national requirement:

A. Statement of Standard

1. Definitions

In this standard,

- a. "bar admission program" refers to any bar admission program or licensing process operated under the auspices of a provincial or territorial law society leading to admission as a lawyer in a Canadian common law jurisdiction;
- b. "competency requirements" refers to the competency requirements, more fully described in section B, that each student must possess for entry to a bar admission program; and
- c. "law school" refers to any educational institution in Canada that has been granted the power to award an LL.B. or J.D. degree by the appropriate provincial or territorial educational authority.

2. General Standard

An applicant for entry to a bar admission program ("the applicant") must satisfy the competency requirements by either,

- a. successful completion of an LL.B. or J.D. degree that has been accepted by the Federation of Law Societies of Canada ("the Federation"); or
- b. possessing a Certificate of Qualification from the Federation's National Committee on Accreditation.

B. Competency Requirements

1. Skills Competencies

The applicant must have demonstrated the following competencies:

1.1 Problem-Solving

In solving legal problems, the applicant must have demonstrated the ability to,

- identify relevant facts;
- identify legal, practical, and policy issues and conduct the necessary research arising from those issues;
- analyze the results of research;
- apply the law to the facts; and
- identify and evaluate the appropriateness of alternatives for resolution of the issue or dispute.

1.2 Legal Research

The applicant must have demonstrated the ability to,

- identify legal issues;
- select sources and methods and conduct legal research relevant to Canadian law;
- use techniques of legal reasoning and argument, such as case analysis and statutory interpretation, to analyze legal issues;
- identify, interpret and apply results of research; and
- effectively communicate the results of research.

1.3 Oral and Written Legal Communication

The applicant must have demonstrated the ability to,

- communicate clearly in the English or French language;
- identify the purpose of the proposed communication;
- use correct grammar, spelling and language suitable to the purpose of the communication and for its intended audience; and

- effectively formulate and present well reasoned and accurate legal argument, analysis, advice or submissions.

2. Ethics and Professionalism

The applicant must have demonstrated an awareness and understanding of the ethical requirements for the practice of law in Canada, including,

- d. the duty to communicate with civility;
- e. the ability to identify and address ethical dilemmas in a legal context;
- f. familiarity with the general principles of ethics and professionalism applying to the practice of law in Canada, including those related to,
 - i. circumstances that give rise to ethical problems;
 - ii. the fiduciary nature of the lawyer's relationship with the client;
 - iii. conflicts of interest;
 - iv. duties to the administration of justice;
 - v. duties relating to confidentiality and disclosure;
 - vi. an awareness of the importance of professionalism in dealing with clients, other counsel, judges, court staff and members of the public; and
 - vii. the importance and value of serving and promoting the public interest in the administration of justice.

3. Substantive Legal Knowledge

The applicant must have undertaken a sufficiently comprehensive program of study to obtain an understanding of the complexity of the law and the interrelationship between different areas of legal knowledge. In the course of this program of study the applicant must have demonstrated a general understanding of the core legal concepts applicable to the practice of law in Canada, including as a minimum the following areas:

3.1 Foundations of Law

The applicant must have an understanding of the foundations of law, including,

- principles of common law and equity;
- the process of statutory construction and analysis; and
- the administration of the law in Canada.

3.2 Public Law of Canada

The applicant must have an understanding of the core principles of public law in Canada, including,

- the constitutional law of Canada, including federalism and the distribution of legislative powers, the Charter of Rights and Freedoms, human rights principles and the rights of Aboriginal peoples of Canada;
- Canadian criminal law; and
- the principles of Canadian administrative law.

3.3 Private Law Principles

The applicant must demonstrate an understanding of the foundational legal principles that apply to private relationships, including,

- contracts, torts and property law; and
- legal and fiduciary concepts in commercial relationships.

C. Approved Canadian Law Degree

The Federation will accept an LL.B. or J.D. degree from a Canadian law school as meeting the competency requirements if the law school offers an academic and professional legal education that will prepare the student for entry to a bar admission program and the law school meets the following criteria:

1. Academic Program
 - 1.1 The law school's academic program for the study of law consists of three academic years or its equivalent in course credits.
 - 1.2 The course of study consists primarily of in-person instruction and learning and/or instruction and learning that involves direct interaction between instructor and students.
 - 1.3 Holders of the degree have met the competency requirements.
 - 1.4 The academic program includes instruction in ethics and professionalism in a course dedicated to those subjects and addressing the required competencies.
 - 1.5 Subject to special circumstances, the admission requirements for the law school include, at a minimum, successful completion of two years of postsecondary education at a recognized university or CEGEP.

2. Learning Resources

2.1 The law school is adequately resourced to enable it to meet its objectives, and in particular, has appropriate numbers of properly qualified academic staff to meet the needs of the academic program.

2.2 The law school has adequate physical resources for both faculty and students to permit effective student learning.

2.3 The law school has adequate information and communication technology to support its academic program.

2.4 The law school maintains a law library in electronic and/or paper form that provides services and collections sufficient in quality and quantity to permit the law school to foster and attain its teaching, learning and research objectives.

5. The Task Force recommends that the compliance mechanism for law schools be a standardized annual report that each law school Dean completes and submits to the Federation or the body it designates to perform this function. In the annual report the Dean will confirm that the law school has conformed to the academic program and learning resources requirements and will explain how the program of study ensures that each graduate of the law school has met the competency requirements.
6. The Task Force recommends that the Federation, or the body it designates to consider proposals for new Canadian law schools, be entitled to approve a proposal with such conditions as it thinks appropriate, relevant to the national requirement.
7. The Task Force recommends that by no later than 2015, and thereafter, all applicants seeking entry to a bar admission program must meet the national requirement.
8. The Task Force recommends that the Federation establish a committee to implement the Task Force's recommendations.

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APPENDIX 2

Working Group Report on the Establishment of the Implementation Committee

May 2010

RECOMMENDED PROCESS FOR ESTABLISHING THE IMPLEMENTATION COMMITTEE

1. An Implementation Committee should be established to be known as the Federation of Law Societies of Canada's Common Law Degree Implementation Committee ("the Implementation Committee").
2. The Implementation Committee's mandate should be,
 - a. to determine how compliance with Section C (Approved Canadian Law Degree)¹ of the recommendations of the Task Force on the Canadian Common Law Degree will be measured. Its mandate may include clarifying or elaborating on the recommendations, where appropriate, to ensure their effective implementation, but will not include altering the substance or purpose of them; and
 - b. to make recommendations as to the establishment of a monitoring body to assume ongoing responsibility for compliance measurement, including an evaluation of the compliance measurement program and the required competencies, and for maintaining the Federation of Law Societies of Canada's ("the Federation") relationship with Canadian law schools. The Implementation Committee should consider any role the National Committee on Accreditation might play in that monitoring process.
3. The Implementation Committee should have seven members, as follows:
 - a. Two law school deans chosen, where possible, from among those deans currently serving on Federation committees.
 - b. At least one law society member who served on the Task Force on the Canadian Common Law degree.

¹ Section C incorporates by reference the recommendations in Sections A and B. The Task Force Recommendations are attached at the end of this report.

- c. At least one law society member who sits on the current Executive of the Federation.
 - d. At least one law society member who did not sit on the Task Force on the Canadian Common Law Degree.
 - e. At least one sitting benchler, either elected or appointed.
4. The Chair of the Implementation Committee should be one of the law society members. The Managing Director of the National Committee on Accreditation should be invited to attend the Implementation Committee meetings, without being a member of the Committee. The Federation of Law Societies Executive should appoint the Implementation Committee members and name the Chair.
5. Subject to the Federation's approval, the Implementation Committee should be entitled and encouraged to seek assistance from individuals in law societies, law school faculties and elsewhere as it considers appropriate to ensure the effective carrying out of its mandate.
6. To ensure that the Implementation Committee can carry out its mandate effectively, it should receive appropriate resourcing and funding, including staff and research assistance.
7. The Implementation Committee should present its final report to Federation Council no later than September 2011, with approval sought from law societies by December 2011. The Implementation Committee should begin meeting no later than June 2010.

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

APPENDIX 3

Canadian Common Law Degree Law School Report Form

Common Law Degree
Implementation Committee

August 2011

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

Canadian Common Law Degree Law School Report Form

Submitted by:

Name of institution

Faculty name

Date

Canadian Common Law Degree Law School Report Form

PREFACE AND PURPOSE OF PROCESS:

Each Canadian law school with a common law degree program is to complete the following report form to enable the Canadian Common Law Program Approval Committee (Approval Committee) to determine that the law school's graduates have earned degrees that meet the Federation of Law Societies of Canada's national requirement (national requirement) for entry to the admission programs of law societies in Canadian common law jurisdictions. The form contains two parts. Part 1 seeks information common to all the law school's programs and Part 2 seeks information respecting each program for which the law school seeks approval. Law schools will complete a Part 2 for each program, including joint programs, for which approval is sought.

Beginning in 2015 and annually thereafter the Approval Committee's final reports will be public and posted on the Federation's website. These reports will set out the basis for the Approval Committee's findings respecting each law program for which approval is sought, provided that any information subject to privacy or other personal information will not appear in the public report. Because the national requirement does not come into effect until 2015, the reports in 2012, 2013 and 2014 will be progress reports and will not be public.

The Federation website will also identify each school's programs that apply the Program Approval Model and those that apply the Individual Student Approval Model.



Canadian Common Law Degree
Law School Report Form

Contact Information

Name of Faculty/School:

Address:

Telephone: _____

Fax: _____

Web Site Address (URL):

Contact Person

Name: _____

Title: _____

Telephone: _____

Fax: _____

E-mail: _____

Canadian Common Law Degree
Law School Report Form

Signature Form

(Name of Institution and Faculty/School)

submits the following documentation to the Federation of Law Societies of Canada in accordance with the requirements for approval of the common law degree for purposes of entry of their graduates to the admission programs of law societies in Canadian common law jurisdictions.

The information submitted in this Report is a true and accurate description of the law faculty/school's academic program and learning resources on which information is requested.

Signature of Dean or other Administrative Head of the Faculty/School

Name

Title

Date

Canadian Common Law Degree Law School Report Form

GLOSSARY OF TERMS - TBD

GENERAL INSTRUCTIONS - TBD

[The commentary and elaboration on the competencies and any other guidance will be provided here.]

CALENDARS

Electronic copies of the latest calendar must be included. In cases where the latest calendar information does not correspond to the curriculum of the upcoming graduation class, an appropriate explanation must be part of the documentation provided.

EXHIBITS

The following supplemental information should be attached at the end of the completed report.

- Exhibit 1: Documents describing the processes and policies for student admission, promotion, and graduation
- Exhibit 2: Copies of degree certificates and transcript entries for all variations of the program [This might need an explanation / examples – such as joint degrees with other professional faculties, joint degrees with other universities etc.]
- Exhibit 3: The program may wish to include a matrix of course and other offerings against the national requirements. See example at xxxx.
- Exhibit 4: Any other document that the program deems relevant for evaluation.

WHERE TO SEND YOUR MATERIALS

[Contact information for Approval Committee will be inserted.]

Canadian Common Law Degree Law School Report Form

PART 1: INFORMATION COMMON TO ALL THE LAW SCHOOL'S PROGRAMS

Please provide a general description of the law school/faculty and any other introductory material.

Please list below all programs, including joint programs, offered by the law school and which compliance model will be followed for each, if any:

Names of Programs	Compliance Model (program approval, individual student approval, or no approval will be sought)



Canadian Common Law Degree Law School Report Form

1. Learning Resources:

- 1.1 *The law school is adequately resourced to enable it to meet its objectives, and in particular, has appropriate numbers of properly qualified academic staff to meet the needs of the academic program.*

The Implementation Committee recommends that the following information be provided in this section:

- General description of numbers of full-time faculty, contract instructors, sessional lecturers and support staff, including significant changes from previous year.
- General description of full-time faculty, contract instructor and sessional lecturer qualifications.
- Number of full-time equivalent students in each program.
- General description of student support services.
- Overview of law school operating budget for the academic program from all sources, and sources of funding.

- 1.2 *The law school has adequate physical resources for both faculty and students to permit effective student learning.*

The Implementation Committee recommends that the following information be provided in this section:

- Overall description of law school space, including whether the space is adequate for the law program(s), any space challenges faced by the school and their impact on the program and proposed or planned solutions.
- Description of space available to the law school to carry out the academic program offered, including seminar rooms, quiet study space for students, etc.
- Description of accessibility of the current space.

- 1.3 *The law school has adequate information and communication technology to support its academic program.*

The Implementation Committee recommends that the following information be provided in this section:

- Description of what IT services are provided at the law school.
- Description of dedicated or shared staff and level of support provided to faculty, staff and students.

Canadian Common Law Degree Law School Report Form

- 1.4 *The law school maintains a law library in electronic and/or paper form that provides services and collections sufficient in quality and quantity to permit the law school to foster and attain its teaching, learning and research objectives.*

(A useful reference for this requirement is the Canadian Academic Law Library Directors Association's standards.)

The Implementation Committee recommends that the following information be provided in this section:

- Overview of library staff complement, qualifications and reporting structure.
- Overview of library facilities and description of collection and collections policies.
- Overview of library acquisitions budget.
- General description of support services available to faculty, students and other library users.

PART 2: INFORMATION SPECIFIC TO EACH PROGRAM

Please indicate under which of the following your program is applying for approval, for this reporting period:

- ☐ Program Approval Model: Each graduate must have obtained an approved law degree for purpose of entry to law society bar admission/licensing programs
- ☐ Individual Student Approval Model: The law school will individually evaluate each student and determine which graduates will have an approved law degree for purpose of entry to law society bar admission/licensing programs.

COMPETENCY REQUIREMENTS

1. Skills Competencies

The applicant must have demonstrated the following competencies:

Canadian Common Law Degree Law School Report Form

1.1 Problem Solving

In solving legal problems, the applicant must have demonstrated the ability to,

- a. identify relevant facts;*
- b. identify legal, practical, and policy issues and conduct the necessary research arising from those issues;*
- c. analyze the results of research;*
- d. apply the law to the facts; and*
- e. identify and evaluate the appropriateness of alternatives for resolution of the issue or dispute.*

Please describe how your graduates will meet this requirement (supporting documents may be attached):

1.2 Legal Research

The applicant must have demonstrated the ability to,

- a. identify legal issues;*
- b. select sources and methods and conduct legal research relevant to Canadian law;*
- c. use techniques of legal reasoning and argument, such as case analysis and statutory interpretation, to analyze legal issues;*
- d. identify, interpret and apply results of research; and*
- e. effectively communicate the results of research.*

Canadian Common Law Degree Law School Report Form

Please describe how your graduates will meet this requirement (supporting documents may be attached):

1.3 Oral and Written Legal Communication

The applicant must have demonstrated the ability to,

- a. communicate clearly in the English or French language;*
- b. identify the purpose of the proposed communication;*
- c. use correct grammar, spelling and language suitable to the purpose of the communication and for its intended audience; and*
- d. effectively formulate and present well reasoned and accurate legal argument, analysis, advice or submissions.*

Please describe how your graduates will meet this requirement (supporting documents may be attached):

2. Ethics and Professionalism

The applicant must have demonstrated an awareness and understanding of the ethical dimensions of the practice of law in Canada and an ability to identify and address ethical dilemmas in a legal context, which includes,

- 1. *Knowledge of,*
 - a. the relevant legislation, regulations, rules of professional conduct and common or case law and general principles of ethics and professionalism applying to the practice of law in Canada. This includes familiarity with,*
 - 1. *circumstances that give rise to ethical problems;*

Canadian Common Law Degree
Law School Report Form

2. *the fiduciary nature of the lawyer's relationship with the client;*
 3. *conflicts of interest;*
 4. *the administration of justice;*
 5. *duties relating to confidentiality, lawyer-client privilege and disclosure;*
 6. *the importance of professionalism, including civility and integrity, in dealing with clients, other counsel, judges, court staff and the public; and*
 7. *the importance and value of serving and promoting the public interest in the administration of justice.*
- b. *The nature and scope of a lawyer's duties including to clients, the courts, other legal professionals, law societies, and the public.*
- c. *The range of legal responses to unethical conduct and professional incompetence;*
- d. *The different models concerning the roles of lawyers, the legal profession, and the legal system, including their role in the securing access to justice.*
2. *Skills to,*
- a. *identify and make informed and reasoned decisions about ethical problems in practice; and*
 - b. *identify and engage in critical thinking about ethical issues in legal practice.*

Please describe how your graduates will meet this requirement (supporting documents may be attached):



3. Substantive Legal Knowledge

The applicant must have undertaken a sufficiently comprehensive program of study to obtain an understanding of the complexity of the law and the interrelationship between different areas of legal knowledge. In the course of this program of study the applicant must have demonstrated a general understanding of the core legal concepts applicable to the practice of law in Canada, including as a minimum the following areas:

Please describe how your graduates will have undertaken a sufficiently comprehensive program of study to obtain an understanding of the complexity of the law and the interrelationship between different areas of legal knowledge. (Supporting documents may be attached):

3.1 Foundations of Law

The applicant must have an understanding of the foundations of law, including,

- a. principles of common law and equity;*
- b. the process of statutory construction and analysis; and*
- c. the administration of the law in Canada.*

Please describe how your graduates will meet this requirement (supporting documents may be attached):

Canadian Common Law Degree Law School Report Form

3.2 Public Law of Canada

The applicant must have an understanding of the principles of public law in Canada, including,

- a. the constitutional law of Canada, including federalism and the distribution of legislative powers, the Charter of Rights and Freedoms, human rights principles and the rights of Aboriginal peoples of Canada;*
- b. Canadian criminal law; and*
- c. the principles of Canadian administrative law.*

Please describe how your graduates will meet this requirement (supporting documents may be attached):

3.3 Private Law Principles

The applicant must demonstrate an understanding of the principles that apply to private relationships, including,

- a. contracts, torts and property law; and*
- b. legal and fiduciary concepts in commercial relationships*

Please describe how your graduates will meet this requirement (supporting documents may be attached):

Canadian Common Law Degree Law School Report Form

APPROVED CANADIAN LAW DEGREE

The Federation will accept an LL.B. or J.D. degree from a Canadian law school as meeting the competency requirements if the law school offers an academic and professional legal education that will prepare the student for entry to a bar admission program and the law school meets the following criteria;¹⁹

4. Academic Program

4.1 The law school's academic program for the study of law consists of three full-time academic years or the equivalent in course credits, which, presumptively, is 90 course credits.

Please describe how your graduates will meet this requirement (supporting documents may be attached):

4.2 The course of study consists primarily of in-person instruction and learning and/or instruction and learning that involves direct interaction between instructor and students.

Please describe how your graduates will meet this requirement (supporting documents may be attached):

4.3 Holders of the degree have met the competency requirements.

Please add any comments in addition to the responses to the competency requirements, above:

¹⁹ The Approved Canadian Law Degree criteria include both the Academic Program, in Part 2 of this form, and the Learning Resources, in Part 1 of this form.



Canadian Common Law Degree
Law School Report Form

Please describe how your program will ensure that transfer students from programs other than a Federation approved Canadian common law program will meet the national requirement:

Please describe how your program will ensure that graduates of your program who take part of their program at another institution (either through an exchange or letter of permission) will meet the national requirement:

Canadian Common Law Degree
Law School Report Form

4.4 The academic program includes instruction in ethics and professionalism in a course dedicated to those subjects and addressing the required competencies. ("Course" is properly interpreted to allow for both,

- a single stand alone course devoted to ethics and professionalism that at a minimum addresses the required competencies, and*
- a demonstrable course of study devoted to ethics that could be delivered,*
 - (1) within a single course that addresses other topics, provided there is a dedicated unit on ethics and professionalism that at a minimum addresses the required competencies; and/or*
 - (2) in multiple years within courses that address other topics, provided there are dedicated units on ethics and professionalism that at a minimum address the required competencies.*

Please describe how your graduates will meet this requirement (supporting documents may be attached):

4.5 Subject to special, circumstances, the admission requirements for the law school include, at a minimum, successful completion of two years of postsecondary education at a recognized university or CEGEP.

Please describe how your graduates will meet this requirement (supporting documents may be attached):

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

APPENDIX 4

Common Law Program Approval Timelines

Common Law Degree
Implementation Committee

August 2011

Canadian Common Law Program Approval Timelines

Draft for 2012 Process

This calendar is an approximate timeline of the approval process. The dates may vary depending on your situation.

Transition note: The Canadian Common Law Program National Requirement comes into effect for 2015 graduates. Therefore, the 2012, 2013 and 2014 approval processes will be prospective. That is, the Committee will be evaluating, at least in part, the future plans for the law programs, for which approval is being sought. As of 2015, and every year thereafter, the Committee will evaluate the program followed by the graduates of that year.

<i>Date</i>	<i>Event</i>	<i>Action by</i>
October - November 2011	Draft reporting form and instructions are distributed to the law schools for advance information.	Staff
November 2011	Dean acknowledges receipt of documentation and timelines for report completion.	Dean
December 2011	Preparation of report begins.	Dean/Law School Faculty and Staff
January 2012	Final version of reporting form is sent to the Dean.	Staff
February/ March 2012	Completed report is sent to Staff.	Dean
March 2012	Staff review form, seek any clarification required from the law school, and distributes it to the Committee members.	Staff
April 2012	Committee meets to consider the reports.	Committee and Staff

<i>Date</i>	<i>Event</i>	<i>Action by</i>
May 2012	<p>Draft decision is sent to Dean for comment.</p> <p>Dean sends his/her comments/responses, if any, to Staff.</p> <p>Dean's comments, if any, are sent to Committee for review and response. Discussions on any deficiencies take place and involve the Dean, Committee Chair or his/her delegate.</p> <p>Committee finalizes decisions.</p>	<p>Staff</p> <p>Dean</p> <p>Staff</p> <p>Committee</p>
June 2012	<p>Committee Final Report is prepared and reviewed.</p> <p>Committee Final Report is sent to Dean by June 30, 2012.</p>	<p>Committee Chair and Staff</p> <p>Committee Chair and Staff</p>
July 2012	Report on 2012 reviews is forwarded to Federation and law societies for information. No website posting because 2012 is a progress report.	Staff

INFORMATION

CONTINUING PROFESSIONAL DEVELOPMENT (CPD) REQUIREMENT COMPLIANCE - UPDATE

9. Lawyers and paralegals subject to the CPD requirement are obliged to meet their 2011 required hours by December 31, 2011. To report their CPD hours lawyers and paralegals must register on the Law Society's "portal" and access the section of the portal devoted to CPD.
10. Because the CPD requirement is new this year, the Law Society has developed a multi-step process to,
 - a. inform and educate the profession about the requirement;
 - b. remind individual lawyers and paralegals about the status of their reporting and compliance; and
 - c. continue to advise and remind the profession about the portal and how to use it.
11. This process has continued regularly throughout the year to date, but has been intensified since September and will continue as the deadline for compliance approaches. Because registration on the portal is the first essential step lawyers and paralegals must complete to be able to report compliance, the Law Society is paying particular attention to informing and reminding the profession about the portal. Currently approximately 15% of those required to meet the CPD requirement have not yet registered for the portal. However, in the four weeks since the Law Society ran a Notice to the Profession in the *Ontario Reports* and other locations concerning CPD compliance and the importance of portal registration, 3000 more people have registered. In addition the most recent reminder letters was sent out in mid-October and will result in more lawyers and paralegals registering.

12. Between now and the compliance deadline the Law Society will continue to monitor compliance and remind and inform those who have not yet reported compliance with the requirement. The Law Society will,
 - a. send general e-mail reminders to lawyers and paralegals;
 - b. send specific e-mail reminders (letters to those without e-mail) to those who have not yet registered on the portal;
 - c. remind all callers to the membership resource line and or attending CPD programs about registration and compliance;
 - d. provide additional general and specific reminders 45 days, 25 days, 15 days and 5 days before the end of the year; and
 - e. where necessary, make phone calls to lawyers or paralegals.
13. The Director, Professional Development and Competence, will continue to update the PD&C Committee on compliance.



Tab 3.2.2

Background Information

INTER-JURISDICTIONAL MOBILITY OF LAWYERS IN CANADA

FEDERATION OF LAW SOCIETIES OF CANADA NATIONAL MOBILITY AGREEMENTS

1. In the 1990s national and international agreements that address mobility issues in a variety of contexts were introduced, the effect of which was to cause law societies in Canada to begin considering the issue of lawyer mobility.
2. In 2002 law societies across Canada signed the Federation of Law Societies National Mobility Agreement (“the NMA”) to enable increased inter-provincial and territorial mobility of Canadian lawyers. The Territorial Mobility Agreements (“TMA”¹ and “TMA 2013”) and the Quebec Mobility Agreements (“QMA”², “QMA Addendum”³ and “QMA 2013”) were then also developed and revised over a number of years with the result that upon implementation,⁴ these agreements enable full transfer rights for lawyers across every jurisdiction in Canada. These agreements may be referenced at,

TAB 3.2.2.1: NMA;

TAB 3.2.2.2 TMA;

TAB 3.2.2.3: QMA;

TAB 3.2.2.4 QMA Addendum;

TAB 3.2.2.5 NMA 2013; and

TAB 3.2.2.6: TMA 2013.

¹ 2006

² 2010

³ 2012

⁴ The QMA 2013 will be implemented over the coming months.

3. The Mobility Agreements apply only to situations in which a person already a lawyer licensee/member of a law society in one jurisdiction seeks to practise law in or with the respect to the law of another jurisdiction. There are two components to the NMA: transfer (permanent mobility) and temporary mobility.

(a) Transfer (Permanent Mobility)

4. The mobility agreements have been premised on each law society accepting that a lawyer entitled to practise in one jurisdiction is eligible to transfer to and practise in any other signatory province or territory that has implemented the Agreements without having to undertake any further qualification.
5. The permanent mobility or transfer provisions of the NMA provide that,
 32. A signatory governing body will require no further qualifications for a member of another governing body to be eligible for membership than the following:
 - (a) entitlement to practise law in the lawyer's home jurisdiction;
 - (b) good character and fitness to be a lawyer, on the standard ordinarily applied to applicants for membership; and
 - (c) any other qualifications that ordinarily apply for lawyers to be entitled to practise law in its jurisdiction.⁵
6. "Entitled to practise" is defined in the Agreements to mean "allowed, under all of the legislation and regulation of a home jurisdiction, to engage in the practice of law in the home jurisdiction."
7. At the time the original NMA and TMA were entered into 2002 and 2006, respectively, and subsequently implemented, there had been no new law schools approved for over 20 years. In devising the original policy report proposing enhanced mobility the Mobility Task Force recommended that,
 - A lawyer who is called to the bar in a common-law province of Canada may seek call to the bar in another common-law province in Canada if the lawyer has graduated with a common law degree from a university in Canada or has obtained a Certificate from the National Committee on Accreditation (NCA).

⁵ This provision remains in the NMA 2013 and TMA 2013.

8. For all practical purposes law societies treated all Canadian common law degrees as the same and were more interested in ensuring that individual issues such as good character, insurance requirements, and discipline were addressed under the “entitled to practise” requirement.
9. At the time the NMA was entered into Ontario simply accepted that all law schools met the requirements of accreditation. There was no formal process in place for “accrediting” or for considering whether accreditation could be removed.
10. Nonetheless, the Law Society’s licensing by-law (By-Law 4) provides as follows:
 9. (1) The following are the requirements for the issuance of a Class L1 licence:
 1. The applicant must have one of the following:
 - i. 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.
 - ii. A certificate of qualification issued by the National Committee on Accreditation appointed by the Federation of Law Societies of Canada and the Council of Law Deans.
11. An accredited law school for Ontario is defined as “a law school in Canada that is accredited by the Society.”
12. This requirement would therefore come within the meaning of “any other qualifications that ordinarily apply for lawyers to be entitled to practise law in its jurisdiction” provided in section 32(c) of the NMA.
13. Accordingly, if the Law Society were to deny accreditation to TWU, it would appear that a graduate of TWU called to the bar in any other jurisdiction in Canada would be unable under By-Law 4 to transfer to Ontario to become a member of the Law Society of Upper Canada, unless By-Law 4 were amended to provide an exemption from the accreditation requirement for transfer purposes.

Temporary Mobility

14. If the Law Society were to deny accreditation to TWU, thereby precluding transfer under the permanent mobility provisions, this would not preclude a TWU graduate who is a member of another jurisdiction from exercising temporary mobility in Ontario. This is because in that case the requirements for eligibility are that the lawyer,
 - (a) be entitled to practise law in a home jurisdiction;
 - (b) carry liability insurance that:
 - (i) is reasonably comparable in coverage and amount to that required of lawyers of the host jurisdiction; and
 - (ii) extends to the lawyer's practice in the host jurisdiction;
 - (c) have defalcation compensation coverage from a Canadian governing body that extends to the lawyer's practice in the host jurisdiction;
 - (d) not be subject to conditions of or restrictions on the lawyer's practice or membership in the governing body in any jurisdiction;
 - (e) not be the subject of criminal or disciplinary proceedings in any jurisdiction; and
 - (f) have no disciplinary record in any jurisdiction.
15. Lawyers exercising temporary mobility may provide legal services in or with respect to the law of a reciprocating jurisdiction for up to 100 days in a calendar year without a permit. Moreover, they do not have to advise the law society that they are providing legal services on a temporary basis in or with respect to the law of the jurisdiction. Regardless of the accreditation decision the Law Society makes, graduates from TWU who are members of a reciprocating mobility jurisdiction would be eligible to exercise temporary mobility in Ontario under current By-Law 4.

AGREEMENT ON INTERNAL TRADE – LABOUR MOBILITY

16. The Federal, Provincial and Territorial governments first signed the Agreement on Internal Trade ("AIT") in 1994 to facilitate the mobility of people, investments and services across Canada. In 2009 First Ministers undertook an initiative to significantly strengthen compliance with the labour mobility provisions set out in Chapter 7 of the AIT that specify that a qualified worker in

one jurisdiction must have access to similar employment in other Canadian jurisdictions. Professions are subject to Chapter 7, set out at **TAB 3.2.2.7: AIT – Chapter 7**. Parties to the Agreement are governments.

17. Chapter 7 requires that provinces and territories agree to certify ⁶ workers, already certified in another Canadian jurisdiction, without any requirement for any material additional training, experience, examinations or assessment.
18. A regulatory authority of a party may, however, as a condition of certification, impose requirements on a worker (other than requirements for material additional training, experience, examinations or assessments) that are substantially the same as those imposed as part of its normal licensing or certification process. These could include a requirement to pay an application or processing fee, obtain insurance or post a bond, undergo a criminal records check, provide evidence of good character, or demonstrate knowledge of the measures applicable to the practice of the occupation in a jurisdiction. These can be no more onerous than those demanded of workers already certified in the receiving jurisdiction or applying for certification for the first time within the jurisdiction.⁷
19. An additional measure imposed by a party may be challenged on the grounds that it is inconsistent with the party's obligations under the AIT. In addition to the right of a party to the agreement to initiate a complaint, an individual may request that a party commence dispute resolution proceedings on his or her behalf. If the party refuses, an individual may initiate proceedings on his or her own, but such individual complaints are subject to a screening process and may not be permitted to proceed if found to be frivolous or vexatious, initiated solely to harass the party complained about, or where there is no reasonable case of injury or denial of benefit.

⁶ This is generic language that includes "license."

⁷AIT. Article706 (3).

20. Chapter 7 does provide for limited exceptions to the requirement to certify without additional training or examination to achieve a “legitimate objective” within certain defined categories.⁸ The measure must not be more restrictive than necessary to achieve the legitimate objective and not be a disguised restriction to mobility. As well, a “mere difference between the certification requirements of a Party related to academic credentials, education, training, experience, examination or assessment methods and those of any other Party is not by itself, sufficient to justify the imposition of additional education, training, experience, examination or assessment requirements as necessary to achieve a legitimate objective.”⁹ The party seeking to impose an additional requirement must be able to demonstrate that any such difference results in an actual material deficiency in skill, area of knowledge or ability.
21. The authority to create a legitimate objective can only be exercised by governments who are parties to the AIT.
22. Chapter 7 includes a provision requiring parties to ensure that non-governmental bodies such as professional regulators comply with the labour mobility provisions. This is mandatory and reflects governmental commitments to compliance.
23. In Ontario the applicable legislation is the *Ontario Labour Mobility Act, 2009* (“OLMA”), set out at **TAB 3.2.2.8: Ontario Labour Mobility Act**, whose purposes are,

⁸AIT Article 711 **legitimate objective** means one or more of the following objectives pursued within the territory of a Party:

- (a) public security and safety;
- (b) public order;
- (c) protection of human, animal or plant life or health; (d) protection of the environment;
- (e) consumer protection;
- (f) protection of the health, safety and well-being of workers;
- (g) provision of adequate social and health services to all its geographic regions; and
- (h) programs for disadvantaged groups;

⁹ AIT Article 708 (2)

(a) to eliminate or reduce measures established or implemented by Ontario regulatory authorities that restrict or impair the ability of an individual to become certified in Ontario in a regulated occupation in which the individual is certified by an out-of-province regulatory authority; and

(b) to support the Government of Ontario in fulfilling its obligations under Chapter Seven of the Agreement on Internal Trade.

24. The Act specifically provides that if the Labour Mobility Code is in conflict with a regulatory authority's authorizing statute or other provisions, including by-laws, the Labour Mobility Code prevails to the extent of the conflict.¹⁰ The Act designates "monitors" to address enforcement of the Act with the right to do one or more of the following:

1. Review the instruments of a legislative nature under the regulatory authority's authorizing statute in order to assess their conformity with the Labour Mobility Code.
2. Request the regulatory authority to take such steps as are within its power to make, amend or revoke an instrument of a legislative nature under its authorizing statute so that the instrument conforms with the Labour Mobility Code.
3. Review the certification processes and practices of the regulatory authority in order to assess their compliance with the Labour Mobility Code.
4. Request the regulatory authority to provide information and reports with respect to any matter relating to compliance with the Labour Mobility Code or any matter relating to the administration of Chapter Seven of the Agreement on Internal Trade.
5. Request the regulatory authority to do anything that, in the opinion of the monitor, is necessary or advisable to implement, or carry out the intent and purposes of, the Labour Mobility Code or a decision of a presiding body established or convened under the Agreement on Internal Trade.
6. If the Lieutenant Governor in Council makes an order in council under subsection 17 (1), request the regulatory authority to publish it in accordance with the monitor's directions.

¹⁰ OLMA. Section 14(1)

25. The Ministers responsible for regulatory authorities established by public Acts serve as monitors responsible for ensuring that the authorities comply with the OLMA. In the case of the Law Society the monitor is the Attorney General.
26. If the Law Society decides that a TWU graduate called to the bar in another Canadian jurisdiction is not to be eligible to transfer to pursuant to the By-law 4 provisions implementing the national mobility agreements, it is possible that Chapter 7 of the AIT and the *Ontario Labour Mobility Act, 2009* may be invoked to challenge that decision.



National Mobility Agreement

Federation of Law Societies of Canada /
Fédération des ordres professionnels de juristes du Canada
480 - 445, boulevard Saint-Laurent
Montreal, Quebec
H2Y 2Y7
Tel (514) 875-6350
Fax (514) 875-6115
<http://www.flsc.ca>
info@flsc.ca

National Mobility Agreement

Federation of Law Societies of Canada

August 16, 2002
Niagara-on-the-Lake, Ontario

The purpose of this agreement is to facilitate temporary and permanent mobility of lawyers between Canadian jurisdictions.

While the signatories participate in this agreement voluntarily, they intend that only lawyers who are members of signatories that have implemented reciprocal provisions in their jurisdictions will be able to take advantage of the provisions of this agreement.

The signatories recognize that

- they have a duty to the Canadian public and to their members to regulate the inter-jurisdictional practice of law so as to ensure that their members practise law competently, ethically and with financial responsibility, including professional liability insurance and defalcation compensation coverage, in all jurisdictions of Canada,
- differences exist in the legislation, policies and programs pertaining to the signatories, particularly between common law and civil law jurisdictions, and
- it is desirable to facilitate a nationwide regulatory regime for the inter-jurisdictional practice of law to promote uniform standards and procedures, while recognizing the exclusive authority of each signatory within its own legislative jurisdiction.

Most of the signatories subscribed to the Interjurisdictional Practice Protocol of 1994, in which they agreed to certain measures to facilitate the temporary and permanent inter-jurisdictional practice of law and the enforcement of appropriate standards on lawyers practising law in host jurisdictions.

In August 2001, the Federation of Law Societies established a National Mobility Task Force to examine full mobility rights and conditions for lawyers to practise law in all Canadian jurisdictions.

In August, 2002, the Federation of Law Societies accepted the report of the National Mobility Task Force for the implementation of full mobility rights for Canadian lawyers.

National Mobility Agreement

THE SIGNATORIES AGREE AS FOLLOWS:

Definitions

1. In this agreement, unless the context indicates otherwise:

“Barreau” means le Barreau du Québec;

“day” means any calendar day or part of a calendar day in which a lawyer provides legal services;

“discipline” includes a finding by a governing body of any of the following:

- (a) professional misconduct;
- (b) incompetence;
- (c) conduct unbecoming a lawyer;
- (d) lack of physical or mental capacity to engage in the practice of law;
- (e) any other breach of a lawyer’s professional responsibilities;

“disciplinary record” includes any of the following, unless reversed on appeal or review:

- (a) any action taken by a governing body as a result of discipline;
- (b) disbarment;
- (c) a lawyer’s resignation or otherwise ceasing to be a member of a governing body as a result of disciplinary proceedings;
- (d) restrictions or limits on a lawyer’s entitlement to practise;
- (e) any interim suspension or restriction or limits on a lawyer’s entitlement to practise imposed pending the outcome of a disciplinary hearing.

“entitled to practise law” means allowed, under all of the legislation and regulation of a home jurisdiction, to engage in the practice of law in the home jurisdiction;

“governing body” means the Law Society or Barristers’ Society in a Canadian common law jurisdiction, and the Barreau;

“home governing body” means any or all of the governing bodies of the legal profession in Canada of which a lawyer is a member, and **“home jurisdiction”** has a corresponding meaning;

“host governing body” means a governing body of the legal profession in Canada in whose jurisdiction a lawyer practises law without being a member, and **“host jurisdiction”** has a corresponding meaning;

National Mobility Agreement

“Inter-Jurisdictional Practice Protocol” means the 1994 Inter-Jurisdictional Practice Protocol of the Federation of Law Societies of Canada, as amended from time to time;

“lawyer” means a member of a signatory governing body;

“liability insurance” means compulsory professional liability errors and omissions insurance required by a governing body;

“mobility permit” means a permit issued by a host governing body on application to a lawyer allowing the lawyer to provide legal services in the host jurisdiction on a temporary basis;

“practice of law” has the meaning with respect to each jurisdiction that applies in that jurisdiction;

“providing legal services” means engaging in the practice of law physically in a Canadian jurisdiction or with respect to the law of a Canadian jurisdiction;

“Registry” means the National Registry of Practising Lawyers established under clause 17 of this agreement;

“resident” has the meaning respecting a province or territory that it has with respect to Canada in the *Income Tax Act* (Canada).

National Mobility Agreement

General

2. The signatory governing bodies will
 - (a) use their best efforts to obtain from the appropriate legislative or supervisory bodies amendments to their legislation or regulations necessary or advisable in order to implement the provisions of this agreement;
 - (b) amend their own rules, by-laws, policies and programs to the extent they consider necessary or advisable in order to implement the provisions of this agreement;
 - (c) comply with the spirit and intent of this agreement to facilitate mobility of Canadian lawyers in the public interest and strive to resolve any differences among them in that spirit and in favour of that intent; and
 - (d) work cooperatively to resolve all current and future differences and ambiguities in legislation, policies and programs regarding inter-jurisdictional mobility.
3. Signatory governing bodies will subscribe to this agreement and be bound by it by means of the signature of an authorized person affixed to any copy of this agreement.
4. A signatory governing body will not, by reason of this agreement alone,
 - (a) grant to a lawyer who is a member of another governing body greater rights to provide legal services than are permitted to the lawyer by his or her home governing body; or
 - (b) relieve a lawyer of restrictions or limits on the lawyer's right to practise, except under conditions that apply to all members of the signatory governing body.
5. Amendments made under clause 2(b) will take effect immediately on adoption with respect to members of signatory governing bodies that have adopted reciprocal provisions.

National Mobility Agreement

Temporary Mobility Among Common law Jurisdictions

6. Clauses 7 to 31 apply to temporary mobility of lawyers of common law jurisdictions in other common law jurisdictions.

Mobility without permit

7. A host governing body will allow a lawyer from another jurisdiction to provide legal services in the host jurisdiction or with respect to the law of the host jurisdiction on a temporary basis, without a mobility permit or notice to the host governing body, for a total of not more than 100 days in a calendar year, provided the lawyer:
- (a) meets the criteria in clause 10; and
 - (b) has not established an economic nexus with the host jurisdiction as described in clause 16.
8. The host governing body will have the discretion to extend the time limit for temporary mobility under clause 7 with respect to an individual lawyer.
9. It will be the responsibility of a lawyer to
- (a) record and verify the number of days in which he or she provides legal services in a host jurisdiction(s) or with respect to each jurisdiction; and
 - (b) prove that he or she has complied with provisions implementing clause 7.
10. To qualify to provide legal services on a temporary basis without a mobility permit or notice to the host governing body under clause 7, a lawyer will be required to do each of the following at all times:
- (a) be entitled to practise law in a home jurisdiction;
 - (b) carry liability insurance that:
 - (i) is reasonably comparable in coverage and amount to that required of lawyers of the host jurisdiction; and
 - (ii) extends to the lawyer's practice in the host jurisdiction;
 - (c) have defalcation compensation coverage from a Canadian governing body that extends to the lawyer's practice in the host jurisdiction;
 - (d) not be subject to conditions of or restrictions on the lawyer's practice or membership in the governing body in any jurisdiction;
 - (e) not be the subject of criminal or disciplinary proceedings in any jurisdiction; and
 - (f) have no disciplinary record in any jurisdiction.
11. For the purposes of clause 7:
- (a) a lawyer practising law of federal jurisdiction in a host jurisdiction will be providing legal services in the host jurisdiction;

National Mobility Agreement

- (b) as an exception to subclause (a), when appearing before the following tribunals in a host jurisdiction a lawyer will not be providing legal services in a host jurisdiction:
 - (i) the Supreme Court of Canada;
 - (ii) the Federal Court of Canada;
 - (iii) the Tax Court of Canada;
 - (iv) a federal administrative tribunal.
- 12. A host jurisdiction will allow a lawyer to accept funds in trust on deposit, provided the funds are deposited to a trust account:
 - (a) in the lawyer's home jurisdiction; or
 - (b) operated in the host jurisdiction by a member of the host governing body.

Mobility permit required

- 13. If a lawyer does not meet the criteria in clause 10 to provide legal services in the host jurisdiction or with respect to the law of the host jurisdiction on a temporary basis, a host governing body will issue a mobility permit to the lawyer:
 - (a) on application;
 - (b) if, in the complete discretion of the host governing body, it is consistent with the public interest to do so;
 - (c) for a total of not more than 100 days in a calendar year; and
 - (d) subject to any conditions and restrictions that the host governing body considers appropriate.

Temporary mobility not allowed

- 14. A host governing body will not allow a lawyer who has established an economic nexus with the host jurisdiction to provide legal services on a temporary basis under clause 7, but will require the lawyer to do one of the following:
 - (a) cease providing legal services in the host jurisdiction forthwith;
 - (b) apply for and obtain membership in the host governing body; or
 - (c) apply for and obtain a mobility permit under clause 13.
- 15. On application, the host governing body will have the discretion to allow a lawyer to continue to provide legal services in the host jurisdiction or with respect to the law of the host jurisdiction pending consideration of an application under clause 14(b) or (c).
- 16. In clause 14, an economic nexus is established by actions inconsistent with temporary mobility to the host jurisdiction, including but not limited to doing any of the following in the host jurisdiction:
 - (a) providing legal services beyond 100 days, or longer period allowed under clause 8;

National Mobility Agreement

- (b) opening an office from which legal services are offered or provided to the public;
- (c) becoming resident;
- (d) opening or operating a trust account, or accepting trust funds, except as permitted under clause 12.

National Registry of Practising Lawyers

- 17. The signatory governing bodies will establish, maintain and operate a National Registry of Practising Lawyers containing the names of lawyers from each signatory governing body qualified under clause 10 to practise law interjurisdictionally without a mobility permit or notice to the host governing body.
- 18. Each signatory governing body will take all reasonable steps to ensure that all relevant information respecting its members is supplied to the Registry and is kept current and accurate.

Liability Insurance and Defalcation Compensation Funds

- 19. Each signatory governing body will ensure that the ongoing liability insurance in its jurisdiction
 - (a) extends to its members for the provision of legal services on a temporary basis in or with respect to the law of host signatory jurisdictions; and
 - (b) provides occurrence or claim limits of \$1,000,000 and \$2,000,000 annual per member aggregate.
- 20. In the event that a claim arises from a lawyer providing legal services on a temporary basis, and the closest and most real connection to the claim is with a host jurisdiction, the home governing body will provide at least the same scope of coverage as the liability insurance in the host jurisdiction. For clarity, all claims and potential claims reported under the policy will remain subject to the policy's occurrence or claim limit of \$1,000,000 and \$2,000,000 annual per member aggregate.
- 21. Signatory governing bodies will notify one another in writing, as soon as practicable, of any changes to their liability insurance policies that affect the limits of liability or scope of coverage.
- 22. Signatory governing bodies will apply or continue to apply the provisions of the Interjurisdictional Practice Protocol respecting defalcation compensation, specifically clause 10 of the Protocol and Appendix 6 to the Protocol.

National Mobility Agreement

23. Signatory governing bodies will notify one another in writing, as soon as practicable, of any changes to their defalcation compensation fund programs that affect the limits of compensation available or the criteria for payment.

Enforcement

24. A host governing body that has reasonable grounds to believe that a member of another governing body has provided legal services in the host jurisdiction will be entitled to require that lawyer to:
- (a) account for and verify the number of days spent providing legal services in the host jurisdiction; and
 - (b) verify that he or she has not done anything inconsistent with the provision of legal services on a temporary basis.
25. If a lawyer fails or refuses to comply with the provisions of clause 24, a host governing body will be entitled to:
- (a) prohibit the lawyer from providing legal services in the jurisdiction for any period of time; or
 - (b) require the lawyer to apply for membership in the host jurisdiction before providing further legal services in the jurisdiction.
26. When providing legal services in a host jurisdiction or with respect to the law of a host jurisdiction, all lawyers will be required to comply with the applicable legislation, regulations, rules and standards of professional conduct of the host jurisdiction.
27. In the event of alleged misconduct arising out of a lawyer providing legal services in a host jurisdiction, the lawyer's home governing body will:
- (a) assume responsibility for the conduct of disciplinary proceedings against the lawyer unless the host and home governing bodies agree to the contrary; and
 - (b) consult with the host governing body respecting the manner in which disciplinary proceedings will be taken against the lawyer.
28. If a signatory governing body investigates the conduct of or takes disciplinary proceedings against a lawyer, that lawyer's home governing body or bodies, and each governing body in whose jurisdiction the lawyer has provided legal services on a temporary basis will provide all relevant information and documentation respecting the lawyer as is reasonable in the circumstances.
29. In determining the location of a hearing under clause 27, the primary considerations will be the public interest, convenience and cost.

National Mobility Agreement

- 30.** A governing body that initiates disciplinary proceedings against a lawyer under clause 27 will assume full responsibility for conduct of the proceedings, including costs, subject to a contrary agreement between governing bodies.
- 31.** In any proceeding of a signatory governing body, a duly certified copy of a disciplinary decision of another governing body concerning a lawyer found guilty of misconduct will be proof of that lawyer's guilt.

National Mobility Agreement

Permanent Mobility Among Common Law Jurisdictions

32. A signatory governing body will require no further qualifications for a member of another governing body to be eligible for membership than the following:
- (a) entitlement to practise law in the lawyer's home jurisdiction;
 - (b) good character and fitness to be a lawyer, on the standard ordinarily applied to applicants for membership; and
 - (c) any other qualifications that ordinarily apply for lawyers to be entitled to practise law in its jurisdiction.
33. Before admitting as a member a lawyer qualified under clause 32, a governing body will not require the lawyer to pass a transfer examination or other examination, but may require the lawyer to do all of the following:
- (a) provide certificates of standing from all Canadian and foreign governing bodies of which the lawyer is or has been a member;
 - (b) disclose criminal and disciplinary records in any jurisdiction;
 - (c) consent to access by the governing body to the lawyer's regulatory files of all governing bodies of which the lawyer is a member, whether in Canada or elsewhere; and
 - (d) certify that he or she has reviewed all of the materials reasonably required by the governing body.

Public Information

34. A governing body will make available to the public information obtained under clause 33 in the same manner as similar records originating in its jurisdiction.

Liability Insurance

35. On application, a signatory governing body will exempt a lawyer from liability insurance requirements if the lawyer does the following in another signatory jurisdiction :
- (a) is resident;
 - (b) is a member of the governing body; and
 - (c) maintains ongoing liability insurance required in that jurisdiction that provides occurrence or claim limits of \$1,000,000 and \$2,000,000 annual per member aggregate.

National Mobility Agreement

- 36.** In the event that a claim arises from a lawyer providing legal services and the closest and most real connection to the claim is with a jurisdiction in which the lawyer has claimed an exemption under clause **35**, the insurance program of the governing body in the jurisdiction where the lawyer is insured will provide at least the same scope of coverage as the liability insurance in the jurisdiction in which the lawyer is exempt. For clarity, all claims and potential claims reported under the policy will remain subject to the policy's occurrence or claim limit of \$1,000,000 and \$2,000,000 annual per member aggregate.

National Mobility Agreement

Temporary Mobility between Quebec and Common Law Jurisdictions

37. The Barreau will permit lawyers entitled to practise law in a home jurisdiction, on application under regulations that apply to the Barreau, to provide legal services in Quebec or with respect to the law of Quebec on a specific case or for a specific client for a period of up to one year, which may be extended on application to the Barreau.
38. A signatory governing body, other than the Barreau, will permit members of the Barreau to provide legal services in its jurisdiction or with respect to the law of its jurisdiction on one of the following bases:
 - (a) as provided in clauses 7 to 31; or
 - (b) as permitted by the Barreau in respect of the members of the signatory governing body.

National Mobility Agreement

Permanent Mobility Between Quebec and Common Law Jurisdictions

39. While the signatory governing bodies recognize that the Barreau must comply with regulations that apply to all professions in Quebec, the Barreau agrees to consult with the other signatory governing bodies before changing regulations on the mobility of Canadian lawyers to Quebec.
40. A signatory governing body, other than the Barreau, will admit members of the Barreau as members on one of the following bases:
- (a) as provided in clauses 32 to 36; or
 - (b) as permitted by the Barreau in respect of the members of the signatory governing body.

National Mobility Agreement

Inter-Jurisdictional Practice Protocol

41. The signatory governing bodies agree that the Inter-Jurisdictional Practice Protocol will continue in effect,
 - (a) with respect to governing bodies that are signatories of that Protocol, but not this agreement;
 - (b) to the extent that it is not replaced by or inconsistent with legislation, regulation and programs adopted and implemented to give effect to this agreement.
42. Signatory governing bodies will apply or continue to apply provisions in the Inter-Jurisdictional Practice Protocol in respect of defalcation compensation and arbitration of disputes, specifically, clause 10 of the Protocol and Appendices 5 and 6 to the Protocol.

National Mobility Agreement

Transition Provisions

43. This agreement is a multi-lateral agreement, effective respecting the governing bodies that are signatories, and it does not require unanimous agreement of Canadian governing bodies.
44. Provisions governing temporary and permanent mobility in effect at the time that a governing body becomes a signatory to this agreement will continue in effect:
 - (a) with respect to all Canadian lawyers until this agreement is implemented;
and
 - (b) with respect to members of Canadian law societies that are not signatories to this agreement.

National Mobility Agreement

Withdrawal

45. A signatory may cease to be bound by this agreement by giving each other signatory written notice of at least one clear calendar year.
46. A signatory that gives notice under clause 45 will:
 - (a) immediately notify its members in writing of the effective date of withdrawal; and
 - (b) require that its members who provide legal services in the jurisdiction of another signatory governing body ascertain from that governing body its requirements for inter-provincial mobility before providing legal services in that jurisdiction after the effective date of withdrawal.

National Mobility Agreement



Signed by eight jurisdictions on December 7, 2002
New Brunswick signed on July 8, 2006
Prince Edward Island signed on November 3, 2006

Saturday, December 7, 2002

SIGNED BY

The Law Society of **Alberta**

The Law Society of **British Columbia**

The Law Society of **Manitoba**

Law Society of **New Brunswick**

The Law Society of **Newfoundland**

Nova Scotia Barristers' Society

Law Society of the **Northwest Territories**

The Law Society of **Nunavut**

The Law Society of **Upper Canada**

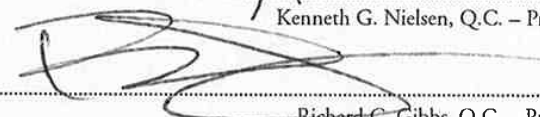
The Law Society of **Prince Edward Island**

Barreau du **Québec**

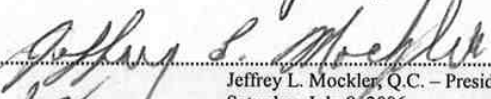
Law Society of **Saskatchewan**

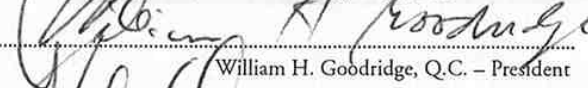
The Law Society of **Yukon**

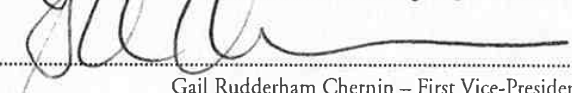

Kenneth G. Nielsen, Q.C. – President

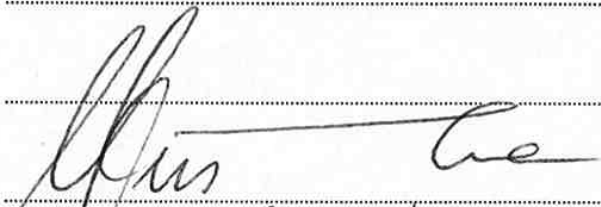

Richard C. Gibbs, Q.C. – President

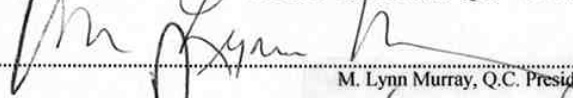

Lori T. Spivak – President



Jeffrey L. Mockler, Q.C. – President
Saturday, July 8, 2006



William H. Goodridge, Q.C. – President


Gail Rudderham Chernin – First Vice-President


Professor Vera Krishna, Q.C. – Treasurer


M. Lynn Murray, Q.C. President


M. Pierre Gagnon, Vice-President


Michael W. Milani, Q.C. – President

DATED December 7, 2002

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

Territorial Mobility Agreement

November 2011

Territorial Mobility Agreement

FEDERATION OF LAW SOCIETIES OF CANADA

November , 2011

Introduction

The purpose of this Agreement is to extend the scope of the National Mobility Agreement in facilitating permanent mobility of lawyers between Canadian jurisdictions.

While the signatories participate in this Agreement voluntarily, they intend that only lawyers who are members of signatories that have implemented reciprocal provisions in their jurisdictions will be able to take advantage of the provisions of this Agreement.

The signatories recognize that

- they have a duty to the Canadian public and to their members to regulate the inter-jurisdictional practice of law so as to ensure that their members practise law competently, ethically and with financial responsibility, including professional liability insurance and defalcation compensation coverage, in all jurisdictions of Canada,
- differences exist in the legislation, policies and programs pertaining to the signatories, particularly between common law and civil law jurisdictions, and
- it is desirable to facilitate a nationwide regulatory regime for the inter-jurisdictional practice of law to promote uniform standards and procedures, while recognizing the exclusive authority of each signatory within its own legislative jurisdiction.

Background

In August, 2002, the Federation of Law Societies of Canada (the "Federation") approved the report of the National Mobility Task Force ("the Task Force") for the implementation of full mobility rights for Canadian lawyers. This led to adoption of the National Mobility Agreement by 10 law societies and its full implementation in nine jurisdictions. Since that time, all Canadian law societies have also signed the Quebec Mobility Agreement, which facilitates reciprocal mobility between Quebec and the common law jurisdictions.

Territorial Mobility Agreement

Territorial Mobility Agreement

The resolution adopted by the Federation in approving the Task Force report included an acknowledgement that “the unique circumstances of the law societies of Yukon, the Northwest Territories and Nunavut necessitate special considerations that could not be undertaken within the time frame prescribed in the Task Force’s terms of reference, but should be undertaken in the future.”

In 2005, an informal Territorial Mobility Group (“the Group”) was formed with representatives of the Task Force, the law societies of the provinces in Western Canada and the law societies of the territories. The Group developed a proposal respecting territorial mobility to address the unique characteristics of the law societies of the territories. This agreement gives effect to the Group’s proposal.

The purpose of this Agreement is to allow the law societies of the territories to participate in national mobility for lawyers to the extent possible for them, given their unique circumstances. Specifically, the signatories agree that the territorial law societies will participate in national mobility as reciprocating governing bodies with respect to permanent mobility, or transfer of lawyers from one jurisdiction to another, without a requirement that they participate in temporary mobility provisions.

The signatories to this Agreement who are not signatories to the National Mobility Agreement do not hereby subscribe to the provisions of the National Mobility Agreement, except as expressly stated in this Agreement.

THE SIGNATORIES AGREE AS FOLLOWS:

Definitions

1. In this Agreement, unless the context indicates otherwise:

“**governing body**” means the Law Society or Barristers’ Society in a Canadian common law jurisdiction, and the Barreau;

“**home governing body**” means any or all of the governing bodies of the legal profession in Canada of which a lawyer is a member, and “**home jurisdiction**” has a corresponding meaning;

“**Inter-Jurisdictional Practice Protocol**” means the 1994 Inter-Jurisdictional Practice Protocol of the Federation of Law Societies of Canada, as amended from time to time;

“**lawyer**” means a member of a signatory governing body;

Territorial Mobility Agreement

“liability insurance” means compulsory professional liability errors and omissions insurance required by a governing body;

“National Mobility Agreement” or **“NMA”** means the 2002 National Mobility Agreement of the Federation of Law Societies of Canada, as amended from time to time;

“permanent mobility provisions” means clauses 32 to 36, 39 and 40 of the National Mobility Agreement;

“practice of law” has the meaning with respect to each jurisdiction that applies in that jurisdiction;

“Registry” means the National Registry of Practising Lawyers established under clause 17 of the National Mobility Agreement;

General

2. The signatory governing bodies will
 - (a) use their best efforts to obtain from the appropriate legislative or supervisory bodies amendments to their legislation or regulations necessary or advisable in order to implement the provisions of this Agreement;
 - (b) amend their own rules, by-laws, policies and programs to the extent they consider necessary or advisable in order to implement the provisions of this Agreement;
 - (c) comply with the spirit and intent of this Agreement to facilitate mobility of Canadian lawyers in the public interest and strive to resolve any differences among them in that spirit and in favour of that intent; and
 - (d) work cooperatively to resolve all current and future differences and ambiguities in legislation, policies and programs regarding inter-jurisdictional mobility.
3. Signatory governing bodies will subscribe to this Agreement and be bound by it by means of the signature of an authorized person affixed to any copy of this Agreement.
4. A signatory governing body will not, by reason of this Agreement alone,
 - (a) grant to a lawyer who is a member of another governing body greater rights to provide legal services than are permitted to the lawyer by his or her home governing body; or

Territorial Mobility Agreement

- (b) relieve a lawyer of restrictions or limits on the lawyer's right to practise, except under conditions that apply to all members of the signatory governing body.
- 5. Amendments made under clause 2(b) will take effect immediately on adoption with respect to members of signatory governing bodies that have adopted reciprocal provisions.

Permanent Mobility

- 6. The signatories that are signatories to the National Mobility Agreement agree to extend the application of the permanent mobility provisions of the National Mobility Agreement with respect to the territorial signatories to this Agreement.
- 7. The territorial signatories agree to adopt and be bound by the permanent mobility provisions of the National Mobility Agreement.
- 8. A signatory that has adopted regulatory provisions giving effect to the permanent mobility requirements of the National Mobility Agreement is a reciprocating governing body for the purposes of permanent mobility under this Agreement, whether or not the signatory has adopted or given effect to any other provisions of the National Mobility Agreement.

Transition Provisions

- 9. This Agreement is a multi-lateral agreement, effective respecting the governing bodies that are signatories, and it does not require unanimous agreement of Canadian governing bodies.
- 10. Provisions governing permanent mobility in effect at the time that a governing body becomes a signatory to this Agreement will continue in effect: until this agreement is implemented.

Dispute Resolution

- 11. Signatory governing bodies adopt and agree to apply provisions in the Inter-Jurisdictional Practice Protocol in respect of arbitration of disputes, specifically Clause 14 and Appendix 5 of the Protocol.

Withdrawal

- 12. A signatory may cease to be bound by this Agreement by giving each other signatory written notice of at least one clear calendar year.

Territorial Mobility Agreement

13. A signatory that gives notice under clause 12 will immediately notify its members in writing of the effective date of withdrawal.

Territorial Mobility Agreement

Law Society of Prince Edward Island

Per: _____
Authorized Signatory

**Law Society of Newfoundland and
Labrador**

Per: _____
Authorized Signatory

Law Society of Yukon

Per: _____
Authorized Signatory

**Law Society of the Northwest
Territories**

Per: _____
Authorized Signatory

Law Society of Nunavut

Per: _____
Authorized Signatory

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

Quebec Mobility Agreement

FEDERATION OF LAW SOCIETIES OF CANADA

March 19, 2010
Toronto, Ontario

Introduction

The purpose of this Agreement is to extend the scope of the National Mobility Agreement (the "NMA") in facilitating reciprocal permanent mobility between the common law jurisdictions and the Barreau du Québec ("the Barreau"). Clause 40(b) of the NMA provides that "a signatory governing body, other than the Barreau, will admit members of the Barreau as members on one of the following bases:...(b) as permitted by the Barreau in respect of members of the signatory governing body."

The Barreau has implemented a scheme under which members of the law societies of the other provinces and the territories may become members of the Barreau and practise federal law and the law of their home jurisdictions as Canadian Legal Advisors. It is the intention of the signatories to this Agreement that the other provincial and territorial law societies will reciprocate with the Barreau by implementing provisions that will permit members of the Barreau to become members of other law societies and practise federal and Quebec law in other jurisdictions.

The signatories recognize that,

- they have a duty to the Canadian public and to their members to regulate the inter-jurisdictional practice of law so as to ensure that their members practise law competently, ethically and with financial responsibility, including professional liability insurance and defalcation compensation coverage, in all jurisdictions of Canada,
- differences exist in the legislation, policies and programs pertaining to the signatories, particularly between common law and civil jurisdictions, and
- it is desirable to facilitate a nationwide regulatory regime for the inter-jurisdictional practice of law to promote uniform standards and procedures, while recognizing the exclusive authority of each signatory within its own legislative jurisdiction.



Background

In August 2002 the Federation of Law Societies of Canada (the “Federation”) accepted the report of the National Mobility Task Force for the implementation of full mobility rights for Canadian lawyers.

Eight law societies, including the Barreau, signed the NMA on December 9, 2002. The Agreement recognized that special circumstances applicable to the Barreau would necessitate additional provisions to implement mobility between the Barreau and the common law jurisdictions. The signatories also recognized that the requirement for the Barreau to comply with regulations applicable to all professions in Quebec would delay implementation of the NMA with respect to the Barreau.

In 2006, the law societies of all 10 provinces, including the Barreau, signed the Territorial Mobility Agreement, along with the law societies of all three territories. Under that agreement, provisions were mandated for reciprocal permanent mobility between the law societies of the territories and the provinces, for a five-year period ending January 1, 2012.

Quebec Mobility

In June 2008 Quebec enacted a “Regulation respecting the issuance of special permits of the Barreau du Québec”, which is stated to be “made in order to facilitate the mobility of advocates.” The Regulation provides, *inter alia*, that a member in good standing of a bar of another Canadian province or territory may apply for a “special Canadian legal advisor permit” in Quebec. A person granted such a permit may engage in the following activities on behalf of another person:

- (1) give legal advice and consultations on legal matters involving the law of the Canadian province or territory where he or she is legally authorized to practise law or involving matters under federal jurisdiction;
- (2) prepare and draw up a notice, motion, proceeding or other similar document intended for use in a case before the courts, but only with respect to matters under federal jurisdiction;
- (3) give legal advice and consultations on legal matters involving public international law; and
- (4) plead or act before any tribunal, but only with respect to matters under federal jurisdiction.

Recognizing the provisions of the Quebec Regulation, the signatories to this Agreement agree to enter into an arrangement with the Barreau to enable its members to exercise mobility in the common law jurisdictions on a reciprocal basis. It is recognized that members of other governing bodies will not be able to

exercise the reciprocal right to practise public international law unless they have professional liability insurance coverage that specifically includes such practice.

THE SIGNATORIES AGREE AS FOLLOWS:

Definitions

1. In this Agreement, unless the context indicates otherwise:

“Advisor” means a Canadian Legal Advisor;

“Barreau” means the Barreau du Québec;

“Canadian Legal Advisor” means a member of a governing body who holds a current Canadian Legal Advisor certificate issued by another governing body;

“governing body” means the Law Society or Barristers’ Society in a Canadian common law jurisdiction, and the Barreau;

“home governing body” means any or all of the governing bodies of the legal profession in Canada of which a lawyer is a member, and **“home jurisdiction”** has a corresponding meaning;

“lawyer” means a member of a signatory governing body;

“liability insurance” means compulsory professional liability errors and omissions insurance required by a governing body;

“National Mobility Agreement” or **“NMA”** means the 2002 National Mobility Agreement of the Federation of Law Societies of Canada;

“permanent mobility provisions” means clauses 32 to 36, 39 and 40 of the NMA;

General

2. The signatory governing bodies will

(a) use their best efforts to obtain from the appropriate legislative or supervisory bodies amendments to their legislation or regulations necessary or advisable in order to implement the provisions of this Agreement;

- (b) amend their own rules, by-laws, policies and programs to the extent they consider necessary or advisable in order to implement the provisions of this Agreement;
 - (c) comply with the spirit and intent of this Agreement to facilitate mobility of Canadian lawyers in the public interest and strive to resolve any differences among them in that spirit and in favour of that intent; and
 - (d) work cooperatively to resolve all current and future differences and ambiguities in legislation, policies and programs regarding inter-jurisdictional mobility.
3. Signatory governing bodies will subscribe to this Agreement and be bound by means of the signature of an authorized person affixed to any copy of this Agreement.
 4. A signatory governing body will not, by reason of this agreement alone,
 - (a) grant to a lawyer who is a member of another governing body greater rights to provide legal services than are permitted to the lawyer by his or her home governing body; or
 - (b) relieve a lawyer of restrictions or limits on the lawyer's right to practise, except under conditions that apply to all members of the signatory governing body.
 5. Amendments made under clause 2(b) will take effect immediately on adoption with respect to members of signatory governing bodies that have adopted reciprocal provisions.

Canadian Legal Advisor

6. The Barreau will continue to issue Canadian Legal Advisor certificates to qualifying members of governing bodies, and the other signatories will establish and maintain an equivalent program in order to issue Canadian Legal Advisor certificates to qualifying members of the Barreau.
7. Members of the Barreau whose legal training was obtained outside Canada and who have not had their credentials reviewed and accepted as equivalent by the Barreau are not qualifying members of the Barreau for the purpose of clause 6.
8. The permanent mobility provisions of the NMA apply with respect to requirements and qualifications to obtain a Canadian Legal Advisor Certificate, except that a signatory governing body must require that an

Advisor continue to maintain practising membership in the home governing body.

9. A signatory governing body that has adopted regulatory provisions giving effect to the requirements of clauses 6 and 8 of this Agreement is a reciprocating governing body for the purposes of this Agreement, whether or not the signatory governing body has adopted or given effect to the NMA or any provision of the NMA.

Liability Insurance

10. A governing body will continue to make available to its members who are also Advisors in another jurisdiction ongoing liability insurance as required in the governing body's jurisdiction that provides occurrence or claim limits for indemnity of \$1,000,000 and \$2,000,000 annual per member aggregate.
11. If a member of more than one governing body becomes an Advisor member of a third governing body, the governing body that makes ongoing liability insurance available to the member at the time or did so most recently, will continue to do so or resume doing so, whether or not the member continues to be a resident of that jurisdiction.
12. On application, a signatory governing body will exempt an Advisor member from liability insurance requirements if the Advisor maintains, in another signatory jurisdiction, ongoing liability insurance that provides occurrence or claim limits for indemnity of \$1,000,000 and \$2,000,000 annual per member aggregate.

Transition Provisions

13. This agreement is a multi-lateral agreement, effective respecting the governing bodies that are signatories, and it does not require unanimous agreement of Canadian governing bodies.
14. This Agreement is intended to implement clauses 39 and 40 of the NMA. It does not affect the obligations of any party under others provision of the NMA or other agreements in effect.
15. Provisions governing temporary and permanent mobility in effect at the time that a governing body becomes a signatory to this agreement will continue in effect
 - (a) until this Agreement is implemented, and
 - (b) when this Agreement is implemented, except to the extent modified by this Agreement.

Dispute Resolution

- 16.** Signatory governing bodies adopt and agree to apply provisions in the Inter-Jurisdictional Practice protocol in respect of arbitration of disputes, specifically Clause 13 and Appendix 5 of the Protocol.

Withdrawal

- 17.** A signatory governing body may cease to be bound by this agreement by giving each other signatory governing body written notice of at least one clear calendar year.
- 18.** A signatory governing body that gives notice under clause 17 will immediately notify its members in writing of the effective date of withdrawal.

SIGNED on the 19th day of March 2010.

Law Society of British Columbia

Per: 
Authorized Signatory

Law Society of Saskatchewan

Per: 
Authorized Signatory

Law Society of Upper Canada

Per: 
Authorized Signatory

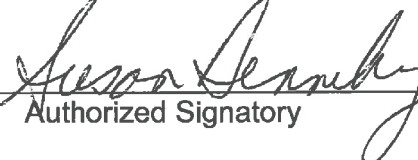
Law Society of New Brunswick

Per: 
Authorized Signatory

Law Society of Prince Edward Island

Per: 
Authorized Signatory

Law Society of Yukon

Per: 
Authorized Signatory

Law Society of Nunavut

Per: 
Authorized Signatory

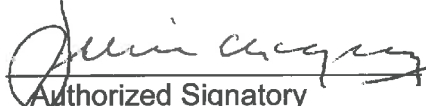
Law Society of Alberta

Per: 
Authorized Signatory


Law Society of Manitoba

Per: 
Authorized Signatory

Barreau du Québec

Per: 
Authorized Signatory


Nova Scotia Barristers' Society

Per: 
Authorized Signatory

Law Society of Newfoundland and Labrador

Per: 
Authorized Signatory

Law Society of the Northwest Territories

Per: 
Authorized Signatory



*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

Quebec Mobility Agreement

Addendum to Extend Mobility Rights to Members of the Chambre des notaires du Québec

FEDERATION OF LAW SOCIETIES OF CANADA

(Date)
(Place)

Introduction

The purpose of this Agreement is to extend the scope of the Quebec Mobility Agreement (the "QMA") in order to facilitate permanent mobility between the Chambre des notaires du Québec (the "Chambre") and law societies in common law jurisdictions, thereby completing the national mobility regime for all members of the Federation of Law Societies of Canada (the "Federation") and both branches of Quebec's legal profession.

Pursuant to the QMA, the Barreau du Québec (the "Barreau") and the provincial and territorial law societies in common law jurisdictions have entered into an arrangement under which members of the Barreau may become members of the other law societies and practise federal and Quebec law as Canadian Legal Advisors. Accordingly, the QMA establishes mobility rights for members of the Barreau in the same manner as those that have been established by the Barreau for members of the other law societies, thereby meeting the reciprocity requirements set out in the National Mobility Agreement (the "NMA").

It is the intention of the signatories to this Agreement that the provincial and territorial law societies in common law jurisdictions implement provisions that will permit members of the Chambre to become members of such law societies and practise federal and Quebec law in those jurisdictions within the scope set out in this Agreement.

The signatories recognize that,

- they have a duty to the Canadian public and to their members to regulate the inter-jurisdictional practice of law so as to ensure that their members practise law competently, ethically and with financial responsibility, including professional liability insurance and defalcation compensation coverage, in all jurisdictions of Canada,
- differences exist in the legislation, policies and programs pertaining to the signatories, particularly between common law and civil jurisdictions, and
- it is desirable to facilitate a nationwide regulatory regime for the inter-jurisdictional practice of law to promote uniform standards and procedures,

while recognizing the exclusive authority of each signatory within its own legislative jurisdiction.

Background

In August 2002 the Federation accepted the report of the National Mobility Task Force for the implementation of full mobility rights for Canadian lawyers.

Eight law societies, including the Barreau, signed the NMA on December 9, 2002. The NMA recognized that special circumstances applicable to the Barreau would necessitate additional provisions to implement mobility between the Barreau and the common law jurisdictions. The signatories also recognized that the requirement for the Barreau to comply with regulations applicable to all professions in Quebec would delay implementation of the NMA with respect to the Barreau. The Chambre is not a signatory to the NMA.

In 2006, the law societies of all 10 provinces, including the Barreau, signed the Territorial Mobility Agreement (the "TMA"), along with the law societies of all three territories. The Chambre is not a signatory to the TMA. Under that agreement, provisions were mandated for reciprocal permanent mobility between the law societies of the territories and the provinces, for a five-year period ending January 1, 2012.

Quebec Mobility

In June 2008, the Government of Quebec enacted a "Regulation respecting the issuance of special permits of the Barreau du Québec", which is stated to be "made in order to facilitate the mobility of advocates." The Regulation provides, *inter alia*, that a member in good standing of a bar of another Canadian province or territory may apply for a "special Canadian legal advisor permit" in Quebec. A person granted such a permit may engage in the following activities on behalf of another person:

- (1) give legal advice and consultations on legal matters involving the law of the Canadian province or territory where he or she is legally authorized to practise law or involving matters under federal jurisdiction;
- (2) prepare and draw up a notice, motion, proceeding or other similar document intended for use in a case before the courts, but only with respect to matters under federal jurisdiction;
- (3) give legal advice and consultations on legal matters involving public international law; and
- (4) plead or act before any tribunal, but only with respect to matters under federal jurisdiction.

In March 2010, recognizing the provisions of the Quebec Regulation, the common law governing bodies entered into the QMA with the Barreau to enable its members to exercise mobility in the common law jurisdictions on a reciprocal basis. It was recognized that members of other governing bodies will not be able to exercise the reciprocal right to practise public international law unless they have professional liability insurance coverage that specifically includes such practice.

Recognizing that Quebec's legal system is founded on the French civil law system and its institutions which are reflected in the division of the legal profession in Quebec between advocates, who are members of and are governed by the Barreau, and notaries, who are members of and are governed by the Chambre, it is desirable that mobility rights be extended to members of the Chambre on the basis set out in this Agreement.

THE SIGNATORIES AGREE AS FOLLOWS:

Definitions

1. In this Agreement, unless the context indicates otherwise:

"Advisor" means a Canadian Legal Advisor;

"Canadian Legal Advisor" means a member of the Chambre who holds a current Canadian Legal Advisor certificate issued by a common law governing body;

"Chambre" means the Chambre des notaires du Québec;

"common law governing body" means the Law Society or Barristers' Society in a Canadian common law jurisdiction;

"liability insurance" means compulsory professional liability errors and omissions insurance required by the Chambre; and

"Quebec notary" means a member of the Chambre.

General

2. The signatory common law governing bodies and the Chambre will

- (a) use their best efforts to obtain from the appropriate legislative or supervisory bodies amendments to their legislation or regulations necessary or advisable in order to implement the provisions of this Agreement;

- (b) amend their own rules, by-laws, policies and programs to the extent they consider necessary or advisable in order to implement the provisions of this Agreement;
 - (c) comply with the spirit and intent of this Agreement to facilitate mobility of Quebec notaries in the public interest and strive to resolve any differences among them in that spirit and in favour of that intent; and
 - (d) work cooperatively to resolve all current and future differences and ambiguities in legislation, policies and programs regarding inter-jurisdictional mobility.
3. Signatory common law governing bodies and the Chambre will subscribe to this Agreement and be bound by means of the signature of an authorized person affixed to any copy of this Agreement.
 4. A signatory common law governing body will not, by reason of this agreement alone,
 - (a) grant to a Quebec notary greater rights to provide legal services than are permitted to the Quebec notary by the Chambre; or
 - (b) relieve a Quebec notary of restrictions or limits on the Quebec notary's right to practise, except under conditions that apply to all members of the signatory common law governing body.

Canadian Legal Advisor

5. Signatory common law governing bodies will establish and maintain a program in order to issue Canadian Legal Advisor certificates to qualifying members of the Chambre.
6. Members of the Chambre whose legal training was obtained outside Canada and who have not had their credentials reviewed and accepted as equivalent by the Chambre are not qualifying members of the Chambre for the purpose of clause 5.
7. A member of the Chambre who is granted the status of Advisor in any jurisdiction outside of Quebec, may, in his or her capacity as Advisor:
 - (a) give legal advice and consultations on legal matters involving the law of Quebec or involving matters under federal jurisdiction;
 - (b) prepare and draw up a notice, motion, proceeding or similar document intended for use in a case before a judicial or quasi-judicial body in a

matter under federal jurisdiction where expressly permitted by federal statute or regulations;

- (c) give legal advice and consultations on legal matters involving public international law; and
 - (d) plead or act before a judicial or quasi-judicial body in a matter under federal jurisdiction where expressly permitted by federal statute or regulations.
8. A signatory common law governing body will require no further qualifications for a Quebec notary to be eligible for membership as Advisor than the following:
- (a) entitlement to practice the notarial profession in Quebec; and
 - (b) good character and fitness to be a member of the legal profession, on the standard ordinarily applied to applicants for membership.
9. Before admitting as a member a Quebec notary qualified under clause 8, a signatory common law governing body will not require the Quebec notary to pass a transfer examination or other examination, but may require the Quebec notary to do all of the following:
- (a) provide certificates of standing from all Canadian and foreign governing bodies of the legal profession of which the Quebec notary is or has been a member;
 - (b) disclose criminal and disciplinary records in any jurisdiction; and
 - (c) consent to access by the governing body to the Quebec notary's regulatory files of all governing bodies of the legal profession of which the Quebec notary is a member, whether in Canada or elsewhere.
10. A signatory common law governing body will make available to the public information obtained under clause 9 in the same manner as similar records originating in its jurisdiction.
11. A signatory common law governing body must require that a member of the Chambre who is granted the status of a Canadian Legal Advisor continue to maintain his or her practising membership in the Chambre.

Liability Insurance

12. The Chambre will continue to make available to its members who are also Advisors in another jurisdiction ongoing liability insurance with minimum occurrence or claim limits for indemnity of \$1,000,000 and \$2,000,000 annual per member aggregate.

Transition Provisions

13. This agreement is a multi-lateral agreement, effective respecting the common law governing bodies that are signatories and the Chambre, and it does not require unanimous agreement of common law governing bodies and the Chambre.
14. Nothing in this Agreement is intended to affect the obligations of any party under the provisions of the NMA, the QMA or other agreements in effect.

Dispute Resolution


15. Signatory common law governing bodies and the Chambre adopt and agree to apply provisions in the Inter-Jurisdictional Practice Protocol in respect of arbitration of disputes, specifically Clause 14 and Appendix 5 of the Protocol.

Withdrawal


16. A signatory common law governing body or the Chambre may cease to be bound by this agreement by giving each other party written notice of at least one clear calendar year.
17. A party that gives notice under clause 16 will immediately notify its members in writing of the effective date of withdrawal.

SIGNED on the 15th day of March, 2012.

Law Society of British Columbia

Per: 
Authorized Signatory

Law Society of Alberta

Per: 
Authorized Signatory

Law Society of Saskatchewan

Per: 
Authorized Signatory

Law Society of Manitoba

Per: 
Authorized Signatory

Law Society of Upper Canada

Per: 
Authorized Signatory

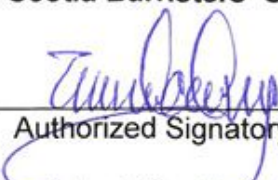
Chambre des notaires du Québec

Per: 
Authorized Signatory

Law Society of New Brunswick

Per: 
Authorized Signatory


Nova Scotia Barristers' Society

Per: 
Authorized Signatory

Law Society of Prince Edward Island

Per: 
Authorized Signatory

Law Society of Newfoundland and Labrador

Per: 
Authorized Signatory

Law Society of Yukon

Per: 
Authorized Signatory

Law Society of the Northwest Territories

Per: 
Authorized Signatory

Law Society of Nunavut

Per: 
Authorized Signatory

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

National Mobility Agreement 2013

Signed October 17, 2013

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

October, 2013
St. John's

The purpose of this agreement is to facilitate temporary and permanent mobility of lawyers between Canadian jurisdictions.

While the signatories participate in this agreement voluntarily, they intend that only lawyers who are members of signatories that have implemented reciprocal provisions in their jurisdictions will be able to take advantage of the provisions of this agreement.

The signatories recognize that

- they have a duty to the Canadian public and to their members to regulate the inter-jurisdictional practice of law so as to ensure that their members practise law competently, ethically and with financial responsibility, including professional liability insurance and defalcation compensation coverage, in all jurisdictions of Canada,
- while differences exist in the legislation, policies and programs pertaining to the signatories, including those differences between common law and civil law jurisdictions in Canada, lawyers have a professional responsibility to ensure that they are competent with respect to any matter that they undertake, and
- it is desirable to facilitate a nationwide regulatory regime for the inter-jurisdictional practice of law to promote uniform standards and procedures, while recognizing the exclusive authority of each signatory within its own legislative jurisdiction.

Most of the signatories subscribed to the Interjurisdictional Practice Protocol of 1994, in which they agreed to certain measures to facilitate the temporary and permanent inter-jurisdictional practice of law and the enforcement of appropriate standards on lawyers practising law in host jurisdictions.

Since December 2002, all provincial law societies, other than the Chambre des notaires du Quebec ("Chambre"), have signed the National Mobility Agreement ("NMA") establishing a comprehensive mobility regime for Canadian lawyers.

In 2006 all law societies other than the Chambre, signed the Territorial Mobility Agreement. Under that agreement, provisions were mandated for reciprocal permanent mobility between the law societies of the territories and the provinces for five years. A further agreement made in November 2011 renewed the Territorial Mobility Agreement without a termination date.

In June 2008 Quebec enacted a "Regulation respecting the issuance of special permits of the Barreau du Quebec" ("Barreau"), which provided, inter alia, that a member in good standing of a bar of another Canadian province or territory could become a member of the Barreau known as a

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National Mobility Agreement 2013

In March 2010 all law societies, other than the Chambre, signed the Quebec Mobility Agreement ("QMA"). Under that agreement members of the Barreau are able to exercise mobility in the common law jurisdictions on a reciprocal basis as CLAs.

In June 2010 the Council of the Federation approved the Mobility Defalcation Compensation Agreement ("MDCA") to bring more consistency, certainty and transparency to the process for compensating the public if funds are misappropriated by lawyers exercising their mobility rights under the NMA. Since then, all provincial law societies, other than the Barreau and the Chambre, have signed the MDCA.

In March 2012 all law societies, including the Chambre, signed an addendum to the Quebec Mobility Agreement extending to members of the Chambre the right to acquire CLA status in another province.

In January 2013, the Council of the Federation of Law Societies approved a report from the National Mobility Policy Committee. In that report, the Committee concluded and recommended that it would be in the public interest to implement mobility to and from the Barreau on the same terms as now apply to mobility between common law jurisdictions under the permanent mobility provisions of the NMA. The Committee also reported that the CLA provisions of the QMA and its Addendum should continue in place with respect to members of the Chambre, and the Chambre was in favour of that resolution. The Committee's report and recommendations do not affect the current rules for temporary mobility between Quebec and other provinces and the territories.

As a result, the signatories hereby agree to adopt this new National Mobility Agreement, 2013 ("NMA 2013"), changing the original NMA to remove the distinction between members of the Barreau and members of law societies outside of Quebec for the purposes of transfer between governing bodies. The signatories also agree to incorporate into the NMA 2013 the provisions for members of the Chambre to be granted status as CLAs by law societies outside of Quebec and to rescind the QMA and its Addendum.

/A

National Mobility Agreement 2013

THE SIGNATORIES AGREE AS FOLLOWS:

Definitions

1. In this agreement, unless the context indicates otherwise:

“Barreau” means le Barreau du Québec;

“Chambre” means la Chambre des notaires du Québec;

“day” means any calendar day or part of a calendar day in which a lawyer provides legal services;

“discipline” includes a finding by a governing body of any of the following:

- (a) professional misconduct;
- (b) incompetence;
- (c) conduct unbecoming a lawyer;
- (d) lack of physical or mental capacity to engage in the practice of law;
- (e) any other breach of a lawyer’s professional responsibilities;

“disciplinary record” includes any of the following, unless reversed on appeal or review:

- (a) any action taken by a governing body as a result of discipline;
- (b) disbarment;
- (c) a lawyer’s resignation or otherwise ceasing to be a member of a governing body as a result of disciplinary proceedings;
- (d) restrictions or limits on a lawyer’s entitlement to practise;
- (e) any interim suspension or restriction or limits on a lawyer’s entitlement to practise imposed pending the outcome of a disciplinary hearing.

“entitled to practise law” means allowed, under all of the legislation and regulation of a home jurisdiction, to engage in the practice of law in the home jurisdiction;

“governing body” means the Law Society or Barristers’ Society in a Canadian common law jurisdiction, the Barreau and the Chambre;

“home governing body” means any or all of the governing bodies of the legal profession in Canada of which a lawyer is a member, and “home jurisdiction” has a corresponding meaning;

“host governing body” means a governing body of the legal profession in Canada in whose jurisdiction a lawyer practises law without being a member, and “host jurisdiction” has a corresponding meaning;

..../5

National Mobility Agreement 2013

“Inter-Jurisdictional Practice Protocol” means the 1994 Inter-Jurisdictional Practice Protocol of the Federation of Law Societies of Canada, as amended from time to time;

“lawyer” means a member of a signatory governing body, other than the Chambre;

“liability insurance” means compulsory professional liability errors and omissions insurance required by a governing body;

“mobility permit” means a permit issued by a host governing body on application to a lawyer allowing the lawyer to provide legal services in the host jurisdiction on a temporary basis;

“notary” means a member of the Chambre;

“practice of law” has the meaning with respect to each jurisdiction that applies in that jurisdiction;

“providing legal services” means engaging in the practice of law physically in a Canadian jurisdiction or with respect to the law of a Canadian jurisdiction;

“Registry” means the National Registry of Practising Lawyers established under clause 18 of this agreement;

“resident” has the meaning respecting a province or territory that it has with respect to Canada in the Income Tax Act (Canada).

General

2. The signatories agree to adopt this agreement as a replacement for the National Mobility Agreement of 2002, the Quebec Mobility Agreement of 2010 and the Addendum to the Quebec Mobility Agreement of 2012, all of which are revoked by consent.
3. The signatory governing bodies will
 - (a) use their best efforts to obtain from the appropriate legislative or supervisory bodies amendments to their legislation or regulations necessary or advisable in order to implement the provisions of this agreement;
 - (b) amend their own rules, by-laws, policies and programs to the extent they consider necessary or advisable in order to implement the provisions of this agreement;
 - (c) comply with the spirit and intent of this agreement to facilitate mobility of Canadian lawyers in the public interest and strive to resolve any differences among them in that spirit and in favour of that intent; and
 - (d) work cooperatively to resolve all current and future differences and ambiguities in legislation, policies and programs regarding inter- jurisdictional mobility.

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National Mobility Agreement 2013

4. Signatory governing bodies will subscribe to this agreement and be bound by it by means of the signature of an authorized person affixed to any copy of this agreement.
5. A signatory governing body will not, by reason of this agreement alone,
 - (a) grant to a lawyer who is a member of another governing body greater rights to provide legal services than are permitted to the lawyer by his or her home governing body; or
 - (b) relieve a lawyer of restrictions or limits on the lawyer's right to practise, except under conditions that apply to all members of the signatory governing body.
6. Amendments made under clause 3(b) will take effect immediately on adoption with respect to members of signatory governing bodies that have adopted reciprocal provisions.

Temporary Mobility Among Common Law Jurisdictions

7. Clauses 8 to 32 apply to temporary mobility of lawyers of common law jurisdictions in other common law jurisdictions.

Mobility without permit

8. A host governing body will allow a lawyer from another jurisdiction to provide legal services in the host jurisdiction or with respect to the law of the host jurisdiction on a temporary basis, without a mobility permit or notice to the host governing body, for a total of not more than 100 days in a calendar year, provided the lawyer:
 - (a) meets the criteria in clause 11; and
 - (b) has not established an economic nexus with the host jurisdiction as described in clause 17.
9. The host governing body will have the discretion to extend the time limit for temporary mobility under clause 8 with respect to an individual lawyer.
10. It will be the responsibility of a lawyer to
 - (a) record and verify the number of days in which he or she provides legal services in a host jurisdiction(s) or with respect to each jurisdiction; and
 - (b) prove that he or she has complied with provisions implementing clause 8.

....17

National Mobility Agreement 2013

11. To qualify to provide legal services on a temporary basis without a mobility permit or notice to the host governing body under clause 8, a lawyer will be required to do each of the following at all times:
- (a) be entitled to practise law in a home jurisdiction;
 - (b) carry liability insurance that:
 - (i) is reasonably comparable in coverage and amount to that required of lawyers of the host jurisdiction; and
 - (ii) extends to the lawyer's practice in the host jurisdiction;
 - (c) have defalcation compensation coverage from a Canadian governing body that extends to the lawyer's practice in the host jurisdiction;
 - (d) not be subject to conditions of or restrictions on the lawyer's practice or membership in the governing body in any jurisdiction;
 - (e) not be the subject of criminal or disciplinary proceedings in any jurisdiction; and
 - (f) have no disciplinary record in any jurisdiction.
12. For the purposes of clause 8:
- (a) a lawyer practising law of federal jurisdiction in a host jurisdiction will be providing legal services in the host jurisdiction;
 - (b) as an exception to subclause (a), when appearing before the following tribunals in a host jurisdiction a lawyer will not be providing legal services in a host jurisdiction:
 - (i) the Supreme Court of Canada;
 - (ii) the Federal Court of Canada;
 - (iii) the Tax Court of Canada;
 - (iv) a federal administrative tribunal.
13. A host jurisdiction will allow a lawyer to accept funds in trust on deposit, provided the funds are deposited to a trust account:
- (a) in the lawyer's home jurisdiction; or
 - (b) operated in the host jurisdiction by a member of the host governing body.

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National Mobility Agreement 2013

Mobility permit required

14. If a lawyer does not meet the criteria in clause 11 to provide legal services in the host jurisdiction or with respect to the law of the host jurisdiction on a temporary basis, a host governing body will issue a mobility permit to the lawyer:
- (a) on application;
 - (b) if, in the complete discretion of the host governing body, it is consistent with the public interest to do so;
 - (c) for a total of not more than 100 days in a calendar year; and
 - (d) subject to any conditions and restrictions that the host governing body considers appropriate.

Temporary mobility not allowed

15. A host governing body will not allow a lawyer who has established an economic nexus with the host jurisdiction to provide legal services on a temporary basis under clause 8, but will require the lawyer to do one of the following:
- (a) cease providing legal services in the host jurisdiction forthwith;
 - (b) apply for and obtain membership in the host governing body; or
 - (c) apply for and obtain a mobility permit under clause 14.
16. On application, the host governing body will have the discretion to allow a lawyer to continue to provide legal services in the host jurisdiction or with respect to the law of the host jurisdiction pending consideration of an application under clause 15(b) or (c).
17. In clause 15, an economic nexus is established by actions inconsistent with temporary mobility to the host jurisdiction, including but not limited to doing any of the following in the host jurisdiction:
- (a) providing legal services beyond 100 days, or longer period allowed under clause 9;
 - (b) opening an office from which legal services are offered or provided to the public;
 - (c) becoming resident;
 - (d) opening or operating a trust account, or accepting trust funds, except as permitted under clause 13.

National Registry of Practising Lawyers

18. The signatory governing bodies will establish, maintain and operate a National Registry of Practising Lawyers containing the names of lawyers from each signatory governing body qualified under clause 11 to practise law interjurisdictionally without a mobility permit or notice to the host governing body.

National Mobility Agreement 2013

19. Each signatory governing body will take all reasonable steps to ensure that all relevant information respecting its members is supplied to the Registry and is kept current and accurate.

Liability Insurance and Defalcation Compensation Funds

20. Each signatory governing body will ensure that the ongoing liability insurance in its jurisdiction
- (a) extends to its members for the provision of legal services on a temporary basis in or with respect to the law of host signatory jurisdictions; and
 - (b) provides occurrence or claim limits of \$1,000,000 and \$2,000,000 annual per member aggregate.
21. In the event that a claim arises from a lawyer providing legal services on a temporary basis, and the closest and most real connection to the claim is with a host jurisdiction, the home governing body will provide at least the same scope of coverage as the liability insurance in the host jurisdiction. For clarity, all claims and potential claims reported under the policy will remain subject to the policy's occurrence or claim limit of \$1,000,000 and \$2,000,000 annual per member aggregate.
22. Signatory governing bodies will notify one another in writing, as soon as practicable, of any changes to their liability insurance policies that affect the limits of liability or scope of coverage.
23. Signatory governing bodies that are also signatories to the MDCA will apply or continue to apply the provisions of the MDCA respecting defalcation compensation. Signatory governing bodies that are not signatories to the MDCA will apply or continue to apply the provisions of the Interjurisdictional Practice Protocol respecting defalcation compensation, specifically clause 10 of the Protocol and Appendix 6 to the Protocol.
24. Signatory governing bodies will notify one another in writing, as soon as practicable, of any changes to their defalcation compensation fund programs that affect the limits of compensation available or the criteria for payment.

National Mobility Agreement 2013

Enforcement

25. A host governing body that has reasonable grounds to believe that a member of another governing body has provided legal services in the host jurisdiction will be entitled to require that lawyer to:
 - (a) account for and verify the number of days spent providing legal services in the host jurisdiction; and
 - (b) verify that he or she has not done anything inconsistent with the provision of legal services on a temporary basis.
26. If a lawyer fails or refuses to comply with the provisions of clause 25, a host governing body will be entitled to:
 - (a) prohibit the lawyer from providing legal services in the jurisdiction for any period of time; or
 - (b) require the lawyer to apply for membership in the host jurisdiction before providing further legal services in the jurisdiction.
27. When providing legal services in a host jurisdiction or with respect to the law of a host jurisdiction, all lawyers will be required to comply with the applicable legislation, regulations, rules and standards of professional conduct of the host jurisdiction.
28. In the event of alleged misconduct arising out of a lawyer providing legal services in a host jurisdiction, the lawyer's home governing body will:
 - (a) assume responsibility for the conduct of disciplinary proceedings against the lawyer unless the host and home governing bodies agree to the contrary; and
 - (b) consult with the host governing body respecting the manner in which disciplinary proceedings will be taken against the lawyer.
29. If a signatory governing body investigates the conduct of or takes disciplinary proceedings against a lawyer, that lawyer's home governing body or bodies, and each governing body in whose jurisdiction the lawyer has provided legal services on a temporary basis will provide all relevant information and documentation respecting the lawyer as is reasonable in the circumstances.
30. In determining the location of a hearing under clause 28, the primary considerations will be the public interest, convenience and cost.
31. A governing body that initiates disciplinary proceedings against a lawyer under clause 28 will assume full responsibility for conduct of the proceedings, including costs, subject to a contrary agreement between governing bodies.
32. In any proceeding of a signatory governing body, a duly certified copy of a disciplinary decision of another governing body concerning a lawyer found guilty of misconduct will be proof of that lawyer's guilt.

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National Mobility Agreement 2013

Permanent Mobility of Lawyers

33. A signatory governing body will require no further qualifications for a member of another governing body to be eligible for membership than the following:
- (a) entitlement to practise law in the lawyer's home jurisdiction;
 - (b) good character and fitness to be a lawyer, on the standard ordinarily applied to applicants for membership; and
 - (c) any other qualifications that ordinarily apply for lawyers to be entitled to practise law in its jurisdiction.
34. Before admitting as a member a lawyer qualified under clauses 33 to 40, a governing body will not require the lawyer to pass a transfer examination or other examination, but may require the lawyer to do all of the following:
- (a) provide certificates of standing from all Canadian and foreign governing bodies of which the lawyer is or has been a member;
 - (b) disclose criminal and disciplinary records in any jurisdiction;
 - (c) consent to access by the governing body to the lawyer's regulatory files of all governing bodies of which the lawyer is a member, whether in Canada or elsewhere; and
 - (d) certify that he or she has reviewed all of the materials reasonably required by the governing body.
35. Members of the Barreau whose legal training was obtained outside Canada and who have not had their credentials reviewed and accepted by the Barreau are not qualifying members of the Barreau for the purpose of clauses 33 to 40.

Public Information

36. A governing body will make available to the public information obtained under clause 34 in the same manner as similar records originating in its jurisdiction.

Liability Insurance

37. Subject to clause 40, a signatory governing body other than the Barreau will, on application, exempt a lawyer from liability insurance requirements if the lawyer does the following in another signatory jurisdiction:
- (a) is resident;
 - (b) is a member of the governing body; and
 - (c) maintains ongoing liability insurance required in that jurisdiction that provides occurrence or claim limits of \$1,000,000 and \$2,000,000 annual per member aggregate.



National Mobility Agreement 2013

38. For the purposes of clause 37, a lawyer who is resident in Quebec and who is a member of more than one signatory governing body other than the Barreau will be deemed resident in one of the other jurisdictions in which the lawyer is a member, as determined in accordance with nationally consistent criteria to be included in the insurance programs of all signatory jurisdictions. In the event that nationally consistent criteria are not in place, the lawyer will be deemed resident in the jurisdiction of the signatory body in which the lawyer has been a member continuously for the longest period of time.
39. In the event that a claim arises from a lawyer providing legal services and the closest and most real connection to the claim is with a jurisdiction in which the lawyer has claimed an exemption under clause 37, the insurance program of the governing body in the jurisdiction where the lawyer is insured will provide at least the same scope of coverage as the liability insurance in the jurisdiction in which the lawyer is exempt. For clarity, all claims and potential claims reported under the policy will remain subject to the policy's occurrence or claim limit of \$1,000,000 and \$2,000,000 annual per member aggregate.
40. A lawyer who is a member of the Barreau and one or more of the other signatory governing bodies must comply with the liability insurance requirements of the Barreau and at least one of the other signatory governing bodies of which the lawyer is a member. Insurance coverage is to be provided as follows:
 - (a) by the professional liability insurance program of the Barreau with respect to services provided by the lawyer as a member of the Barreau;
 - (b) by the professional liability insurance program of a signatory governing body other than the Barreau with respect to services provided by the lawyer as a member of a signatory governing body other than the Barreau.

Temporary Mobility between Quebec and Common Law Jurisdictions

41. The Barreau will permit lawyers entitled to practise law in a home jurisdiction, on application under regulations that apply to the Barreau, to provide legal services in Quebec or with respect to the law of Quebec on a specific case or for a specific client for a period of up to one year, which may be extended on application to the Barreau.
42. A signatory governing body, other than the Barreau, will permit members of the Barreau to provide legal services in its jurisdiction or with respect to the law of its jurisdiction on one of the following bases:
 - (a) as provided in clauses 8 to 32; or
 - (b) as permitted by the Barreau in respect of the members of the signatory governing body.

National Mobility Agreement 2013

Permanent Mobility of Quebec Notaries

43. Signatory common law governing bodies will establish and maintain a program in order to grant Canadian Legal Advisor ("CLA") status to qualifying members of the Chambre.
44. Members of the Chambre whose legal training was obtained outside Canada and who have not had their credentials reviewed and accepted by the Chambre are not qualifying members of the Chambre for the purpose of clauses 43 to 50.
45. A member of the Chambre who is granted the status of CLA in any jurisdiction outside of Quebec may, in his or her capacity as a CLA:
 - (a) give legal advice and consultations on legal matters involving the law of Quebec or involving matters under federal jurisdiction;
 - (b) prepare and draw up a notice, motion, proceeding or similar document intended for use in a case before a judicial or quasi-judicial body in a matter under federal jurisdiction where expressly permitted by federal statute or regulations;
 - (c) give legal advice and consultations on legal matters involving public international law; and
 - (d) plead or act before a judicial or quasi-judicial body in a matter under federal jurisdiction where expressly permitted by federal statute or regulations.
46. A governing body will require no further qualifications for a notary to be eligible for status as a CLA beyond the following:
 - (a) entitlement to practise the notarial profession in Quebec; and
 - (b) good character and fitness to be a member of the legal profession, on the standard ordinarily applied to applicants for membership.
47. Before granting CLA status to a notary qualified under clauses 43 to 50, a governing body will not require the notary to pass a transfer examination or other examination, but may require the notary to do all of the following:
 - (a) provide certificates of standing from all Canadian and foreign governing bodies of the legal profession of which the notary is or has been a member;
 - (b) disclose criminal and disciplinary records in any jurisdiction; and
 - (c) consent to access by the governing body to the notary's regulatory files of all governing bodies of the legal profession of which the notary is a member, whether in Canada or elsewhere.
48. A governing body will make available to the public information obtained under clause 47 in the same manner as similar records originating in its jurisdiction.



National Mobility Agreement 2013

49. A governing body must require that a notary who is granted the status of a CLA continue to maintain his or her practising membership in the Chambre.
50. The Chambre will continue to make available to its members who are also CLAs in another jurisdiction ongoing liability insurance with minimum occurrence or claim limits for indemnity of \$1,000,000 and \$2,000,000 annual per member aggregate.

Inter-Jurisdictional Practice Protocol

51. The signatory governing bodies agree that the Inter-Jurisdictional Practice Protocol will continue in effect, to the extent that it is not replaced by or inconsistent with legislation, regulation and programs adopted and implemented to give effect to this agreement.

Transition Provisions

52. This agreement is a multi-lateral agreement, effective respecting the governing bodies that are signatories, and it does not require unanimous agreement of Canadian governing bodies.
53. Provisions governing temporary and permanent mobility in effect at the time that a governing body becomes a signatory to this agreement will continue in effect:
 - (a) with respect to all Canadian lawyers until this agreement is implemented; and
 - (b) with respect to members of Canadian law societies that are not signatories to this agreement.

Withdrawal

54. A signatory may cease to be bound by this agreement by giving each other signatory written notice of at least one clear calendar year.
55. A signatory that gives notice under clause 54 will:
 - (a) immediately notify its members in writing of the effective date of withdrawal; and
 - (b) require that its members who provide legal services in the jurisdiction of another signatory governing body ascertain from that governing body its requirements for inter-provincial mobility before providing legal services in that jurisdiction after the effective date of withdrawal.



National Mobility Agreement 2013

SIGNED on the 17th day of October, 2013

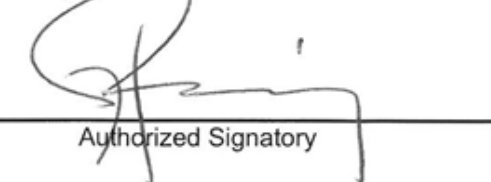
Law Society of British Columbia

Per: 
Authorized Signatory

Law Society of Alberta

Per: 
Authorized Signatory

Law Society of Saskatchewan

Per: 
Authorized Signatory

Law Society of Manitoba

Per: 
Authorized Signatory

Law Society of Upper Canada

Per: 
Authorized Signatory

Chambre des notaires du Québec

Per: 
Authorized Signatory

Barreau du Québec

Per: 
Authorized Signatory

Law Society of New Brunswick

Per: 
Authorized Signatory

Nova Scotia Barristers' Society

Per: 
Authorized Signatory

Law Society of Prince Edward Island

Per: 
Authorized Signatory

Law Society of Newfoundland and Labrador

Per: 
Authorized Signatory

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

TERRITORIAL MOBILITY AGREEMENT 2013

Territorial Mobility Agreement 2013

FEDERATION OF LAW SOCIETIES OF CANADA

April 2014

Introduction

The purpose of this Agreement is to extend the scope of the National Mobility Agreement 2013 ("NMA 2013") in facilitating permanent mobility of lawyers between Canadian jurisdictions.

While the signatories participate in this Agreement voluntarily, they intend that only lawyers who are members of signatories that have implemented reciprocal provisions in their jurisdictions will be able to take advantage of the provisions of this Agreement.

The signatories recognize that

- they have a duty to the Canadian public and to their members to regulate the inter-jurisdictional practice of law so as to ensure that their members practise law competently, ethically and with financial responsibility, including professional liability insurance and defalcation compensation coverage, in all jurisdictions of Canada,
- differences exist in the legislation, policies and programs pertaining to the signatories, including those differences between common law and civil law jurisdictions in Canada, and lawyers have a professional responsibility to ensure that they are competent with respect to any matter that they undertake, and
- it is desirable to facilitate a nationwide regulatory regime for the inter-jurisdictional practice of law to promote uniform standards and procedures, while recognizing the exclusive authority of each signatory within its own legislative jurisdiction.

Background

In August, 2002, the Federation of Law Societies of Canada (the "Federation") approved the report of the National Mobility Task Force ("the Task Force") for the implementation of full mobility rights for Canadian lawyers. This led to adoption of the National Mobility Agreement ("NMA") by all provincial law societies other than the Chambre des notaires du Québec ("Chambre").

Territorial Mobility Agreement 2013

The resolution adopted by the Federation in approving the report of the Task Force included an acknowledgement that “the unique circumstances of the law societies of Yukon, the Northwest Territories and Nunavut necessitate special considerations that could not be undertaken within the time frame prescribed in the Task Force’s terms of reference, but should be undertaken in the future.”

In 2006 all law societies other than the Chambre signed the Territorial Mobility Agreement (“TMA”). To recognize the unique circumstances of the territorial law societies, the agreement provided for reciprocal permanent mobility between the law societies of the provinces and the territories, without requiring the territorial law societies to participate in the temporary mobility provisions of the NMA. The original term of the TMA was five years. In 2011 the agreement was renewed without a termination date.

In March 2010, all Canadian law societies except the Chambre signed the Quebec Mobility Agreement (“QMA”), facilitating reciprocal mobility between Quebec and the common law jurisdictions. The mobility provisions set out in the QMA were extended to members of the Chambre in March 2012 with the signing by all law societies of the Addendum to the QMA.

The signatories to the NMA and the Chambre have now approved a revised agreement that extends the permanent mobility provisions of the NMA to mobility to and from the Barreau du Québec and incorporates the mobility provisions of the QMA and the Addendum to the QMA applicable to the Chambre. The “NMA 2013” was executed in October 2013.

This Agreement has been amended to ensure that references to the relevant clauses of the NMA 2013 are accurate.

The signatories to this Agreement who are not signatories to the NMA 2013 do not hereby subscribe to the provisions of the NMA 2013, except as expressly stated in this Agreement.

THE SIGNATORIES AGREE AS FOLLOWS:

Definitions

1. In this Agreement, unless the context indicates otherwise:

“**governing body**” means the Law Society or Barristers’ Society in a Canadian common law jurisdiction, and the Barreau;

Territorial Mobility Agreement 2013

“home governing body” means any or all of the governing bodies of the legal profession in Canada of which a lawyer is a member, and **“home jurisdiction”** has a corresponding meaning;

“Inter-Jurisdictional Practice Protocol” means the 1994 Inter-Jurisdictional Practice Protocol of the Federation of Law Societies of Canada, as amended from time to time;

“lawyer” means a member of a signatory governing body;

“liability insurance” means compulsory professional liability errors and omissions insurance required by a governing body;

“National Mobility Agreement 2013” or **“NMA 2013”** means the National Mobility Agreement 2013 of the Federation of Law Societies of Canada, as amended from time to time;

“permanent mobility provisions” means clauses 33 to 40, and 43 to 50 of the NMA 2013;

“practice of law” has the meaning with respect to each jurisdiction that applies in that jurisdiction;

“Registry” means the National Registry of Practising Lawyers established under clause 18 of the NMA 2013;

General

2. The signatory governing bodies will

- (a) use their best efforts to obtain from the appropriate legislative or supervisory bodies amendments to their legislation or regulations necessary or advisable in order to implement the provisions of this Agreement;
- (b) amend their own rules, by-laws, policies and programs to the extent they consider necessary or advisable in order to implement the provisions of this Agreement;
- (c) comply with the spirit and intent of this Agreement to facilitate mobility of Canadian lawyers in the public interest and strive to resolve any differences among them in that spirit and in favour of that intent; and
- (d) work cooperatively to resolve all current and future differences and ambiguities in legislation, policies and programs regarding inter-jurisdictional mobility.

Territorial Mobility Agreement 2013

3. Signatory governing bodies will subscribe to this Agreement and be bound by it by means of the signature of an authorized person affixed to any copy of this Agreement.
4. A signatory governing body will not, by reason of this Agreement alone,
 - (a) grant to a lawyer who is a member of another governing body greater rights to provide legal services than are permitted to the lawyer by his or her home governing body; or
 - (b) relieve a lawyer of restrictions or limits on the lawyer's right to practise, except under conditions that apply to all members of the signatory governing body.
5. Amendments made under clause 2(b) will take effect immediately on adoption with respect to members of signatory governing bodies that have adopted reciprocal provisions.

Permanent Mobility

6. The signatories that are signatories to the NMA 2013 agree to extend the application of the permanent mobility provisions of the NMA 2013 with respect to the territorial signatories to this Agreement.
7. The territorial signatories agree to adopt and be bound by the permanent mobility provisions of the NMA 2013.
8. A signatory that has adopted regulatory provisions giving effect to the permanent mobility requirements of the NMA 2013 is a reciprocating governing body for the purposes of permanent mobility under this Agreement, whether or not the signatory has adopted or given effect to any other provisions of the National Mobility Agreement.

Transition Provisions

9. This Agreement is a multi-lateral agreement, effective respecting the governing bodies that are signatories, and it does not require unanimous agreement of Canadian governing bodies.
10. Provisions governing permanent mobility in effect at the time that a governing body becomes a signatory to this Agreement will continue in effect until this agreement is implemented.

Territorial Mobility Agreement 2013

Dispute Resolution

11. Signatory governing bodies adopt and agree to apply provisions in the Inter-Jurisdictional Practice Protocol in respect of arbitration of disputes, specifically Clause 14 and Appendix 5 of the Protocol.

Withdrawal

12. A signatory may cease to be bound by this Agreement by giving each other signatory written notice of at least one clear calendar year.
13. A signatory that gives notice under clause 12 will immediately notify its members in writing of the effective date of withdrawal.

Territorial Mobility Agreement 2013

Nova Scotia Barristers' Society

Law Society of Prince Edward Island

Per: _____
Authorized Signatory

Per: _____
Authorized Signatory

**Law Society of Newfoundland and
Labrador**

Law Society of Yukon

Per: _____
Authorized Signatory

Per: _____
Authorized Signatory

**Law Society of the Northwest
Territories**

Law Society of Nunavut

Per: _____
Authorized Signatory

Per: _____
Authorized Signatory

Chapter Seven

Labour Mobility

Article 700: Application of General Rules

1. Articles 404 (Legitimate Objectives) and 405 (Reconciliation) do not apply to this Chapter.
2. For greater certainty, Articles 400 (Application), 401 (Reciprocal Non-Discrimination), 402 (Right of Entry and Exit), 403 (No Obstacles), and 406 (Transparency) apply to this Chapter.
3. For purposes of Articles 401 (Reciprocal Non-Discrimination), 402 (Right of Entry and Exit), and 403 (No Obstacles), any reference in those Articles to Article 404 (Legitimate Objectives) shall be construed as a reference to Article 708.

Article 701: Purpose

The purpose of this Chapter is to eliminate or reduce measures adopted or maintained by the Parties that restrict or impair labour mobility in Canada and, in particular, to enable any worker certified for an occupation by a regulatory authority of one Party to be recognized as qualified for that occupation by all other Parties.

Article 702: Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party relating to:
 - (a) residency requirements for workers as a condition of access to employment opportunities or as a condition of certification relating to a worker's occupation,
 - (b) certification requirements, other than residency requirements, for workers in order to practice an occupation or use a particular occupational title, and
 - (c) occupational standards.
2. This Chapter does not cover
 - (a) social policy measures including, but not limited to, labour standards and codes, minimum wages, employment insurance qualification periods and social assistance, and
 - (b) Quebec's measures pertaining to language requirements.

Article 703: Extent of Obligations

1. For the purposes of Article 102(1)(b) and (c) (Extent of Obligations), each Party shall, through appropriate measures, ensure compliance with this Chapter by

(a) its regional, local, district and other forms of municipal government, and

(b) its other governmental bodies and by non-governmental bodies that exercise authority delegated by law.

2. Each Party shall, through appropriate measures, seek compliance with this Chapter by non-governmental bodies other than those that exercise authority delegated by law.

Article 704: Relationship to Other Agreements

In the event of an inconsistency in a particular case between a provision of this Chapter and a provision of any other agreement between two or more Parties respecting matters covered by this Chapter, the agreement that is more conducive to labour mobility in that particular case prevails to the extent of the inconsistency. It is understood that any such other agreement may prevail only as between the Parties that are party to that agreement.

Article 705: Residency Requirements

1. Subject to Article 708, no Party shall require a worker of a Party to be resident in its territory as a condition of:

(a) eligibility for employment; or

(b) certification relating to the worker's occupation.

2. With respect to the Federal Government, paragraph 1 (a) means that, subject to Article 708, it shall not require a worker of a Party to be a resident of a particular province or territory as a condition of eligibility to apply, in an external appointment or hiring process, for appointment or hiring to a position or job in

(a) federal public service departments, departmental corporations, Crown corporations, separate agencies and other portions of the public administration which are listed in Schedules I to VI of the *Financial Administration Act*, Revised Statutes of Canada, chapter F-10, as amended from time to time, and

(b) other Crown corporations, as defined in the *Financial Administration Act*, Revised Statutes of Canada, chapter F-10, as amended from time to time,

which are not covered under paragraph (a).

Article 706: Certification of Workers

1. Subject to paragraphs 2, 3, 4 and 6 and Article 708, any worker certified for an occupation by a regulatory authority of a Party shall, upon application, be certified for that occupation by each other Party which regulates that occupation without any requirement for any material additional training, experience, examinations or assessments as part of that certification procedure.

2. Subject to paragraphs 3, 4 and Article 708, each Party shall recognize any worker holding a jurisdictional certification bearing the Red Seal endorsement under the Interprovincial Standards Red Seal Program as qualified to practice the occupation identified in the certification.

3. It is understood that a regulatory authority of a Party may, as a condition of certification for any worker referred to in paragraph 1 or 2, impose requirements on that worker (other than requirements for material additional training, experience, examinations or assessments), including requirements to:

- (a) pay an application or processing fee;
- (b) obtain insurance, malpractice coverage or similar protection;
- (c) post a bond;
- (d) undergo a criminal background check;
- (e) provide evidence of good character;
- (f) demonstrate knowledge of the measures maintained by that Party applicable to the practice of the occupation in its territory;
- (g) provide a certificate, letter or other evidence from the regulatory authority in each territory in which they are currently certified confirming that their certification in that territory is in good standing;

provided that:

- (h) subject to paragraph (5)(c), any requirements referred to in paragraphs (a) to (f) are the same as, or substantially similar to but no more onerous than, those imposed by the regulatory authority on its own workers as part of the normal certification process; and
- (i) the requirement does not create a disguised restriction on labour mobility.

4. Nothing in paragraphs 1 or 2 limits the ability of a regulatory authority of a Party to:

- (a) refuse to certify a worker or impose terms, conditions or restrictions on his or her ability to practice where such action is considered necessary to protect the public interest as a result of complaints or disciplinary or criminal proceedings in any other jurisdiction relating to the competency, conduct or character of that worker;
- (b) impose additional training, experience, examinations or assessments as a condition of certification where the person has not practiced the occupation within a specified period of time;
- (c) require the worker to demonstrate proficiency in either English or French as a condition of certification in cases where there was no equivalent language proficiency requirement imposed upon, and satisfied by, the worker as a condition of the worker's certification in his or her current certifying jurisdiction;
- (d) assess the equivalency of a practice limitation, restriction or condition imposed on a worker in his or her current certifying jurisdiction to any practice limitation, restriction or condition that may be applied by the regulatory authority to a worker in its territory, and apply an equivalent practice limitation, restriction or condition to the worker's certification, or, where the regulatory authority has no provision for applying an equivalent limited, restricted or conditional certification, refuse to certify the worker;

provided that:

- (e) any such measure is the same as, or substantially similar to but no more onerous than, that imposed by the regulatory authority on its own workers; and
- (f) the measure does not create a disguised restriction on labour mobility.

5. Subject to Article 708, each Party shall ensure that any measure that it adopts or maintains relating to certification of workers of any other Party:

- (a) is published on the website of the relevant regulatory authority or through a readily accessible website of the Party;
- (b) results in expeditious certification; and
- (c) except for actual cost differentials, does not impose fees or other costs that are more burdensome than those imposed on its own workers.

6. Where a worker has been certified for an occupation by a regulatory authority of a Party, nothing in this Article prevents a regulatory authority of another Party from permitting the worker to practice that occupation in its territory without further certification.

Article 707: Occupational Standards

1. Each Party may adopt or maintain any occupational standard, and in doing so, may establish the level of protection that it considers to be appropriate in the circumstances. Parties agree, to the extent possible and where practical, to take steps to reconcile differences in occupational standards.
2. Further to paragraph 1, each Party shall, to the extent possible and where practical, adopt occupational standards based on common interprovincial standards, including occupational standards developed for the Interprovincial Standards Red Seal Program, or international standards. The Parties acknowledge their continued commitment to the Interprovincial Standards Red Seal Program, including the use of National Occupational Analyses, as a well-established means of establishing common interprovincial standards for trades.
3. If occupational standards have not been established in the territory of a Party in respect of a particular occupation but exist in the territory of any other Party, and the Party without the standards wishes to develop such standards, it shall do so in a manner conducive to labour mobility. A Party intending to develop such standards shall notify the other Parties of its intent and afford them an opportunity to comment on the development of those standards.
4. If occupational standards do not exist in the territories of any of the Parties in respect of an occupation and a Party considers it necessary to establish occupational standards for that occupation, the Parties agree that the process of development of new occupational standards shall occur in a manner conducive to labour mobility. A Party intending to develop new standards shall notify the other Parties of its intent and afford them an opportunity to comment on the development of those standards.
5. If a Party considers it necessary to make changes to any standards in respect of an occupation, the Parties agree that the process for making such changes shall occur in a manner conducive to labour mobility. A Party intending to make such changes shall notify the other Parties and afford them an opportunity to comment on the modification of those standards.

Article 708: Legitimate Objectives

1. Where it is established that a measure falling within the scope and coverage of this Chapter is inconsistent with Article 401, Article 402, Article 403 or Article 705, or paragraphs 1, 2 or 5 of Article 706, that measure is still permissible under this Chapter where it can be demonstrated that:
 - (a) the purpose of the measure is to achieve a legitimate objective;
 - (b) the measure is not more restrictive to labour mobility than necessary to achieve that legitimate objective; and
 - (c) the measure does not create a disguised restriction to labour mobility.
2. For greater certainty, for purposes of the application of paragraph 1(b) of Article

708 to paragraph 1, 2 or 5 of Article 706, a mere difference between the certification requirements of a Party related to academic credentials, education, training, experience, examination or assessment methods and those of any other Party is not, by itself, sufficient to justify the imposition of additional education, training, experience, examination or assessment requirements as necessary to achieve a legitimate objective. In the case of a difference related to academic credentials, education, training or experience, the Party seeking to impose an additional requirement must be able to demonstrate that any such difference results in an actual material deficiency in skill, area of knowledge or ability. As an example, the imposition of a requirement for additional, education, training or experience may be justified under paragraph (1)(b) where a Party can demonstrate that:

- (a) there is a material difference between the scope of practice of the occupation for which the worker is seeking to be certified in its territory and the scope of practice of the occupation for which the worker has been certified by the regulatory authority of another Party; and
- (b) as a result of that difference, the worker lacks a critical skill, area of knowledge or ability required to perform the scope of practice of the occupation for which the worker seeks to be certified.

3. Where a Party adopts or maintains a measure under paragraph 1, it shall give written notice to the Forum of the measure, in the form, and containing the information, considered appropriate by the Forum. The notice shall indicate the Party's justification for the measure and the anticipated duration of the measure.

4. The Forum shall develop and implement a framework for the Parties to establish a list of specific measures taken under paragraph 1 for which notice has been given to the Forum under paragraph 3. This list will be posted by the Forum on a public website.

Article 709: Implementation, Administration and Assessment

1. The Forum shall:

- (a) promote the implementation of and ongoing adherence to this Chapter and develop a work plan or plans related to those objectives;
- (b) develop and implement the framework for the implementation of Article 707;
- (c) develop the form and content required for notices under paragraph 3 of Article 708;
- (d) develop and implement the framework for the posting of measures under paragraph 4 of Article 708; and
- (e) annually produce a report on the operation of this Chapter and submit that report to the Committee.

2. The annual report referred to in paragraph 1(e) shall include:

- (a) an assessment of the effectiveness of this Chapter, including an assessment of whether there have been any unintended adverse consequences, together with appropriate recommendations to address concerns identified in the assessment, including recommended amendments to this Chapter;
- (b) a list of measures for which notice has been given under paragraph 3 of Article 708, together with a description of their respective justification and their anticipated duration; and
- (c) a summary of any disputes that have arisen between the Parties during the year concerning the interpretation or application of this Chapter and the results of any consultations or other dispute resolution procedures resorted to by the Parties concerned to resolve the disputes.

3. The Forum may establish any committees that it considers necessary to assist it in the implementation of any work plan. The committees may be composed of representatives of the Parties and, where appropriate, of relevant regulatory authorities, other non-governmental bodies and interest groups.

Article 710: Consultations and Dispute Resolution

Chapter Seventeen shall apply to consultations and the resolution of disputes arising out of this Chapter.

Article 711: Definitions

1. In this Chapter:

certified means that a worker holds a certificate, licence, registration or other form of official recognition issued by a regulatory authority of a Party which attests to the worker being qualified and, where applicable, authorized to practice a particular occupation or to use a particular occupational title in the territory of that Party. For greater certainty, “certified” does not include only having work experience in a given occupation gained within a Party where certification is not required in order to practice that occupation;

Forum means the Forum of Labour Market Ministers;

legitimate objective means one or more of the following objectives pursued within the territory of a Party:

- (a) public security and safety;
- (b) public order;
- (c) protection of human, animal or plant life or health;

- (d) protection of the environment;
- (e) consumer protection;
- (f) protection of the health, safety and well-being of workers;
- (g) provision of adequate social and health services to all its geographic regions; and
- (h) programs for disadvantaged groups;

National Occupational Analysis means a document developed pursuant to the Interprovincial Standards Red Seal Program that details tasks and subtasks performed by workers in a trade;

non-governmental body, with or without authority delegated by law, includes professional corporations and associations, hospitals, health units, long-term care facilities, clinics, other health care/service organizations and authorities, professional regulatory bodies, school authorities, universities, colleges and other educational and training institutions, trade unions and industry associations;

non-governmental body that exercises authority delegated by law means any non-governmental body to whom authority has been delegated by provincial or federal statute to set or implement measures related to:

- (a) the establishment of occupational standards or certification requirements;
- (b) the assessment of the qualifications of workers against established occupational standards or certification requirements; or
- (c) the official recognition that an individual meets established occupational standards or certification requirements;

occupation means a set of jobs which, with some variation, are similar in their main tasks or duties or in the type of work performed.

occupational standard means the skills, knowledge and abilities required for an occupation as established by a regulatory authority of a Party and against which the qualifications of an individual in that occupation are assessed;

regulatory authority of a Party means a department, ministry or similar agency of government of a Party or a non-governmental body that exercises authority delegated by law;

worker means an individual, whether employed, self-employed or unemployed, who performs or seeks to perform work for pay or profit; and

worker of a Party means a worker resident in the territory of a Party.

Français

Ontario Labour Mobility Act, 2009

S.O. 2009, CHAPTER 24

Consolidation Period: From November 6, 2013 to the [e-Laws currency date](#).

Last amendment: 2013, c. 6, s. 75.

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PART I **INTERPRETATION**

Purposes

1. The purposes of this Act are,

- (a) to eliminate or reduce measures established or implemented by Ontario regulatory authorities that restrict or impair the ability of an individual to become certified in Ontario in a regulated occupation in which the individual is certified by an out-of-province regulatory authority; and
- (b) to support the Government of Ontario in fulfilling its obligations under Chapter Seven of the Agreement on Internal Trade. 2009, c. 24, s. 1.

Definitions

2. (1) In this Act,

“Agreement on Internal Trade” means the Agreement on Internal Trade signed in 1994 by the governments of Canada, the provinces of Canada, the Northwest Territories and the Yukon Territory, as amended from time to time; (“Accord sur le commerce intérieur”)

“authorizing certificate”, in relation to an occupation, means,

- (a) a certificate, licence, registration, or other form of official recognition, granted by a regulatory authority to an individual, which attests to the individual being qualified to practise the occupation and authorizes the individual to practise the occupation, use a title or designation relating to the occupation, or both, or
- (b) a certificate, licence, registration, or other form of official recognition, granted by a regulatory authority to an individual, which attests to the individual being qualified to practise the occupation but does not authorize the practice of the occupation or the use of a title or designation relating to the occupation, if the occupation and the regulatory authority granting the certificate, licence, registration or other form of official recognition respecting the occupation are prescribed for the purpose of this clause; (“certificat d’autorisation”)

“authorizing statute”, in relation to an Ontario regulatory authority, means the Act that authorizes the Ontario regulatory authority to certify individuals in one or more occupations, as set out opposite the Ontario regulatory authority in Column 2 of Table 1; (“loi habilitante”)

“certify” means to grant an authorizing certificate for an occupation to an individual; (“accréditation”, “reconnaissance professionnelle”, “accréditer”)

“co-ordinating Minister” means the Minister of Training, Colleges and Universities or such other member of the Executive Council to whom responsibility for the administration of this Act may be assigned or transferred under the *Executive Council Act*; (“ministre coordonnateur”)

“instrument of a legislative nature” includes but is not limited to a regulation, by-law, rule, directive, guideline or order of a legislative nature; (“texte de nature législative”)

“municipal governmental regulatory authority” means an Ontario regulatory authority listed under the heading “Municipal Governmental Regulatory Authorities — Public Acts” in Table 1; (“autorité de réglementation gouvernementale municipale”)

“non-governmental regulatory authority” means an Ontario regulatory authority listed under the heading “Non-Governmental Regulatory Authorities — Private Acts” or “Non-Governmental Regulatory Authorities — Public Acts” in Table 1; (“autorité de réglementation non gouvernementale”)

“occupation” means a set of jobs which, with some variation, are similar in their main tasks or duties or in the type of work performed; (“métier ou profession”)

“occupational standards”, in relation to an occupation, means the knowledge, skills and judgment that an individual must possess in order to be certified in the occupation, as established by a body or individual that is authorized by law to establish them, and against which a regulatory authority measures the qualifications of an individual who applies for certification in the occupation when assessing whether the individual is qualified to practise the occupation; (“normes professionnelles”)

“Ontario regulatory authority” means a body or individual listed in Column 3 of Table 1; (“autorité de réglementation ontarienne”)

“out-of-province regulatory authority” means a regulatory authority that is authorized to certify individuals in an occupation under an Act of Canada or of a province or territory of Canada that is a party to the Agreement on Internal Trade, other than Ontario; (“autorité de réglementation extraprovinciale”)

“prescribed” means prescribed by the regulations made under this Act; (“prescrit”)

“provincial governmental regulatory authority” means an Ontario regulatory authority listed under the heading “Provincial Governmental Regulatory Authorities — Public Acts” in Table 1; (“autorité de réglementation gouvernementale provinciale”)

“regulated occupation” means an occupation for which an Ontario regulatory authority is authorized, under an Act set out opposite the Ontario regulatory authority in Column 2 of Table 1, to grant a specific authorizing certificate to an individual; (“métier ou profession réglementé”)

“regulatory authority” means a body or individual that is authorized by law to certify individuals in an occupation. (“autorité de réglementation”) 2009, c. 24, s. 2 (1).

Same

(2) For greater certainty, the reference in the definition of “out-of-province regulatory authority” in subsection (1) to an Act of Canada that authorizes a regulatory authority to certify individuals in an occupation does not include the *Trade-marks Act* (Canada). 2009, c. 24, s. 2 (2).

Monitor

Monitor re private Acts

3. (1) For the purposes of this Act, the monitor for a non-governmental regulatory authority whose authorizing statute is a private Act is the individual or body prescribed as the monitor for the regulatory authority. 2009, c. 24, s. 3 (1).

Monitor re public Acts

(2) For the purposes of this Act, the monitor for a non-governmental regulatory authority whose authorizing statute is a public Act is,

- (a) if no monitor has been prescribed for the regulatory authority,
 - (i) the member of the Executive Council who is responsible for the administration of the public Act, or
 - (ii) if more than one member of the Executive Council is responsible for the administration of the public Act, the member who is responsible for the administration of the public Act in respect of the regulatory authority; or
- (b) if a monitor has been prescribed for the regulatory authority, the individual or body prescribed as the monitor. 2009, c. 24, s. 3 (2).

Public Accountants Council

4. For the purpose of every section of this Act, other than sections 8 and 9, The Public Accountants Council for the Province of Ontario shall be deemed to be a non-governmental regulatory authority and its authorizing statute shall be deemed to be the *Public Accounting Act, 2004*. 2009, c. 24, s. 4.

Crown bound

5. This Act binds the Crown. 2009, c. 24, s. 5.

Commitment to Red Seal Program

6. Nothing in this Act restricts the Crown from taking any action that it considers advisable in order to fulfil its ongoing commitment to the Interprovincial Standards Red Seal Program. 2009, c. 24, s. 6.

**PART II
LABOUR MOBILITY CODE**

Labour Mobility Code

7. This Part shall be known in English as the Labour Mobility Code and in French as Code de mobilité de la main-d’œuvre. 2009, c. 24, s. 7.

Residency

Ontario residency cannot be required

8. (1) No Ontario regulatory authority shall require that an individual reside in Ontario as a condition of being certified in a regulated occupation, if the individual resides in another province or territory of Canada that is a party to the Agreement on Internal Trade. 2009, c. 24, s. 8 (1).

Residency in municipality cannot be required

(2) No municipal governmental regulatory authority shall require that an individual reside in its geographic area of jurisdiction as a condition of eligibility for employment, if the individual resides in a province or territory of Canada that is a party to the Agreement on Internal Trade. 2009, c. 24, s. 8 (2).

When applicant is certified by out-of-province regulatory authority

9. (1) This section applies if an individual applying to an Ontario regulatory authority for certification in a regulated occupation is already certified in the same occupation by an out-of-province regulatory authority. 2009, c. 24, s. 9 (1).

Material additional training, etc., cannot be required

(2) The Ontario regulatory authority shall not require, as a condition of certifying the individual in the regulated occupation, that the individual have, undertake, obtain or undergo any material additional training, experience, examinations or assessments. 2009, c. 24, s. 9 (2).

Exception, certification requirements listed on website

(3) Despite subsection (2), the Ontario regulatory authority is not prohibited from imposing on the individual, as a condition of certifying the individual in the regulated occupation, any requirement that,

- (a) is listed on the website of the Ministry of Training, Colleges and Universities or such other publicly accessible website as may be prescribed; and
- (b) is stated on the website to be a permissible certification requirement for that regulated occupation, adopted by the Government of Ontario under Article 708 of the Agreement on Internal Trade. 2009, c. 24, s. 9 (3).

Other exceptions

(4) Despite subsection (2), if the conditions set out in subsection (6) are met, the Ontario regulatory authority is not prohibited from requiring that the individual do one or both of the following as a condition of being certified in the regulated occupation:

1. Demonstrate proficiency in English or in French if equivalent proficiency in the language was not a condition of certification of the individual by the out-of-province regulatory authority.
2. Undertake, obtain or undergo material additional training, experience, examinations or assessments if the individual has not practised the regulated occupation within a period of time fixed by the Ontario regulatory authority, before submitting his or her application for certification to the Ontario regulatory authority. 2009, c. 24, s. 9 (4).

Other permitted certification requirements

(5) Subsection (2) does not prohibit the Ontario regulatory authority from requiring that the individual do one or more of the following as a condition of being certified in the regulated occupation:

1. If the conditions set out in subsection (6) are met:
 - i. Pay an application or processing fee.
 - ii. Obtain malpractice insurance or any other insurance or similar protection.
 - iii. Post a bond.
 - iv. Undergo a criminal background check.
 - v. Provide evidence of good character.
2. If the condition set out in paragraph 2 of subsection (6) is met, provide a certificate, letter or other evidence from every out-of-province regulatory authority by which the individual is currently certified in the occupation, confirming that the authorizing certificate that the regulatory authority granted to the individual for the occupation is in good standing.
3. If the conditions set out in subsection (6) are met, demonstrate knowledge of matters applicable to the practice of the regulated occupation in Ontario, as long as this does not involve material additional training, experience, examinations or assessments.
4. If the conditions set out in subsection (6) are met, meet any other requirement specified by the Ontario regulatory authority that does not involve material additional training, experience, examinations or assessments. 2009, c. 24, s. 9 (5).

Conditions for subss. (4) and (5)

(6) The conditions referred to in subsections (4) and (5) are:

1. Subject to subsection (9), the requirement imposed by the Ontario regulatory authority on applicants who are certified by an out-of-province regulatory authority must be the same as, or substantially similar to but no more onerous than, the requirement imposed by the Ontario regulatory authority on applicants who are not certified by an out-of-province regulatory authority.
2. The requirement imposed by the Ontario regulatory authority must not be a disguised restriction on labour mobility. 2009, c. 24, s. 9 (6).

Permitted measures

(7) This section does not prohibit the Ontario regulatory authority from carrying out the following measures in respect of the individual if the conditions set out in subsection (8) are met:

1. Refusing to certify the individual or imposing terms, conditions or limitations on the individual's authorizing certificate if, in the opinion of the Ontario regulatory authority, such action is necessary to protect the public interest as a result of complaints, or criminal, disciplinary or other proceedings, against the individual in any jurisdiction whether in or outside Canada, relating to the individual's competency, conduct or character.

2. If the authorizing certificate granted to the individual by the out-of-province regulatory authority is subject to a term, condition or limitation,
 - i. imposing an equivalent term, condition or limitation on the authorizing certificate to be granted by the Ontario regulatory authority to the individual, or
 - ii. refusing to certify the individual, if the Ontario regulatory authority does not impose an equivalent term, condition or limitation on the authorizing certificate that it grants for the occupation. 2009, c. 24, s. 9 (7).

Conditions for subs. (7)

(8) The conditions referred to in subsection (7) are:

1. Subject to subsection (9), the measure carried out by the Ontario regulatory authority with respect to applicants who are certified by an out-of-province regulatory authority must be the same as, or substantially similar to but no more onerous than, the measure carried out by the Ontario regulatory authority with respect to applicants who are not certified by an out-of-province regulatory authority.
2. The measure carried out by the Ontario regulatory authority must not be a disguised restriction on labour mobility. 2009, c. 24, s. 9 (8).

Costs

(9) The Ontario regulatory authority shall ensure that any requirements it imposes on the individual, and any measures it carries out with respect to the individual, in connection with the certification of the individual in the regulated occupation do not result in the imposition on the individual of fees or other costs that are more onerous than those the Ontario regulatory authority would impose if the individual were not certified by an out-of-province regulatory authority, unless the difference in such fees or other costs reflects the actual cost differential to the Ontario regulatory authority. 2009, c. 24, s. 9 (9).

Expeditious certification

(10) The Ontario regulatory authority shall ensure that its imposition of certification requirements on the individual under subsections (3), (4) and (5) and its imposition of terms, conditions or limitations on the individual's authorizing certificate under subsection (7) do not prevent the expeditious certification of the individual. 2009, c. 24, s. 9 (10).

Transition

10. Sections 8 and 9 apply to,

- (a) an application for certification made to an Ontario regulatory authority on or after the day this section comes into force; and
- (b) an application for certification made to an Ontario regulatory authority before the day this section comes into force, if the application has not been finally decided before that day. 2009, c. 24, s. 10.

Duty to publish

11. Every Ontario regulatory authority shall publish, on a publicly accessible website maintained by the regulatory authority, every requirement that the regulatory authority imposes, as a condition of certification in a regulated occupation, on applicants who are already certified in the same occupation by an out-of-province regulatory authority. 2009, c. 24, s. 11.

Occupational standards

12. (1) Every Ontario regulatory authority shall, to the extent possible and where practical,

- (a) ensure that the process it follows in establishing or amending occupational standards for the occupations for which it is authorized to grant an authorizing certificate is conducive to labour mobility within Canada;
- (b) take steps to reconcile differences between the occupational standards it has established for an occupation and occupational standards in effect with respect to the same occupation in the other provinces and territories of Canada that are parties to the Agreement on Internal Trade; and
- (c) ensure that the occupational standards it establishes for each occupation for which it is authorized to grant an authorizing certificate are consistent with such common interprovincial or international occupational standards as may have been developed for that occupation, including occupational standards developed under the Interprovincial Standards Red Seal Program. 2009, c. 24, s. 12 (1).

No limitation

(2) Subsection (1) does not prevent an Ontario regulatory authority from establishing such occupational standards as it considers appropriate to protect the public, if it is authorized to do so by its authorizing statute. 2009, c. 24, s. 12 (2).

Notice of proposed occupational standards

13. If an Ontario regulatory authority wishes to establish or amend occupational standards for an occupation for which it is authorized to grant authorizing certificates, it shall,

- (a) give notice of the proposed new or amended standards to,
 - (i) its monitor, if any,
 - (ii) the co-ordinating Minister, and
 - (iii) the out-of-province regulatory authorities that grant authorizing certificates in the same occupation; and
- (b) afford those out-of-province regulatory authorities an opportunity to comment on the development of the new or amended standards. 2009, c. 24, s. 13.

PART III

CONFLICTS WITH LABOUR MOBILITY CODE

Conflict

14. (1) If the Labour Mobility Code conflicts with an Ontario regulatory authority's authorizing statute or an instrument of a legislative nature made under that statute, the Labour Mobility Code prevails to the extent of the conflict. 2009, c. 24, s. 14 (1).

Same

(2) This conflict provision prevails over a conflict provision in an Ontario regulatory authority's authorizing statute, even if the conflict provision in the authorizing statute is enacted after this Act, unless the conflict provision in the authorizing statute refers expressly to the Labour Mobility Code. 2009, c. 24, s. 14 (2).

Regulations, etc., to conform

15. Within 12 months after the day this section comes into force or within such longer period as may be prescribed, every non-governmental and provincial governmental regulatory authority shall take such steps as are within its power to make, amend or revoke instruments of a legislative nature under its authorizing statute so that they conform with the Labour Mobility Code. 2009, c. 24, s. 15.

PART IV

ENFORCEMENT

REVIEWS AND REQUESTS

Reviews and requests by monitor

16. (1) The monitor for a non-governmental regulatory authority may do one or more of the following:
- 1. Review the instruments of a legislative nature under the regulatory authority's authorizing statute in order to assess their conformity with the Labour Mobility Code.
 - 2. Request the regulatory authority to take such steps as are within its power to make, amend or revoke an instrument of a legislative nature under its authorizing statute so that the instrument conforms with the Labour Mobility Code.
 - 3. Review the certification processes and practices of the regulatory authority in order to assess their compliance with the Labour Mobility Code.
 - 4. Request the regulatory authority to provide information and reports with respect to any matter relating to compliance with the Labour Mobility Code or any matter relating to the administration of Chapter Seven of the Agreement on Internal Trade.
 - 5. Request the regulatory authority to do anything that, in the opinion of the monitor, is necessary or advisable to implement, or carry out the intent and purposes of, the Labour Mobility Code or a decision of a presiding body established or convened under the Agreement on Internal Trade.
 - 6. If the Lieutenant Governor in Council makes an order in council under subsection 17 (1), request the regulatory authority to publish it in accordance with the monitor's directions. 2009, c. 24, s. 16 (1).

Duty to comply

(2) If the monitor requests the regulatory authority to do anything under subsection (1), the regulatory authority shall comply with the request within such time and in such manner as the monitor may specify. 2009, c. 24, s. 16 (2).

AMENDING, ETC., ONTARIO REGULATORY AUTHORITY'S INSTRUMENTS

Power of L.G. in C. to make, amend or revoke instruments

17. (1) If the monitor for a non-governmental regulatory authority makes a request under paragraph 2 of subsection 16 (1) and the regulatory authority does not comply with the request within the time and in the manner specified by the monitor, the Lieutenant Governor in Council may make, amend or revoke the instrument in question for the purpose of ensuring that it conforms with the Labour Mobility Code,

- (a) by regulation under the regulatory authority's authorizing statute, if the authorizing statute is a public Act and the instrument in question is required to be published on the e-Laws website because of the application of Part III of the *Legislation Act, 2006*;
- (b) by order in council under the regulatory authority's authorizing statute, if the authorizing statute is a public Act and the instrument in question is not required to be published on the e-Laws website because of the non-application of Part III of the *Legislation Act, 2006*; or
- (c) by order in council under this Act, if the regulatory authority's authorizing statute is a private Act. 2009, c. 24, s. 17 (1).

Subject matter

(2) A regulation or an order in council under subsection (1) may be made with respect to any matter in respect of which the regulatory authority's authorizing statute authorizes the instrument in question to be made. 2009, c. 24, s. 17 (2).

Authority to override

- (3) In addition to the authority set out in subsection (2), a regulation or an order in council under subsection (1) may,
 - (a) prescribe provisions to operate in place of a provision of the regulatory authority's authorizing statute or of any other instrument of a legislative nature made under that statute; and
 - (b) may state that it applies despite a provision of the regulatory authority's authorizing statute or of any other instrument of a legislative nature made under that statute. 2009, c. 24, s. 17 (3).

Conflict

(4) If a provision of a regulation or of an order in council made by the Lieutenant Governor in Council under subsection (1) conflicts with a provision of the regulatory authority's authorizing statute or of any other instrument of a legislative nature made under that statute, the provision of the regulation or order in council made by the Lieutenant Governor in Council under subsection (1) prevails to the extent of the conflict. 2009, c. 24, s. 17 (4).

Legislation Act, 2006

(5) Part III (Regulations) of the *Legislation Act, 2006* does not apply to an order in council made under subsection (1). 2009, c. 24, s. 17 (5).

ADMINISTRATIVE PENALTIES

Order to pay administrative penalty

18. (1) If the monitor for a non-governmental regulatory authority believes that the regulatory authority has contravened subsection 16 (2), the monitor may serve an order on the regulatory authority ordering it to pay an administrative penalty in accordance with the regulations made under this Act. 2009, c. 24, s. 18 (1).

Purpose of administrative penalty

(2) An administrative penalty may be ordered under subsection (1) to encourage compliance with a request made under subsection 16 (1). 2009, c. 24, s. 18 (2).

Content of order

- (3) An order under subsection (1) shall,
 - (a) describe the regulatory authority's contravention;
 - (b) specify the amount of the administrative penalty that the monitor is ordering the regulatory authority to pay, specify that it must be paid to the Minister of Finance, and specify the time within which and the manner in which it must be paid; and
 - (c) state that the regulatory authority may apply in accordance with subsection (8) for a review of the order by the coordinating Minister or his or her designate. 2009, c. 24, s. 18 (3).

Notice of intent to issue order

(4) A monitor shall not serve an order on a regulatory authority under subsection (1) unless, before doing so, he or she serves notice on the regulatory authority of the intent to issue the order and gives the regulatory authority an opportunity to make written submissions with respect to the proposed order in accordance with subsection (7). 2009, c. 24, s. 18 (4).

One-year limitation

(5) A notice of intent shall not be served under subsection (4) more than one year after the regulatory authority's alleged contravention first came to the knowledge of the monitor. 2009, c. 24, s. 18 (5).

Content of notice of intent

- (6) A notice of intent under subsection (4) shall,
 - (a) describe the regulatory authority's alleged contravention;

- (b) state that the regulatory authority may make written submissions to the monitor in accordance with subsection (7). 2009, c. 24, s. 18 (6).

Written submissions

(7) A regulatory authority that is served with a notice of intent under subsection (4) may make written submissions to the monitor to explain any matter set out in the notice of intent, within 30 days after the day the notice of intent was served on the regulatory authority or within such longer period as may be specified in the notice of intent. 2009, c. 24, s. 18 (7).

Application for review

(8) An application for review of an order to pay an administrative penalty must be in a form approved by the monitor and must be served on the co-ordinating Minister,

- (a) within 15 days after the day the order was served on the regulatory authority; or
- (b) if the co-ordinating Minister or his or her designate considers it appropriate in the circumstances to extend the time for applying, within such longer period as the co-ordinating Minister or his or her designate specifies. 2009, c. 24, s. 18 (8).

If no review requested

(9) If a regulatory authority that has been served with an order to pay an administrative penalty does not apply for a review in accordance with subsection (8), the regulatory authority shall pay the administrative penalty specified in the order to the Minister of Finance within the time and in the manner specified in the order. 2009, c. 24, s. 18 (9).

If review requested

(10) If a regulatory authority that has been served with an order to pay an administrative penalty applies for a review in accordance with subsection (8), the co-ordinating Minister or his or her designate shall conduct the review in accordance with the regulations made under this Act. 2009, c. 24, s. 18 (10).

Decision

(11) Upon a review, the person conducting the review may,

- (a) find that the regulatory authority did not contravene subsection 16 (2) and rescind the order;
- (b) find that the regulatory authority did contravene subsection 16 (2) and affirm the order; or
- (c) find that although the regulatory authority did contravene subsection 16 (2), the amount of the administrative penalty specified in the order is excessive in the circumstances or is, by its magnitude, punitive in nature having regard to all the circumstances, and amend the order by reducing the amount of the penalty. 2009, c. 24, s. 18 (11).

Decision final

(12) A decision under subsection (11) is final. 2009, c. 24, s. 18 (12).

Payment after review

(13) If the person conducting the review finds that the regulatory authority did contravene subsection 16 (2), the regulatory authority shall pay the administrative penalty specified in the decision to the Minister of Finance within the time and in the manner specified in the decision. 2009, c. 24, s. 18 (13).

Other means not a bar

(14) An order may be served under subsection (1) and a decision may be made under clause (11) (b) or (c) even though a payment order has been or may be issued to the regulatory authority under section 21 with respect to the same contravention. 2009, c. 24, s. 18 (14).

Enforcement of administrative penalty

19. (1) If a regulatory authority that is required to pay an administrative penalty under subsection 18 (9) or (13) fails to pay it within the time specified in the order of the monitor or in the decision of the person who conducted the review, as the case may be, the order or the decision, as the case may be, may be filed with a local registrar of the Superior Court of Justice and may be enforced as if it were an order of the court. 2009, c. 24, s. 19 (1).

Interest

(2) Section 129 of the *Courts of Justice Act* applies in respect of an order or decision filed with the Superior Court of Justice under subsection (1), and the date on which the order or decision is filed under subsection (1) shall be deemed to be the date of the order that is referred to in section 129 of the *Courts of Justice Act*. 2009, c. 24, s. 19 (2).

Debt to Crown

20. If a regulatory authority that is required to pay an administrative penalty under subsection 18 (9) or (13) fails to pay it within the time specified in the order of the monitor or in the decision of the person who conducted the review, as the case

may be, the unpaid amount of the administrative penalty is a debt due to the Crown in right of Ontario and may be recovered by any remedy or procedure available to the Crown by law. 2009, c. 24, s. 20.

RECOVERY OF AMOUNTS PAID UNDER AGREEMENT ON INTERNAL TRADE

Right of recovery by Crown

21. (1) If the Crown in right of Ontario is ordered to pay a penalty or tariff costs under a final order made by a presiding body established or convened under the Agreement on Internal Trade, and the order is wholly or partially the result of non-compliance by a municipal governmental regulatory authority with the Labour Mobility Code, non-compliance by a non-governmental regulatory authority with the Labour Mobility Code and with subsection 16 (2), or non-compliance by a College, as defined in the *Regulated Health Professions Act, 1991*, with any of sections 22.15 to 22.23 of Schedule 2 to that Act and with subsection 5 (2) of that Act, the Crown has the right to recover from the regulatory authority or the College, as the case may be, the amount paid by the Crown under the presiding body's final order. 2009, c. 24, s. 21 (1).

Payment order

(2) Where the Crown in right of Ontario has a right of recovery against a regulatory authority or a College under subsection (1), the co-ordinating Minister may issue a payment order to the regulatory authority or the College, as the case may be, ordering it to pay to the Minister of Finance all or part of the amount referred to in subsection (1) paid by the Crown under the presiding body's final order. 2009, c. 24, s. 21 (2).

Content of payment order

- (3) A payment order issued by the co-ordinating Minister under subsection (2) shall,
- (a) set out the amount paid by the Crown in right of Ontario under the presiding body's final order;
 - (b) describe the non-compliance of the regulatory authority or the College that resulted in the presiding body's final order;
 - (c) specify the amount that the co-ordinating Minister is ordering the regulatory authority or the College to pay, specify that it must be paid to the Minister of Finance, and specify the time within which and the manner in which it must be paid; and
 - (d) state that the regulatory authority or the College may appeal the payment order to the Superior Court of Justice on a question of law or fact or both, in accordance with the rules of court. 2009, c. 24, s. 21 (3).

Other means not a bar

(4) A payment order may be issued under subsection (2) to a non-governmental regulatory authority even though an order to pay an administrative penalty has been or may be served on the regulatory authority under subsection 18 (1), and even though a decision has been or may be made under clause 18 (11) (b) or (c), with respect to the same contravention. 2009, c. 24, s. 21 (4).

If no appeal brought

(5) If a regulatory authority or College to which a payment order is issued under subsection (2) does not appeal the payment order to the Superior Court of Justice in accordance with the rules of court, the regulatory authority or the College, as the case may be, shall pay the amount specified in the payment order to the Minister of Finance within the time and in the manner specified in the payment order. 2009, c. 24, s. 21 (5).

Appeal to court

22. (1) A regulatory authority or College to which a payment order is issued under section 21 may appeal the payment order to the Superior Court of Justice on a question of law or fact or both, in accordance with the rules of court. 2009, c. 24, s. 22 (1).

Co-ordinating Minister is party

(2) The co-ordinating Minister is a party to every appeal under this section. 2009, c. 24, s. 22 (2).

Powers of court

(3) On an appeal under this section, the court may affirm, rescind or alter the payment order appealed from and may exercise all powers of the co-ordinating Minister under section 21 and may direct the co-ordinating Minister to take any action which the co-ordinating Minister may take under section 21 and as the court considers proper, and for such purposes the court may substitute its opinion for that of the co-ordinating Minister or the court may refer the matter back to the co-ordinating Minister for reconsideration, in whole or in part, in accordance with such directions as the court considers proper. 2009, c. 24, s. 22 (3).

Enforcement of payment order

23. (1) If a regulatory authority or College fails to pay the amount specified in a payment order as required by subsection 21 (5), the payment order may be filed with a local registrar of the Superior Court of Justice and may be enforced as if it were an order of the court. 2009, c. 24, s. 23 (1).

Interest

(2) Section 129 of the *Courts of Justice Act* applies in respect of a payment order filed with the Superior Court of Justice under subsection (1), and the date on which the payment order is filed under subsection (1) shall be deemed to be the date of the order that is referred to in section 129 of the *Courts of Justice Act*. 2009, c. 24, s. 23 (2).

Debt to Crown

24. If a regulatory authority or College fails to pay the amount specified in a payment order as required by subsection 21 (5), or fails to pay the amount specified by the court within the time specified by the court on an appeal under section 22, the unpaid amount is a debt due to the Crown in right of Ontario and may be recovered by any remedy or procedure available to the Crown by law. 2009, c. 24, s. 24.

**PART V
REGULATIONS**

Regulations made by L.G. in C.

25. The Lieutenant Governor in Council may make regulations,

- (a) prescribing an individual or body as the monitor for a non-governmental regulatory authority for the purposes of this Act;
- (b) governing the administrative penalties that may be ordered under this Act and all matters necessary and incidental to the administration of a system of administrative penalties under this Act, including,
 - (i) prescribing the amount of an administrative penalty or providing for the determination of the amount of an administrative penalty by prescribing the method of calculating the amount and the criteria to be considered in determining the amount,
 - (ii) providing for different amounts to be paid, or different calculations or criteria to be used, depending on the circumstances that gave rise to the administrative penalty or the time at which the penalty is paid,
 - (iii) providing for the payment of lump sum amounts and daily amounts and prescribing the circumstances in which each type of amount may be required,
 - (iv) prescribing the maximum amount of an administrative penalty, whether a lump sum amount or daily amount and, in the case of a daily amount, prescribing the maximum number of days for which the daily amount may be required,
 - (v) prescribing additional information that must be included in an order for payment of an administrative penalty or a notice of intent to issue the order, and
 - (vi) governing the review by the co-ordinating Minister or his or her designate of an order for payment of an administrative penalty;
- (c) defining, for the purposes of this Act and the regulations, any word or expression that is used but not defined in this Act;
- (d) prescribing anything that is referred to in this Act as prescribed or that is required or permitted to be done in accordance with, or as provided in, the regulations made under this Act and for which a specific power is not otherwise provided in this Act. 2009, c. 24, s. 25.

Regulations made by co-ordinating Minister

26. The co-ordinating Minister may make regulations,

- (a) for the purpose of clause (b) of the definition of “authorizing certificate” in subsection 2 (1), prescribing one or more occupations and, for each occupation, prescribing one or more regulatory authorities that grant individuals a certificate, licence, registration or other form of official recognition that attests to the individual being qualified to practise the occupation but does not authorize the practice of the occupation or the use of a title or designation relating to the occupation;
- (b) prescribing a different publicly accessible website for the purpose of clause 9 (3) (a);
- (c) amending Table 1 in any way, including,
 - (i) adding a statute to, removing a statute from, or changing the title of a statute in Column 2, and
 - (ii) adding a regulatory authority to, removing a regulatory authority from, or changing the name of a regulatory authority in Column 3;
- (d) providing for any transitional matters that arise out of any amendment of Table 1. 2009, c. 24, s. 26.

Regulations made by monitors

27. Subject to the approval of the Lieutenant Governor in Council, the monitor for an Ontario regulatory authority may make a regulation prescribing a longer period for the Ontario regulatory authority for the purpose of section 15. 2009, c. 24, s. 27.

PART VI (OMITTED)

28., 29. OMITTED (AMENDS, REPEALS OR REVOKES OTHER LEGISLATION). 2009, c. 24, ss. 28, 29.

30., 31. OMITTED (PROVIDES FOR AMENDMENTS TO THIS ACT). 2009, c. 24, ss. 30, 31.

32.-35. OMITTED (AMENDS, REPEALS OR REVOKES OTHER LEGISLATION). 2009, c. 24, ss. 32-35.

PART VII (OMITTED)

36. OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THIS ACT). 2009, c. 24, s. 36.

37. OMITTED (ENACTS SHORT TITLE OF THIS ACT). 2009, c. 24, s. 37.

TABLE 1

NON-GOVERNMENTAL REGULATORY AUTHORITIES — PRIVATE ACTS		
Column 1	Column 2	Column 3
Item	Authorizing Statute	Ontario Regulatory Authority
1.	<i>Association of Architectural Technologists of Ontario Act, 1996</i>	Association of Architectural Technologists of Ontario
2.	<i>Association of the Chemical Profession of Ontario Act, 1984</i>	Association of the Chemical Profession of Ontario
3.	<i>Association of Municipal Clerks and Treasurers of Ontario Act, 1985</i>	Association of Municipal Clerks and Treasurers of Ontario
4.	<i>Association of Ontario Road Superintendents Act, 1996</i>	Association of Ontario Road Supervisors
5.	<i>Association of Registered Graphic Designers of Ontario Act, 1996</i>	The Association of Registered Graphic Designers of Ontario
6.	<i>Association of Registered Interior Designers of Ontario Act, 1984</i>	The Association of Registered Interior Designers of Ontario
7.	<i>Association of Translators and Interpreters of Ontario Act, 1989</i>	Association of Translators and Interpreters of Ontario
8.	REPEALED: 2009, c. 24, s. 31 (3).	
9.	<i>Chartered Industrial Designers Act, 1984</i>	Association of Chartered Industrial Designers of Ontario
10.	<i>Chartered Institute of Marketing Management of Ontario Act, 1988</i>	The Chartered Institute of Marketing Management of Ontario
11.	<i>The Chartered Secretaries of Ontario Act, 1958</i>	The Institute of Chartered Secretaries and Administrators in Ontario
12.	REPEALED: 2013, c. 6, s. 75 (1).	
13.	<i>Institute of Management Consultants of Ontario Act, 1983</i>	Institute of Certified Management Consultants of Ontario
14.	<i>Institute of Municipal Assessors Act, 1987</i>	Institute of Municipal Assessors
15.	<i>Municipal Law Enforcement Officers' Association (Ontario) Inc. Act, 1997</i>	Municipal Law Enforcement Officers' Association (Ontario) Inc.
16.	<i>Ontario Association of Certified Engineering Technicians and Technologists Act, 1998</i>	Ontario Association of Certified Engineering Technicians and Technologists
17.	<i>Ontario Association of Home Inspectors Act, 1994</i>	Ontario Association of Home Inspectors
18.	<i>Ontario Association of Landscape Architects Act, 1984</i>	The Ontario Association of Landscape Architects
19.	<i>Ontario Association of Property Standards Officers Act, 1992</i>	Ontario Association of Property Standards Officers
20.	<i>Ontario Association of Veterinary Technicians Act, 1993</i>	Ontario Association of Veterinary Technicians
21.	<i>Ontario Building Officials Association Act, 1992</i>	Ontario Building Officials Association
22.	<i>Ontario Home Economics Association Act, 1989</i>	Ontario Home Economics Association
23.	<i>Ontario Institute of the Purchasing Management Association of Canada Inc. Act, 1987</i>	Ontario Institute of the Purchasing Management Association of Canada Inc.
24.	<i>Ontario Professional Planners Institute Act, 1994</i>	Ontario Professional Planners Institute
25.	<i>The Ontario Registered Music Teachers' Association Act, 1946</i>	The Ontario Registered Music Teachers' Association
26.	REPEALED: 2009, c. 24, s. 31 (4).	

NON-GOVERNMENTAL REGULATORY AUTHORITIES — PUBLIC ACTS		
27.	<i>Architects Act</i>	Ontario Association of Architects
27.1	<i>Certified General Accountants Act, 2009</i>	The Certified General Accountants Association of Ontario
27.2	<i>Certified Management Accountants Act, 2009</i>	Certified Management Accountants of Ontario
28.	<i>Chartered Accountants Act, 2009</i>	The Institute of Chartered Accountants of Ontario
28.1	<i>Commodity Futures Act</i>	Ontario Securities Commission
29.	<i>Drugless Practitioners Act</i>	The Board of Directors of Drugless Therapy
Note: On the day the Statutes of Ontario, 2007, chapter 10, Schedule P, subsection 14 (1) comes into force, item 29 is repealed. See: 2009, c. 24, s. 30 (1).		
30.	<i>Early Childhood Educators Act, 2007</i>	College of Early Childhood Educators
31.	<i>Funeral, Burial and Cremation Services Act, 2002</i>	Registrar appointed by the deputy minister to the Minister responsible for the administration of the Act
Note: On the later of the day section 3 of the <i>Funeral, Burial and Cremation Services Act, 2002</i> comes into force and the day subsection 50 (2) of the <i>Delegated Administrative Authorities Act, 2012</i> comes into force, item 31 is repealed and the following substituted:		
31.	<i>Funeral, Burial and Cremation Services Act, 2002</i>	Registrar appointed by the deputy minister to the Minister responsible for the administration of the authorizing statute, or by the delegated administrative authority prescribed under clause 4 (1) (b) of the <i>Delegated Administrative Authorities Act, 2012</i> in relation to the authorizing statute
See: 2012, c. 8, Sched. 11, ss. 50 (1), 54 (4).		
31.1	<i>Insurance Act</i>	Financial Services Commission of Ontario
32.	<i>Law Society Act</i>	The Law Society of Upper Canada
32.1	<i>Mortgage Brokerages, Lenders and Administrators Act, 2006</i>	Financial Services Commission of Ontario
33.	<i>Ontario College of Teachers Act, 1996</i>	Ontario College of Teachers
33.1	<i>Ontario College of Trades and Apprenticeship Act, 2009</i>	Ontario College of Trades
34.	<i>Professional Engineers Act</i>	Association of Professional Engineers of Ontario
35.	<i>Professional Foresters Act, 2000</i>	Ontario Professional Foresters Association
36.	<i>Professional Geoscientists Act, 2000</i>	Association of Professional Geoscientists of Ontario
37.	<i>Public Accounting Act, 2004</i>	The Certified General Accountants Association of Ontario
38.	<i>Public Accounting Act, 2004</i>	The Institute of Chartered Accountants of Ontario
39.	<i>Public Accounting Act, 2004</i>	Certified Management Accountants of Ontario
39.1	<i>Registered Insurance Brokers Act</i>	Registered Insurance Brokers of Ontario
39.0.1	<i>Registered Human Resources Professionals Act, 2013</i>	Human Resources Professionals Association
39.2	<i>Securities Act</i>	Ontario Securities Commission
40.	<i>Social Work and Social Service Work Act, 1998</i>	Ontario College of Social Workers and Social Service Workers
41.	<i>Surveyors Act</i>	Association of Ontario Land Surveyors
42.	<i>Veterinarians Act</i>	College of Veterinarians of Ontario
MUNICIPAL GOVERNMENTAL REGULATORY AUTHORITIES — PUBLIC ACTS		
43.	<i>City of Toronto Act, 2006</i>	City of Toronto (the municipal corporation)
44.	<i>Municipal Act, 2001</i>	Each municipality, as defined in the authorizing statute (the municipal corporation), other than the City of Toronto
PROVINCIAL GOVERNMENTAL REGULATORY AUTHORITIES — PUBLIC ACTS		
45.	<i>Ambulance Act</i>	Director of the Emergency Health Services Branch of the Ministry of Health and Long-Term Care
46.	REVOKED: O. Reg. 129/13, s. 1 (2).	
47.	<i>Building Code Act, 1992</i>	Director, as defined in subsection 1 (1) of the authorizing statute
48.	<i>Crown Forest Sustainability Act, 1994</i>	Minister responsible for the administration of the authorizing statute
49.	<i>Education Act</i>	Minister of Education
50.	<i>Electricity Act, 1998, Part VIII</i>	The administrative authority designated under subsection 3 (2) of the Safety and Consumer Statutes Administration Act, 1996 or, if there is no designated administrative authority, the Minister responsible for the administration of the authorizing statute
Note: On a day to be named by proclamation of the Lieutenant Governor, item 50 is repealed and the following substituted:		
50.	<i>Electricity Act, 1998, Part VIII</i>	Electrical Safety Authority

See: 2012, c. 8, Sched. 11, ss. 50 (2), 54 (1).		
51.	<i>Environmental Protection Act</i>	Director, as defined in subsection 1 (2) of the authorizing statute
52.	<i>Motor Vehicle Dealers Act, 2002</i>	The administrative authority designated under subsection 3 (2) of the Safety and Consumer Statutes Administration Act, 1996 or, if there is no designated administrative authority, the Minister responsible for the administration of the authorizing statute
Note: On a day to be named by proclamation of the Lieutenant Governor, item 52 is repealed and the following substituted:		
52.	<i>Motor Vehicle Dealers Act, 2002</i>	The delegated administrative authority prescribed under clause 4 (1) (b) of the <i>Delegated Administrative Authorities Act, 2012</i> in relation to the authorizing statute or, if there is no administrative authority, the Minister responsible for the administration of the authorizing statute
See: 2012, c. 8, Sched. 11, ss. 50 (2), 54 (1).		
53.	<i>Nutrient Management Act, 2002</i>	Director, as defined in section 2 of the authorizing statute
54.	<i>Ontario Heritage Act</i>	Minister of Culture
55.	<i>Ontario Water Resources Act</i>	Director, as defined in subsection 1 (1) of the authorizing statute
56.	<i>Pesticides Act</i>	Director, as defined in subsection 1 (2) of the authorizing statute
56.1	<i>Private Security and Investigative Services Act, 2005</i>	Registrar, as defined in section 1 of the authorizing statute
57.	<i>Real Estate and Business Brokers Act, 2002</i>	The administrative authority designated under subsection 3 (2) of the Safety and Consumer Statutes Administration Act, 1996 or, if there is no designated administrative authority, the Minister responsible for the administration of the authorizing statute
Note: On a day to be named by proclamation of the Lieutenant Governor, item 57 is repealed and the following substituted:		
57.	<i>Real Estate and Business Brokers Act, 2002</i>	The delegated administrative authority prescribed under clause 4 (1) (b) of the <i>Delegated Administrative Authorities Act, 2012</i> in relation to the authorizing statute or, if there is no administrative authority, the Minister responsible for the administration of the authorizing statute
See: 2012, c. 8, Sched. 11, ss. 50 (2), 54 (1).		
58.	<i>Safe Drinking Water Act, 2002</i>	Director, within the meaning of subsection 2 (2) of the authorizing statute
59.	<i>Technical Standards and Safety Act, 2000</i>	The administrative authority designated under subsection 3 (2) of the Safety and Consumer Statutes Administration Act, 1996 or, if there is no designated administrative authority, the Minister responsible for the administration of the authorizing statute
Note: On a day to be named by proclamation of the Lieutenant Governor, item 59 is repealed and the following substituted:		
59.	<i>Technical Standards and Safety Act, 2000</i>	Technical Standards and Safety Authority
See: 2012, c. 8, Sched. 11, ss. 50 (2), 54 (1).		
60.	REVOKED: O. Reg. 129/13, s. 1 (2).	

2009, c. 24, Table 1; 2009, c. 24, ss. 30 (2, 3), 31; O. Reg. 333/11, ss. 1, 2; O. Reg. 129/13, s. 1; 2013, c. 6, s. 75.

Français

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Ms Elliot Spears
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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.

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April 4, 2014

BY EMAIL AND REGULAR MAIL

Ms A. Elliot Spears
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Dear Ms Spears:

RE: Trinity Western University Accreditation Decision – Discretion and Public Interest

You have asked for some guidance on discretionary decision-making by Convocation in respect of the Trinity Western University ("TWU") accreditation decision. In particular, you have asked for guidance on the approach to section 4.2 of the Law Society Act ("*LSA*"), which provides that in carrying out its functions, duties and powers, the Society shall have regard to the principle that the Society has a duty to protect the public interest.

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A. Executive Summary

Convocation will be making a discretionary decision whether or not to accredit Trinity Western University ("TWU"). The *Law Society Act* ("LSA") and By-Laws provide little concrete guidance to Convocation on how to exercise its discretion.

General administrative law principles governing the exercise of discretion are relevant to Convocation's decision-making. Discretion must "be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law...,in line with general principles of administrative law governing the exercise of discretion, and consistent with the Canadian *Charter of Rights and Freedoms*."¹

In exercising discretionary powers, principles of administrative law require decision-makers to use discretionary powers in good faith and for a proper purpose; consider only relevant considerations and not consider irrelevant considerations; exercise their discretion independently, not act under the dictation or at the behest of any third person or body; and give proper, genuine and realistic consideration to the merits of the particular case.

¹ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 53 (internal citations omitted)

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The exercise of discretion is also constrained by the *Charter* and the Ontario *Human Rights Code*. Where legislation confers a broad discretion, it must be exercised in a manner consistent with the *Charter* and human rights legislation, and must take into account fundamental Canadian values including *Charter* and human rights values.

The statutory scheme is critical as it defines the context within which the power to accredit is exercised, and thus the factors relevant to the scope of discretion afforded to Convocation. The *LSA*, the By-Laws and regulations establish the framework governing the decision-making functions of the Society. The exercise of discretion must be consistent with the *LSA*'s purposes and principles, as well as the By-Laws and regulations. Section 4.1 of the *LSA* sets out the functions of the Society, which are essentially the purposes of the Society. In the context of accreditation, section 4.1 provides it is a function of the Society to ensure that persons practicing law in Ontario "meet standards of learning, professional competence and professional conduct". Section 62.01(4.1) gives Convocation the power to make by-laws governing licensing and prescribing the qualifications and requirements for licensing. By-Law 4 was enacted pursuant to this power. It establishes as a qualification for licensees a requirement either that (i) a licensee graduate from an accredited Canadian law school, or (b) have a certificate issued by the National Committee on Accreditation. An accredited law school is defined in By-Law 4 as "a law school that is accredited by the Society." There are no processes or criteria set out in the *LSA* or By-Laws relating to accreditation. Convocation has as a matter of policy approved the role of the Federation's Approval Committee in determining whether current and proposed law schools meet the national requirement. Policy is not binding on Convocation, although a failure to follow a policy may lead to concerns regarding the application of the administrative law doctrine of legitimate expectations.

Section 4.2 of the *LSA* establishes five principles to be applied by the Society in carrying out its functions, duties and powers, which includes the discretionary decision on accreditation. The principles include that the Society "has a duty to maintain and advance the cause of justice and the rule of law", and "a duty to protect the public interest."

The next step in Convocation's analysis is to determine what constitutes the "public interest" in the context of the accreditation decision. This can be done by looking at how the "public interest" has been interpreted in the context of the *LSA* and how courts have approached administrative decision-making in the "public interest" more broadly. With respect to the *LSA*, courts have determined that the Society must consider the members of the public who utilize legal services, as well as the public at large who may require legal services in the future. The public interest mandate of the Society has been relied on in the discipline jurisprudence as a means to ensure that the public has access to quality and reliable legal services, and that the public retains trust in the legal community.

Outside of the *LSA* context, courts have held that the discretion of administrative agencies and tribunals to act in the public interest is not unlimited. Where administrative decision-makers have the power to make decisions or orders in the public interest, courts have held that they must base their decisions on the facts of the case, must be consistent with the purposes of the statute granting power and the legislative and social context of the statute, and must not act in an arbitrary manner. Courts have also held that decision making in the public interest must take into

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consideration the concerns of society generally, or at least those concerns relevant given the statutory scheme, and not merely the interests of one segment of society. *Charter* and human rights values such as equality, non-discrimination and religious freedom properly form part of the determination of what constitutes public interest.

Convocation may properly take into account various Law Society policies in approaching the discretionary decision. The Society has articulated the content and scope of its public interest mandate through studies and reports commissioned by the Society, and through a wide variety of documents and statements. The Society has policies dealing with religious freedom and non-discrimination, as well as mobility.

B. Introduction

Convocation will be making a discretionary decision whether or not to accredit TWU. In this opinion we commence with a review of general administrative law principles relevant to the exercise of discretionary decision-making powers, which includes the duty to consider *Charter* and human rights values. Since the statutory context is critical to the exercise of discretion, we review the statutory scheme within which the power to accredit is situated. We then examine the Society's articulation of its public interest mandate, and review case law with respect to the interpretation of the public interest in case law, both within and outside the Law Society context. Our goal is to provide Benchers with an overview of relevant issues they should consider as they exercise their discretion to accredit or not accredit TWU.

C. Accreditation is a Discretionary Decision

A discretionary decision is one where "the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries." The decision by Convocation is a discretionary decision, in that Convocation may decide to accredit or refuse to accredit TWU.

1. Administrative Law Principles

No administrative decision-maker has an unfettered discretionary power. Discretion must "be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis*, [1959] S.C.R. 121), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms*."² We discuss the relevant sections of the Law Society Act ("*LSA*") and By-Laws below, since they are the legal source for the power to accredit, and define the scope and principles governing the exercise of discretion.

In exercising discretionary powers, principles of administrative law require decision-makers to:

² *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 53.

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- use discretionary powers in good faith and for a proper purpose (i.e., honestly and only within the scope of and for the purpose for which the power was given, and not arbitrarily);³
- consider only relevant considerations and not consider irrelevant considerations: the failure of an administrative decision-maker to take into account a highly relevant consideration is just as erroneous as the improper importation of an extraneous consideration;⁴
- exercise their discretion independently and not act under the dictation or at the behest of any third person or body; and
- give proper, genuine and realistic consideration to the merits of the particular case, and not fetter their discretion by applying policies inflexibly without considering the merits of the application and the relevant criteria.⁵

2. Charter Values and Non-Discrimination

Discretion is also constrained by the *Charter* and human rights legislation. Administrative decision-makers, in exercising their discretion, are required to take into account fundamental Canadian values, including those in the *Charter*.⁶ In *Doré*, the Supreme Court held that "administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter* values".⁷ Further, where legislation confers a broad discretion, it must be exercised in a manner consistent with Charter rights.⁸

A decision-maker may not exercise its discretion for discriminatory purposes, unless authorized by statute.⁹ Convocation must also consider the Ontario *Human Rights Code* and protected grounds of non-discrimination.¹⁰

³*Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 140-143; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 S.C.R. 650, 2004 SCC 48 at paras. 6-7.

⁴*Oakwood Development Ltd. v. Rural Municipality of St. François Xavier*, [1985] 2 S.C.R. 164 at pp. 174-175 per Wilson, J.

⁵*See Maple Lodge Farms Ltd. v. Canada*, [1980] F.C.J. No. 171 (F.C.A.); aff'd [1982] 2 S.C.R. 2.

⁶*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 53-56; *see also Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

⁷*Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, at para. 24.

⁸*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *PHS Community Services Society*, 2011 SCC 44 at para. 117.

⁹*Montreal (City) v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368, at pp. 404-406.

¹⁰*Chamberlain v. Surrey School District No. 36*, [2002] S.C.J. No. 87; *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772, at paras. 26-28.

D. Factors to Consider From the Statutory Context

1. Statutory Scheme Generally

The exercise of a discretion, stated Rand J. in *Roncarelli*, “is to be based upon a weighing of considerations pertinent to the object of the [statute’s] administration.”¹¹ The *LSA*, the By-Laws and regulations establish the framework governing the decision-making functions of the Society. Administrative law principles require Convocation to consider proper purposes, and not consider improper or irrelevant purposes. The exercise of discretion must be consistent with the principles governing the application of the *LSA* and with the *LSA*’s purposes.¹² This requires a consideration of the statutory scheme.

The *LSA* vests Convocation with control over licensee education, admission, discipline and unauthorized practice.¹³ The courts have recognized that the Society regulates the legal profession, and now paralegals, in the public interest, and exercises discretionary public law powers. In *Edwards v. Law Society of Upper Canada*, the Supreme Court held that the Society did not owe a private law duty of care to members of the public when exercising statutory functions. The Court held:¹⁴

14 With reference to the Act, it is apparent that the Law Society regulates the legal profession. Specifically, its responsibilities include the admission standards of the profession (beginning at s. 27), the continuing education of its members (s. 60) and the formulation and enforcement of a code of professional ethics. ... The *Law Society Act* is geared for the protection of clients and thereby the public as a whole... Decisions made by the Law Society require the exercise of legislatively delegated discretion and involve pursuing a myriad of objectives consistent with public rather than private law duties.

While there are no specific indications of the process for accreditation, or what should be considered in the determination of accreditation, the Society is guided by its governing statute. The functions of the Society and the principles to be applied by the Society, as set out in the *LSA*, provide guidance and terms of reference for the Society in carrying out its functions, duties and powers.

Section 4.1 of the *LSA* sets out the functions of the Society, which are essentially the purposes of the Society, and will help guide Convocation’s determinations as to factors which are relevant to

¹¹ *Roncarelli*, *supra*, at p. 140.

¹² *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, [2012] 2 S.C.R. 108, at pars. 23-25, 40-41; see also *British Columbia (Workers’ Compensation Board) v. Figliola*, [2011] 3 S.C.R. 422, at para. 541, and *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, [2010] 1 S.C.R. 815, at para. 66 (“This discretion is to be exercised with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case. ...”).

¹³ *Regina v. Lawrie and Pointts Ltd.*, 1987 CanLII 4173 (ON CA) for a discussion in the context of lawyers; similar powers now apply with respect to all licensees.

¹⁴ *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, at para. 14 (emphasis added).

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the accreditation decision, and the purposes being furthered by the decision. Section 4.1 provides:¹⁵

Function of the Society

4.1 It is a function of the Society to ensure that,

- (a) 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; and
- (b) the standards of learning, professional competence and professional conduct for the provision of a particular legal service in a particular area of law apply equally to persons who practise law in Ontario and persons who provide legal services in Ontario.

The purposes are focussed on standards of learning, professional competence and professional conduct. The discretion conferred by the *LSA* "must be exercised consistently with the purposes underlying its grant."¹⁶

In addition to the purposes or functions of the Society, section 4.2 of the *LSA* also establishes five principles to be applied by the Society in carrying out its functions, duties and powers, which includes the discretionary decision on accreditation. The decision may not invoke all of these principles, but all those that are relevant must be considered:

Principles to be applied by the Society

4.2 In 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.

¹⁵ *LSA*, supra, at ss. 4.1-4.2.

¹⁶ *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, [2010] 1 S.C.R. 815, at para. 46

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The inclusion of principles is a statement by the legislature that in exercising powers and duties that are consistent with the functions of the Society, the Society must take into consideration the principles enumerated in section 4.2. These are by definition "relevant factors" for the purposes of the exercise of discretion.

2. Statutory Scheme Relevant to Accreditation

The *LSA* does not refer to accreditation. Rather, accreditation arises pursuant to Convocation's power to make By-Laws with respect to licensing of persons to practise law in Ontario.

(a) By-Laws

Sub-section 62.01(4.1) provides that Convocation may make By-Laws:

[G]overning the licensing of persons to practise law in Ontario as barristers and solicitors and the licensing of persons to provide legal services in Ontario, including prescribing the qualifications and other requirements for the various classes of licence and governing applications for a licence.

This authority to prescribe "qualifications and other requirements" for licensing is in furtherance of section 27(3) of the *LSA* which provides that:

If a person who applies to the Society for a class of licence in accordance with the by-laws meets the qualifications and other requirements set out in this Act and the by-laws for the issuance of that class of licence, the Society shall issue a licence of that class to the applicant.

The Law Society is required to license persons who meet the qualifications prescribed in the By-Laws and in the *LSA*; it is mandatory rather than discretionary.

The concept of accreditation arises in By-Law 4, where it is related to the qualification required of licensees.¹⁷ Under By-Law 4, the requirement for the issuance of a Class L1 licence includes either:¹⁸

- i. 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**.
- ii. A certificate of qualification issued by the National Committee on Accreditation appointed by the Federation of Law Societies of Canada and the Council of Law Deans.

¹⁷ The *LSA* provides that: "The by-laws made under this section shall be interpreted as if they formed part of this Act." *LSA*, *supra*, at s. 62(2).

¹⁸ By-Law 4, s. 9(1)1 (emphasis added).

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An “accredited law school” is defined as “a law school in Canada that is accredited by the Society”.¹⁹

The primary effect of accreditation of a law school is that a graduate of an accredited Canadian common law school is entitled to be licensed subject to meeting three further requirements: (1) licensing examinations, (2) articling/law practice program, and (3) good character.²⁰ Accreditation is thus related to the core concerns of the Law Society, which include, as set out in section 4(1) of the Act, standards of learning and professional competence.

Graduates of international law schools must meet additional requirements. International graduates are required to apply to the National Committee on Accreditation (“NCA”) of the Federation of Law Societies of Canada. Candidates may be required to pass certain examinations or successfully complete specified courses at a law school before completing the licensing examination and articling/law practice program. Individual applicants from non-accredited international law schools thus face additional costs and delay when seeking entry into the profession in Ontario, when compared to applicants from accredited Canadian law schools.

Currently there is no process in place by which graduates of a non-accredited Canadian common law university may enter the Law Society's licensing process. The Federation's National Committee of Accreditation's (“NCA”) mandate is to evaluate the qualifications of those with degrees from outside Canada (international degrees) and from Quebec. It was not established to consider additional qualifications that graduates of non-accredited Canadian common law schools would have to meet.

(b) Mobility Issues

There are issues relating to inter-jurisdictional mobility for graduates of a non-accredited Canadian law school under the present statutory scheme.²¹ We discuss two aspects below: the National Mobility Agreement, and the Agreement on Internal Trade (“AIT”).

The permanent mobility²² or transfer provisions of the Federation of Law Societies National Mobility Agreement provide that:

32. A signatory governing body will require no further qualifications for a member of another governing body to be eligible for membership than the following:

¹⁹ *Ibid.* at sec. 7.

²⁰ The Society has accredited seven law schools in Ontario and eleven additional law schools throughout Canada.

²¹ For a more complete discussion of inter-jurisdictional mobility and links to the Agreements see LSUC, Background Information, Inter-jurisdiction Mobility of Lawyers in Canada, Federation of Law Societies of Canada National Mobility Agreements, <http://www.lsuc.on.ca/uploadedFiles/BackgroundInter-JurisdictionalMobilityReport.pdf>, accessed April 3, 2014.

²² Temporary mobility is discussed in the LSUC Background Information piece, *supra*.

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- (a) entitlement to practise law in the lawyer's home jurisdiction;
- (b) good character and fitness to be a lawyer, on the standard ordinarily applied to applicants for membership; and
- (c) **any other qualifications that ordinarily apply for lawyers to be entitled to practise law in its jurisdiction.**

"Entitled to practise" is defined in the Agreements to mean "allowed, under all of the legislation and regulation of a home jurisdiction, to engage in the practice of law in the home jurisdiction." The requirement in By-Law 4 is graduation from an "accredited" Canadian law school. The accreditation requirement is thus one of the "qualifications that ordinarily apply for lawyers to be entitled to practise law in its jurisdiction" provided for in section 32(c) of the National Mobility Agreement.

Accordingly, if the Law Society denies accreditation to TWU, a graduate of TWU called to the bar in any other jurisdiction in Canada would be unable to transfer to Ontario to become a member of the Law Society of Upper Canada under the National Mobility Agreement, unless By-Law 4 is amended to provide an exemption for transfer purposes from the accreditation requirement, or the AIT process discussed below is engaged.

Chapter 7 of the AIT requires that provinces and territories agree to certify²³ workers, already certified in another Canadian jurisdiction, without the imposition of further training, experience, examinations or assessment. A jurisdiction can impose additional requirements to certify a worker who is already certified elsewhere in Canada only if these additional requirements are in the service of a "legitimate objective". A legitimate objective exemption must meet with the approval of government (s) in which the exemption is sought. Any additional requirements of, or conditions imposed on, a worker certified in another jurisdiction can be no more onerous than those demanded of workers already certified in the receiving jurisdiction or applying for certification for the first time within the jurisdiction. The AIT is a government to government regime requiring, for example, that legitimate objective exemptions and enforcement issues be pursued at the governmental level. If a Law Society were to refuse a mobility transfer to a TWU graduate called to the bar in another jurisdiction in Canada the AIT could potentially be resorted to challenge that decision, unless a legitimate objective exemption has been obtained. The Chapter 7 provisions of the AIT have been incorporated into the *Ontario Labour Mobility Act, 2009*.²⁴

(c) Policies

By-Law 4 does not specify any process or criteria by which the Society is to accredit law schools. There are no other policies or procedures in the *LSA* or By-laws directly relevant to the

²³ This is generic language that includes "license."

²⁴ S.O. 2009, c. 24

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accreditation decision. There are two policies relating to the role of the Federation regarding academic requirements for common law degree programs which have been approved by Convocation.

In 2010 Convocation approved the report of the Federation of Law Societies of Canada Task Force on the Canadian Common Law Degree that established the national requirement, which specifies the competencies graduates must have attained and the law school academic program and learning resources law schools must have in place. In 2011, Convocation approved the Federation Implementation Committee report that established and set out the mandate of the Federation's Approval Committee to determine whether current and proposed law programs meet the national requirement. The Approval Committee completed its review of the Trinity Western Faculty of Law application, and determined that, subject to concerns and comments contained in its report, if implemented as proposed, TWU's proposed program will meet the national requirement. The proposal has been granted preliminary approval.

As described above these policies do not bind Convocation in the same way as the *LSA* and By-Laws. However, policies like these which have been developed through a committee process, with due deliberation and appropriate input, should be considered and may be relied on in approaching the discretionary decision on the academic aspect of the national requirement, separate and apart from the "public interest" aspect of the accreditation decision. Generally, Convocation should only depart from such policies for good reason, and there may be issues relating to the administrative law doctrine of legitimate expectations with respect to process if Convocation departs from a process it approved for academic requirements after a participant has engaged in the process. This question of academic requirements is separate and apart from the public interest question presently before Convocation.

We now turn to the issue of the "public interest", reviewing Society policies and general jurisprudence on this point.

E. The Society's Articulation of Its Public Interest Mandate

Section 4.2 of the *LSA* sets out the five basic principles that guide the Society's actions. Of particular importance to the accreditation decision is the third principle, specifically that the "Society has a duty to protect the public interest."

The Society has articulated the content and scope of its public interest mandate through studies and reports commissioned by the Society, and through a wide variety of documents and statements. In the interests of consistency, transparency and accountability, it is important for the Society to consider its own articulation of the public interest.

For example, the requirements of governing lawyers in the public interest has been interpreted *inter alia* through a number of reports to Convocation as exercising regulatory authority in a timely and effective manner,²⁵ institutionalizing best practices and assuring accountability,²⁶

²⁵ Investigations Task Force, Law Society of Upper Canada, Final Report to Convocations (May 25, 2006), at paras. 2-4, available at http://www.lsuc.on.ca/media/convmay06_investigations.pdf.

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expanding the pool of adjudicators to include additional non-bench non-lawyer persons,²⁷ ensuring full disciplinary hearings on the merits where appropriate,²⁸ providing a hearing process that is fair, transparent and efficient,²⁹ and protecting the public through a competence based licensing process.³⁰ In the Society's own materials, regulating in the public interest has been understood as a mandate to integrate equity and diversity values and principles into the Society's model policies, services, programs and procedures,³¹ to ensure accessibility of services and the profession,³² and to advise clients of the French language rights.³³

We review below a number of documents and programmes implemented by the Society that describe the scope and content of the requirement to govern in the public interest, which we suggest are of greatest relevance to the accreditation decision.

1. Role Statement

On October 27, 1994, Convocation adopted a Role Statement. The Role Statement is a "mission statement" that provides guidance to the Society by: (a) defining the proper role of the Society and informing members of the profession and the public of that role; (b) assisting Convocation to

²⁶ Governance Task Force, Law Society of Upper Canada, Second Report to Convocation (March 29, 2007), at paras. 6-8, *available at* http://www.lsuc.on.ca/media/convmar2907_governance.pdf; Governance Task Force, Law Society of Upper Canada, Final Report to Convocation (Dec. 4, 2009), at p. 6, *available at* http://www.lsuc.on.ca/media/convdec09_governance.pdf.

²⁷ Tribunals Composition Task Force, Law Society of Upper Canada, Report to Convocation (April 26, 2007), at paras. 62-63, *available at* http://www.lsuc.on.ca/media/convapr07_tribunals_composition.pdf.

²⁸ Professional Regulation Committee, Law Society of Upper Canada, Report to Convocation (January 28, 2010), at paras. 9-10, *available at* http://www.lsuc.on.ca/media/conjan10_PRC.pdf.

²⁹ Tribunals Committee, Law Society of Upper Canada, Report to Convocation (June 28, 2012), at pg. 130, *available at* <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147488008>.

³⁰ Articling Task Force, Law Society of Upper Canada, Final Report – Pathways to the Profession: A Roadmap for the Reform of Lawyer Licensing in Ontario (Oct. 25, 2012), at p. 2 and para. 2 and 5, *available at* <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147489848>.

³¹ Law Society of Upper Canada, Equity Initiatives Department, <http://www.lsuc.on.ca/faq.aspx?id=1034#q1213> (last visited March 3, 2014). *See also* Retention of Women in Private Practice Working Group, Law Society of Upper Canada, Report to Convocation (May 22, 2008), at p. 5, *available at* http://www.lsuc.on.ca/media/convmay08_retention_of_women_consultation.pdf; Law Society of Upper Canada, Respect for Religious and Spiritual Beliefs: A Statement of Principles of the Law Society of Upper Canada (March 10, 2005), *available at* <http://rc.lsuc.on.ca/pdf/equity/antiSemitism.pdf>; Law Society of Upper Canada, Guidelines for Lawyers Acting in Aboriginal Residential School Cases (Oct. 23, 2003).

³² Law Society of Upper Canada, Accessible Customer Service, <http://www.lsuc.on.ca/with.aspx?id=2147486355> (last visited March 3, 2014). *See also* Law Society of Upper Canada, Guide to Developing a Law Firm Policy Regarding Accommodation Requirements (May 2005), *available at* <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147487131>; Report of the Disability Working Group, Law Society of Upper Canada, Students and Lawyers with Disabilities – Increasing Access to the Legal Profession (Dec. 2005), *available at* <http://rc.lsuc.on.ca/pdf/equity/studentsandlawyerswithdisabilitiesreport.pdf>.

³³ Law Society of Upper Canada, Advising Your Clients About Access to Legal Services in French (2013), *available at* [http://www.lsuc.on.ca/uploadedFiles/Equity_and_Diversity/Members2/EQ-AJEFO-Brochure-French-Services\(1\).pdf](http://www.lsuc.on.ca/uploadedFiles/Equity_and_Diversity/Members2/EQ-AJEFO-Brochure-French-Services(1).pdf).

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establish goals and to concentrate on policy issues at the core of the Society's responsibilities; and (c) assisting Convocation when discussing the continuation of established programs or the commencement of new activities.³⁴ The role statement was adopted before amendments to the *LSA* which introduced sections 4.1 and 4.2, but appears to be consistent with those sections, given the focus on governing the profession in the public interest.

The purpose of the Society is described in the Role Statement as follows:³⁵

The Law Society of Upper Canada exists to govern the legal profession in the public interest by,

- ensuring that the people of Ontario are served by lawyers who meet high standards of learning, competence and professional conduct; and
- upholding the independence, integrity and honour of the legal profession,

for the purpose of advancing the cause of justice and the rule of law.

In describing in greater detail what obligations and duties fall on the Society in governing the profession in the public interest, Convocation stated:³⁶

3.2 For example, it is in the interests of both public and profession that lawyers meet high standards of learning, competence and conduct.

...

3.6 In the final analysis, the public interest will always be paramount in determining the activities, policies and programs of the Law Society. It is only if the profession is seen to be serving the public interest that it will maintain public confidence and command public respect.

...

4.2 The concept that the Society must govern its members in the public interest is inseparable from the idea that one of the distinguishing features of a profession is that it exists to put its specialist skills at the service of the public. The obligation is more

³⁴ Law Society of Upper Canada, *Role Statement*, Oct. 27, 1994.

³⁵ *Ibid.* at p. 1.

³⁶ *Ibid.*, internal citations omitted (emphasis added).

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compelling where the public has given the profession a monopoly on the delivery of those services

...

5.3 The Law Society has a public obligation, arising from this monopoly, to ensure that the people whom it admits to membership and on whom it confers the right to practise law, are indeed fit to practice and competent to offer legal services. The Law Society also has an obligation to ensure that its members *continue* to be fit, qualified and competent.

5.4 A member of the public will not necessarily be in a position to evaluate the competence of a person who claims to be qualified to practise law. Membership of the Law Society of Upper Canada certifies to the world at large that the person is fit, qualifies and competent.

...

7.1 ... the Law Society is to govern the legal profession in the public interest by upholding the *integrity and honour* of the legal profession. "Integrity" is a personal trait or attribute describing one's moral character: "honour" is the respect of esteem in which one is held by others.

...

7.3 The integrity and honour of the profession as a whole depend on the integrity of its individual members. Integrity is "the fundamental quality of any person who seeks to practice as a member of the legal profession." The Canadian Bar Association notes that the principle of integrity is a key element of each rule in its *Code of Professional Conduct*.

...

7.5 As with the duty to uphold the independence of the profession, so with the duty to uphold its integrity and honour: it is grounded in the public interest. The integrity of the legal profession is essential to the well-being of a free and democratic society. In the words of Iacobucci J., writing for a unanimous, nine-judge court in *Pearlman v. Manitoba Law Society* *Pearlman v. Manitoba Law Society*, "The general public has a vested interest in the ethical integrity of the legal profession." The integrity of the justice system depends on the integrity of lawyers: without lawyers of integrity there can be no system of justice properly so called.

...

8.1 The role statement concludes that the overriding purpose for which the Law Society exists is to advance the cause of justice and the rule of law.

While these provisions do not provide specific advice to Convocation today as it debates what constitutes the public interest, the provisions highlight Convocation's understanding that its role is to ensure that the people of Ontario are served by lawyers who meet high standards of learning, competence and professional and ethical conduct.

2. 2005 Tribunals Task Force

A similar description of the public interest has been utilized in outlining what principles should underlie the Society's tribunals process and procedure.³⁷ In a May 2005 report to Convocation, the Society's Tribunals Task Force stated:

14. Self-regulation is essential to safeguard the public's access to justice and to an independent profession and judiciary, and to protect the public from state interference. The value and strength of this principle is undermined, however, where a professional regulator's operations are seen to interfere with the best interests of consumers.

17. Every branch of a law society's operation affects the public interest. The manner in which the Law Society discharges its conduct, capacity and competence responsibilities is critically important to how the public perceives it. The adjudicative process is an essential component of the Law Society's responsibilities.

3. 2013 Suitability to Practise Standard

In November, 2013 the Society approved the Submission responding to the Federation's Consultation Report on a Suitability to Practise National Standard, relevant to the Society's functions to ensure that those who are licensed in Ontario are of good character.

The Society considered the regulatory reasons for the good character requirement, noting that:³⁸

It is important to convey to the public and the profession that licensees are required to comply with standards of professional

³⁷ Tribunals Task Force, Report to Convocation – Final Report (May 26, 2005).

³⁸ Professional Regulation Committee, Law Society of Upper Canada, Report to Convocation (November 21, 2013), at pp. 70-71, available at http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2013/convnov2013_PRC.pdf.

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conduct. One of the ways of doing so is to license those who, at the time of licensing, have demonstrated the behaviours discussed in the Consultation Report namely, respect for the rule of law and the administration of justice, honesty, governability and financial responsibility. Underlying these behaviours is the principle that the profession must be worthy of clients' and the public's trust. If an applicant's past conduct has raised some question about his or her respect for the behaviours integral to the profession, it is valuable for law societies to make further inquiries and determine whether the applicant should be licensed. In this way, the Law Society's commitment to maintaining standards of professional development is demonstrated.

The Society ultimately accepted that the good character requirement should focus on the four behaviours, which are:

- Respect for the rule of law and the administration of justice
- Honesty
- Governability
- Financial Responsibility

The Society also noted that within the behaviour "respect for the rule of law and the administration of justice", greater attention should be paid to specifying breaches of human rights codes as conduct that should be further investigated on a good character inquiry. The Report states:³⁹

Specific reference to respect for and adherence to human rights and equality principles sends an important message to those entering the legal profession.

4. Law Society Statements on Religious Freedom

The Law Society has made a number of statements and developed a number of policies regarding the intersection of religious and spiritual beliefs and the practice of law. As stated by the Law Society "There is great diversity in the religious and spiritual beliefs and practices of people in Ontario and in Canada. This diversity, together with the values and spirituality that are shared in Ontario, in Canada and throughout the world, should be celebrated."⁴⁰ In this section we highlight some of the statements and policies concerning religious freedom.

³⁹ *Ibid.* at p. 74.

⁴⁰ The Law Society of Upper Canada, Dialogue with Lawyers: Religious and Spiritual Beliefs and the Practice of Law (April 14, 2005), at p. 4, available at <http://rc.lsuc.on.ca/pdf/equity/dialogueLawyers.pdf>. See also The

In 1991, Convocation adopted a Statement of Policy, which *inter alia*, provided that "the law Society endorses the principles of the *Human Rights Code*, 1981, and accordingly affirms that every member of the Society has a right to equal treatment with respect to conditions of employment without discrimination because of race, ancestry, place or origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability."⁴¹ As a specific statement of policy, Convocation stated that "Lawyers have a responsibility to take a lead in eliminating discrimination. The Law Society will intensify its efforts to eradicate discrimination in the profession."⁴²

The Statement of Policy was followed in 1995 with Convocation's adoption of a Statement of Values, which included the following reference: "The Law Society of Upper Canada declares that the legal profession in Ontario is enormously enriched by, and values deeply, the full participation of men and women in our profession regardless of age, disability, race, religion, marital or family status or sexual orientation."⁴³

In May 1997, the Law Society unanimously adopted the Bicentennial Report and Recommendations on Equity Issues in the Legal Profession. In the Report, the Law Society recognized its commitment to the promotion of equality and diversity in the legal profession. Recommendation 1 of the Bicentennial Report provides "The Law Society should ensure that the policies it adopts actively promote the achievement of equality and diversity within the profession and do not have a discriminatory impact."⁴⁴

On March 24, 2005, Convocation adopted the document Anti-Semitism and Respect for Religious and Spiritual Beliefs – Statement of Principles, which specifically articulated principles for recognizing religious diversity in the profession. In the document the Law Society recognized that hatred and discrimination on the basis of creed or religion violates a number of federal and provincial statutes, as well as the Law Society of Upper Canada *Rules of Professional Conduct*, which contain provisions "that recognized the value of religious and spiritual beliefs and/or prohibit discrimination and the wilful promotion of hatred on the basis of religion or creed."⁴⁵ The document also noted that the "Law Society of Upper Canada recognizes

Law Society of Upper Canada, Respect for Religious and Spiritual Beliefs: A Statement of Principles of the Law Society of Upper Canada (May 10, 2005), at para. 2, *available at* <http://rc.lsuc.on.ca/pdf/equity/antiSemitism.pdf> ["Respect for Religious and Spiritual Beliefs"]

⁴¹ The Law Society of Upper Canada, Statement of Policy (1991) at para. xi, *as cited in* The Law Society of Upper Canada, Bicentennial Report and Recommendations on Equity Issues in the Legal Profession, Report to Bicentennial Convocation (May 1997), at para. 26, *available at* <http://www.lsuc.on.ca/with.aspx?id=2147487006> ["Bicentennial Report"].

⁴² *Ibid.*, at para. xii.

⁴³ The Law Society of Upper Canada, Statement of Values (April 1995), *as cited in* Bicentennial Report, *supra*.

⁴⁴ Bicentennial Report, *supra*, at Recommendation 1, at p. 25.

⁴⁵ Respect for Religious and Spiritual Beliefs, *supra*, at para. 3.

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the importance of promoting religious diversity and respect for religious beliefs."⁴⁶ The Principles adopted are as follows:⁴⁷

50. The Law Society of Upper Canada, recognizing that:

- a. Respect for religious diversity advances the cause of justice;
- b. The rule of law is enhanced when religiously motivated discrimination or hatred is not tolerated;
- c. There continues to be a disturbing number of incidents of religious discrimination and religiously motivated hate crimes in Ontario and in Canada, as well as in the world;
- d. The laws of Ontario and Canada guarantee freedom of conscience and religion, and prohibit discrimination and the wilful promotion of hatred on the basis of religion or creed;
- e. The international community has condemned religious discrimination as harmful and unacceptable, and has recommended that measures be undertaken to combat religious hatred and discrimination; and
- f. Although particular groups may be frequent targets of religious discrimination, religious hatred and discrimination is problem of Canadian society as a whole;

51. The Law Society of Upper Canada condemns in the strongest terms all manifestations and forms of hatred and discrimination based upon religious and spiritual beliefs. Although current circumstances center predominantly on issues of anti-Semitism and Islamophobia, the Law Society condemns all forms of religious intolerance directed at any group or community.

52. The Law Society of Upper Canada undertakes to promote and support religious understanding and respect both inside and outside the legal profession.

⁴⁶ *Ibid.*, at para. 4.

⁴⁷ *Ibid.*, at paras. 50-52.

5. Law Society Statements on Non-Discrimination on the Ground of Sexual Orientation

The Law Society has a number of initiatives and policies directed at promoting equality for persons identifying as lesbian, gay, bisexual, transsexual, transgender, intersex, queer/questioning, two-spirited and allies within the legal profession.⁴⁸

In addition to the policy statements in the 1991 Statement of Policy, the 1995 Statement of Values and the 1997 Bicentennial Report and recommendations, summarized with respect to non-discrimination on the grounds of creed above, but equally relevant to non-discrimination on the basis of sexual orientation, the Law Society has made other public statements of direct or high relevance to non-discrimination on the ground of sexual orientation. For example, also contained in the Bicentennial Report is a recommendation with respect to education in the profession, highlighting that the Law Society "should continue to ensure that Bar Admissions ... encourages the participation of equality-seeking groups in its design, development and presentation."⁴⁹

The Law Society also has numerous initiatives aimed at addressing non-discrimination on the ground of sexual orientation, including (a) the Discrimination and Harassment Counsel, which provides confidential assistance to anyone who may have experienced discrimination or harassment by a lawyer or a paralegal; (b) the Equity and Diversity Mentorship Program, which encourages students from equity-seeking communities to consider law as a career and to assist in the transition into the profession; (c) the Equity Advisory Group, a group of lawyers, paralegals and legal organizations mandated to assist the Equity Committee in the development of policy options for the promotion of equity and diversity in the legal profession; and (d) the Equity Public Education Series, which presents lectures, seminars, workshops and consultations to address issues of equity and diversity in the legal profession and to build bridges between the legal profession and members of the public concerned about equality rights.⁵⁰

6. Rules of Professional Conduct

Convocation has adopted the Rules of Professional Conduct, which state that "a lawyer has special responsibilities by virtue of the privileges afforded the legal profession and the important role it plays in a free and democratic society and in the administration of justice, including a special responsibility to recognize the diversity of the Ontario community, to protect the dignity of individuals, and to respect human rights laws in for in Ontario." Rule 5.04 provides in part:

⁴⁸ See e.g. The Law Society of Upper Canada, *Sexual Orientation and Gender Identity: Creating and Inclusive Work Environment, A Guide for Law Firms and Other Organizations* (October 2013), available at <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147487143>.

⁴⁹ Bicentennial Report, *supra*, at Recommendation 8, at p. 31.

⁵⁰ *Ibid.*, at fn. 23.

5.04 DISCRIMINATION

Special Responsibility

5.04 (1) A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identify, gender expression, age, record of offences (as defined in the Ontario Human Rights Code), marital status, family status, or disability with respect to professional employment of other lawyers, articulated students, or any other person or in professional dealings with other licensees or any other person.

7. Mobility

Convocation has also adopted a number of policies and instruments with respect to mobility. These are summarized in Background Information provided by the Law Society and posted on the website.⁵¹

F. "Public Interest" in Case Law

The treatment of public interest mandates in Canadian jurisprudence provides quite limited guidance regarding what the Society might consider in its accreditation determination. The term "public interest" is used throughout Canadian federal and provincial statutes⁵² and governing in the public interest, has been seen as the only justification for self-governing or regulating professions.⁵³ However, the term, and what must be considered in decision-making with respect to the public interest, tends to be very case specific.

Courts have held that the discretion of administrative agencies and tribunals to act in the public interest is not unlimited.⁵⁴ Where administrative decision-makers have the power to make

⁵¹ Background Information, Inter-jurisdiction Mobility of Lawyers in Canada, Federation of Law Societies of Canada National Mobility Agreements, <http://www.lsuc.on.ca/uploadedFiles/BackgroundInter-JurisdictionalMobilityReport.pdf>, accessed April 3, 2014

⁵² In *R. v. Zundel*, [1992] 2 S.C.R. 731, at pg. 805 ["Zundel"], Cory and Iacobucci JJ, in their dissent noted that a "survey of federal statutes alone reveals that the term 'public interest' is mentioned 224 times in 84 federal statutes."

⁵³ *Royal Commission Inquiry into Civil Rights, Report Number One* (Toronto: Queen's Printer, 1968), Vol. 3, p. 1162 ("The granting of self-government is a delegation of legislative and judicial functions and can only be justified as a safeguard to the public interest. The power is not conferred to five or reinforce a professional occupational status. The relevant question is not 'do the practitioners of this occupation desire the power of self-government?' but 'is self-government necessary for the protection of the public?' No right of self-government should be claimed merely because the term 'profession' has been attached to the occupation. The power of self-government should not be extended beyond the present limitations, unless it is clearly established that the public interest demands it.").

⁵⁴ *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, at para. 45. See also Sara Blake, *Administrative Law in Canada* (5th ed., Lexis Nexis: 2011) at pg. 100.

decisions or orders in the public interest, courts have held that they must base their decisions on the facts of the case, must be consistent with the purposes of the statute granting power and must not act in an arbitrary manner.⁵⁵ In this way, the public interest requirement is often like the administrative law requirements for discretionary decision-making described above.

In fact, with respect to *Criminal Code* provisions, the Supreme Court has even expressed concern that the term can never be defined in a broad sense so as to be useful.⁵⁶ *R. v. Morales* is a case concerning the "public interest" component of pre-trial detention provisions in the *Criminal Code*. The Supreme Court held that the term "public interest" was unconstitutional as a criterion for pre-trial detention as it had no meaningful definition. On this point, the Court referred to the criterion of public interest as "vague and imprecise", holding:⁵⁷

As currently defined by the courts, the term "public interest" is incapable of framing the legal debate in any meaningful manner or structuring discretion in any way.

Nor would it be possible in my view to give the term "public interest" a constant or settled meaning. The term gives the courts unrestricted latitude to define any circumstances as sufficient to justify pre-trial detention. The term creates no criteria to define these circumstances. No amount of judicial interpretation of the term "public interest" would be capable of rendering it a provision which gives any guidance for legal debate.

Looking more broadly at decisions outside the context of the *LSA*, Courts have held that the scope of the phrase "public interest" must "be interpreted in the light of the legislative history of the particular provision in which it appears and the legislative and social context in which it is used."⁵⁸ For example, in *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, the Supreme Court looked to the purpose of the legislative provisions at issue in order to determine in the context of the statute what constituted the public interest.⁵⁹

⁵⁵ *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 S.C.R. 650, at paras. 6-7; *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140 ("In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute."); *Lindsay v. Manitoba (Motor Transport Board)*, [1989] M.J. No. 432 (Man. C.A.), leave to appeal refused [1989] S.C.C.A. no. 396 ("While the determination of the public interest is a matter within the discretion of the Board, that determination must find justification in the facts.").

⁵⁶ *Zundel*, *supra*, at pp. 770-771; *R. v. Morales*, [1992] 3 S.C.R. 711, at pp. 726, 732 ["*Morales*"].

⁵⁷ *Morales*, *supra* at pp. 726, 732.

⁵⁸ *Stewart v. Canadian Broadcasting Corp.*, 1997 CanLII 12318 (ON SC), at para. 229.

⁵⁹ *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815, at paras. 50, 53.

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Courts have also held that decision making in the public interest must take into consideration the concerns of society generally, or at least those concerns relevant given the statutory scheme, and not merely the interests of one segment of society.⁶⁰

The Supreme Court has held that equality and human rights values properly form part of the determination of what constitutes the public interest. In *Trinity Western University v. College of Teachers*, the Supreme Court determined that the B.C. College of Teachers ("BCCT") had jurisdiction to consider discriminatory practices of TWU, and the BCCT was entitled to look to B.C. human rights legislation and the *Charter* to determine whether it would be in the public interest to allow public school teachers to be trained at TWU. On this, the Court stated:⁶¹

[26] This is not to say that the BCCT erred in considering equality concerns pursuant to its public interest jurisdiction. As we have already stated, concerns about equality were appropriately considered by the BCCT under the public interest component of s. 4 of the *Teaching Profession Act*. The importance of equality in Canadian society was discussed by Cory J. for the majority of this Court in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 67...

[28] At the same time, however, the BCCT is also required to consider issues of religious freedom. Section 15 of the *Charter* protects equally against "discrimination based on . . . religion". Similarly, s. 2(a) of the *Charter* guarantees that "[e]veryone has the following fundamental freedoms: . . . freedom of conscience and religion".

...

[34] Consideration of human rights values in these circumstances encompasses consideration of the place of private institutions in our society and the reconciling of competing rights and values. Freedom of religion, conscience and association coexist with the right to be free of discrimination based on sexual orientation.

Thus, there is little guidance as to the meaning of the "public interest" in a general sense. In each instance, the purpose for which powers are granted are critical in framing the public interest aspects to be considered.

1. Law Society Jurisprudence

The term "public interest" has been interpreted in other sections of the *LSA*. Specifically, the *LSA* describes the Attorney General as the guardian of the public interest in s. 13(1).⁶² The public

⁶⁰ *Waycobah First Nation v. Canada (Attorney General)*, [2010] F.C.J. No. 1486, at para. 31, aff'd [2011] F.C.J. No. 847 (F.C.A.); see also *Edwards*, *supra*.

⁶¹ *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772, at paras. 26-28.

⁶² *Law Society Act*, RSO 1990, c L.8, at sec. 13.1 ("The Attorney General for Ontario shall serve as the guardian of the public interest in all matters within the scope of this Act or having to do in any way with the practice of law in Ontario or the provision of legal services in Ontario, and for this purpose he or she may at any time require the production of any document or thing pertaining to the affairs of the Society.").

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interest in the context of s. 13(1) of the *LSA* addresses two forms of the public interest: the public interest in all matters within the scope of the *LSA* and the public interest in all matters having to do with the legal profession in any way.⁶³ The Ontario Superior Court has expanded on these two meanings:⁶⁴

[230] ... either specified form of public interest is intended to include the rights and protections which law and equity afford to members of the public who are clients of lawyers. The many members of the public who have lawyers acting for them are vitally concerned with clients' rights and protections in respect of members of this powerful self-governing profession, skilled in the disputationary arts. The rest of the public, blessed by the absence of problems larger than their own solutions, also has an interest in these rights and protections. That is because lawyer and client relationships are made frequent by the complexity of modern life, and made necessary by the clients' frequent lack of expertise in dealing with these complexities. The rights and protections which law and equity afford to clients support every client and every prospective client in the faith he or she invests, or may well have to invest in a lawyer and client relationship. From the clients' perspective, a lawyer and client relationship consists primarily of faith and fees. From the lawyers' perspective, without the first there will not be the second. Faith is the basis on which clients retain lawyers. It is a significant part of the trust which is the heart of lawyer and client relationships. Convocation does not have the power to regulate these aspects of client rights and protections even though it is empowered to impose on lawyers' constraints and obligations which may shape their duties.

This understanding of the public interest reinforces that the Society must consider the members of the public who utilize legal services, as well as the public at large who may need them one day.⁶⁵ It is also consistent with interpretations of the "public interest" with respect to the Society's mandate to regulate as articulated by the Supreme Court in *Edwards v. Law Society of Upper Canada*.⁶⁶

The discipline jurisprudence on the duty of the Society to protect the public interest has largely focused on the obligation of the Society to discipline members and the tensions between the rights of individual lawyers and the public at large. In this respect, Lederer J. has stated that "[i]t is incumbent on us to ensure that members of the public can trust the work of the lawyers they

⁶³ *Stewart v. Canadian Broadcasting Corp.*, 1997 CanLII 12318 (ON SC), at para. 229.

⁶⁴ *Ibid.* at para. 230.

⁶⁵ A similar sentiment has been expressed for the Crown in *Elder Advocates*, where the Supreme Court stated: "The Crown's broad responsibility to act in the public interest means that situations where it is shown to owe a duty of loyalty to a particular person or group will be rare: see *Harris v. Canada*, 2001 FCT 1408, [2002] 2 F.C. 484, at para. 178." See *Alberta v. Elder Advocates of Alberta Society*, [2011] 2 S.C.R. 26, at para. 44.

⁶⁶ *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, at para. 14.

retain and be sure that those who step outside the rules and ethical principles will be properly disciplined."⁶⁷

The definition of professional misconduct under the Rules provides in part as follows: "'professional misconduct' means conduct in a lawyer's professional capacity that tends to bring discredit upon the legal profession including ..."⁶⁸

The penalty jurisprudence is also instructive with respect to the public interest. In *Law Society of Upper Canada v. Jodi Lynne Feldman*, the Hearing Panel said:⁶⁹

[63] The parties agree that, as set out in *Law Society of Upper Canada v. Jonathan Wade Strug*, ... the four purposes served by making disciplinary orders are:

- a) To maintain public confidence in the legal profession;
- b) Specific deterrence, namely preventing a particular lawyer from continuing a course of conduct;
- c) General deterrence, namely deterring the profession at large from engaging in certain courses of conduct; and
- d) Rehabilitation, restitution, and improving the practice of a particular lawyer.

[64] The parties also agree that maintaining public confidence in the legal profession is the most important and that it is more important than the fortunes of any one lawyer. In *Law Society of Upper Canada v. Mary Martha Coady*,the panel stated that public confidence is based on "such matters as a licensee's credibility, integrity, character, repute, and fitness. While mitigating factors and compassion for the licensee have their place, they should not compromise an impartial adjudication of those matters."....

The duty of the Society to protect the public interest has been articulated as follows in disciplinary decisions:

⁶⁷ *Sandra Thompson Family Trust (Re)*, 2011 ONSC 7056, at para. 21.

⁶⁸ *Rules of Professional Conduct*, at rule 1.02 (emphasis added).

⁶⁹ *Law Society of Upper Canada v. Jodi Lynne Feldman*, 2014 ONLSHP 6, at paras. 63-64; internal citations omitted (emphasis added).

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- "It is not in the public interest to allow lawyers to escape Society discipline by hiding behind their client's privilege."⁷⁰
- There is "public interest in preventing the unauthorized practice of law so as to protect the public."⁷¹
- "The public interest is best served when properly licensed legal professionals appear before administrative tribunals"⁷²
- "The Law Society's duty to protect the public interest involves an obligation to be neutral and to be rigorous in exercising its judgment at every stage of a proceeding about questions concerning the quality of the evidence at its disposal as well as the appropriate remedy available to it in any given situation. The Law Society's authority as guardian of the public interest is jeopardized as much by lack of rigour in using appropriate discretion based on solid evidence (which speaks to judgment) as it would be by its decision inspired by a partisan stance (which would speak to a collateral purpose or malicious intent). The Law Society cannot be permitted to slough off mistakes by saying that it meant well."⁷³
- "... the Society has a statutory duty to protect the public interest. That duty is cast upon it as a self-governing body. The public at large would be justly aggrieved and would properly demand that the right of self-governance be removed if it was found that hearing panels, on discovering acts of professional misconduct that had not been particularized, did not make a finding with respect to them. The public must be satisfied that the Society takes its duties seriously and does not overlook or excuse matters of professional misconduct when such matters are discovered."⁷⁴
- the Society's "powers to govern the profession in the public interest allow access to and use of solicitor/client privileged material in a number of contexts: investigation, trusteeship, trust audits and practice reviews."⁷⁵

From these examples, it can be discerned that the public interest mandate of the Society has been relied on in the discipline jurisprudence as a means to ensure that the public has access to quality and reliable legal services, and that the public retains trust in the legal community. This is largely in line with the Society's self-described purpose, to govern the legal profession "in the public

⁷⁰ *Law Society of Upper Canada v. Feldman*, [2012] L.S.D.D. No. 195, at para. 153

⁷¹ *Law Society of Upper Canada v. Chiarelli*, [2013] O.J. No. 1253, at para. 25.

⁷² *Ibid.* at para. 26.

⁷³ *Law Society of Upper Canada v. Shore*, [2007] L.S.D.D. No. 42, overturned on appeal with respect to costs only, *Law Society of Upper Canada v. Sharon Ellen Shore*, 2008 ONLSAP 0006.

⁷⁴ *Law Society of Upper Canada v. Kelly*, [2009] L.S.D.D. No. 103, at para. 152.

⁷⁵ *Law Society of Upper Canada v. Feldman*, [2012] L.S.D.D. No. 195, at para. 27.

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interest by ensuring that the people of Ontario are served by lawyers and paralegals who meet high standards of learning, competence and professional conduct."⁷⁶

G. **Conclusion**

We summarize our guidance in the Executive Summary at the outset of this letter.

Please do not hesitate to contact us if you have further questions.

Yours very truly,

CAVALLUZZO SHILTON MCINTYRE CORNISH LLP



Freya Kristjanson

⁷⁶ Law Society of Upper Canada, About the Law Society, <http://www.lsuc.on.ca/with.aspx?id=905> (last visited March 5, 2014).



LAWYERS | AVOCATS

VIA EMAIL: ESpears@lsuc.on.ca

April 7, 2014

Ms. Elliot Spears
Senior Counsel, Legal Affairs
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Toronto, Ontario
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Dear Ms. Spears:

RE: TWU Law School Accreditation Decision – Human Rights Legal Opinion

The Law Society of Upper Canada (the “Law Society”) has asked us to provide a legal opinion on the following question:

What are the Law Society’s obligations with respect to the Ontario *Human Rights Code* when deciding whether to accredit Trinity Western University’s proposed law school?

Our opinion is organized as follows:

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1. **Executive Summary**

We suggest the following four steps in terms of how the Law Society should view its human rights obligation under the *Code* with respect to the TWU Law School accreditation decision:

1. Review what accreditation of a law school means in the statutory context and determine whether accreditation entitles the Law Society to look at TWU's alleged discriminatory practices.
2. Consider the TWU Covenant's alleged discriminatory impact on various persons and how the Law Society's accreditation or non-accreditation decision would impact on those persons.
3. Consider the competing rights at stake and determine, having regard to *Code* jurisprudence, whether TWU Law School is entitled to lawfully discriminate because of its religious character.
4. Incorporate the conclusion in 3 into the overall discretionary decision of whether the Law Society should accredit TWU Law School.



The Law Society is the gatekeeper to the profession of law in Ontario. It has the ultimate responsibility for the training of lawyers in Ontario, one part of which involves accrediting law schools in Canada whose graduates may wish to practice law or provide legal services in Ontario. When considering whether to accredit law schools in Canada, the Law Society has a duty, amongst other things, to protect the public interest and maintain and advance the cause of justice and the rule of law. Accreditation of a law school is a discretionary decision.

Accreditation is not defined in the *Law Society Act*. The Law Society can take a broad or narrow approach to the meaning of accreditation. The broad approach considers all the law school's practices; the narrow approach focuses only on the law school providing the appropriate "standards of learning" for the purpose of entering the Ontario legal profession. Guidance to the proper approach to accreditation comes from the duties of the Law Society and the *TWU 2001* Supreme Court decision which held that a regulator is entitled to look at an institution's alleged discriminatory practices when regulating in the public interest.

The focus of the present controversy is on the requirement that students of the proposed TWU Law School sign a Covenant that appears to discriminate against several classes of persons: LGBT students most prominently, but also women and unmarried heterosexuals. The seriousness of the potential discrimination varies from pre-admission to post-graduation. Of most concern, while at TWU Law School, students, faculty and staff must adhere to the Covenant or risk disciplinary action including probation, suspension, and expulsion from TWU Law School.

Human rights law in Ontario is governed by the Ontario *Human Rights Code*, which has wide application to persons and organizations in both the private and public spheres. The *Code* provides protection from discrimination in specific areas (such as services, employment and membership in a self-governing profession) on the basis of prohibited grounds (such as race, age, disability, etc.). The *Code* regulates conduct, not belief. It is regarded as quasi-constitutional in nature because of its unique and fundamental importance. While the purpose of the *Code* includes the prevention of discrimination, the *Code* also provides for certain exemptions and defences for respondents in circumstances that amount to "lawful discrimination."

The *Code* is part of the general law and decision making bodies must take into account the *Code* in situations where human rights issues arise. While the alleged discrimination may be occurring in British Columbia, it becomes a concern for the Law Society here in Ontario because the



accreditation is taking place in this province. The Law Society is not sitting as a human rights tribunal. However, the Law Society is being asked to accredit a law school which engages in alleged discriminatory practices, so the only way to properly determine if discrimination may be taking place is to look at *Code* jurisprudence, including about balancing rights.

The most likely way in which the Law Society's accreditation decision may be challenged is through judicial review. Another approach would be for an individual to file an application before the Human Rights Tribunal of Ontario on the basis of discrimination in the area of vocational associations since the legal profession is a self-governing profession. The Law Society's defence would depend on showing that it did not discriminate against an individual on a prohibited ground including because its decision was made in compliance with *Code* principles. It is important therefore that the Law Society properly analyse, within the TWU Law School Proposal, what human rights issues are at stake.

The Law Society must also consider the *Charter*, which is part of the Canadian Constitution. The *Charter* and the *Code* are both important human rights laws but are distinct. Following the Supreme Court's decision in *Doré*, the Law Society must take *Charter* values into account in its discretionary regulatory decision-making. Conducting a *Charter* analysis and a *Code* analysis are two distinct inquiries. Here we focus on the *Code*, acknowledging that *Charter* jurisprudence contributes to the interpretation of the *Code*.

TWU Law School's inclusion of a Covenant that all students, faculty, and staff must adhere to raises a question of how to reconcile competing rights. An individual's right to be free from discrimination may compete with a group's right to restrict membership based on religious or other grounds. Whether the group's "associational" right trumps the individual's "non-discrimination" right, or *vice versa*, depends on the specific context and facts of the case. The Ontario Human Rights Commission has prepared a *Policy on Competing Human Rights* which lays out important principles and processes that may be considered by the Law Society when attempting to reconcile competing rights.

The question of whether TWU's Covenant is discriminatory according to Ontario law is important because the answer impacts on the Law Society's requirement to make its accreditation decision in compliance with the *Code*. The *Code* requires that the Law Society ask two questions to determine if the Covenant is discriminatory:

1. Does the TWU Covenant discriminate against anyone on grounds prohibited by the *Code*?



2. If so, is TWU Law School's proposal nevertheless lawful because of an exemption or defence available under the *Code*?

Ontario law provides an exemption for special interest organizations under s. 18 of the *Code*; and a defence to an allegation of employment discrimination under s. 24 based on a workplace requirement constituting a *bona fide* occupational requirement.

A series of cases over the last 30 years from *Caldwell* (1984) to *Whatcott* (2013) in courts and human rights tribunals provide the jurisprudence concerning legitimate exemptions and defences in human rights law. In three cases identified – *Caldwell*, *Steinbach Bible College*, and *Christian Horizons* – there was a requirement for an employee to adhere to a religious institution's code of conduct. In *Christian Horizons*, an Ontario employment case, the Human Rights Tribunal of Ontario found that the institution's imposition of a code of conduct on a lesbian employee constituted discrimination on the basis of sexual orientation. TWU Law School's Covenant applies not only to its employees but also to its students.

In order to determine whether TWU Law School is entitled to an exemption or defence under the *Code*, the Law Society should analyze, *inter alia*, TWU Law School's Proposal to the Federation of Law Societies as the Proposal represents an important statement of how the TWU Law School will operate. The Law Society should ask a series of questions that arise from the case law that will inform its decision about whether TWU, through its Covenant, is entitled to lawfully discriminate because of its particular religious character. That determination, one way or another, must be considered alongside any other discretionary considerations that Convocation may take into account in making its accreditation decision.

2. Law Society of Upper Canada

a. *The Law Society Act*

The Law Society is a not-for-profit corporation that derives its authority from its enabling statute the *Law Society Act*.¹ The Law Society's function is to ensure that:

¹ *Law Society Act*, RSO 1990, c L.8 ["LSA"].



- (a) 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; and
- (b) the standards of learning, professional competence and professional conduct for the provision of a particular legal service in a particular area of law apply equally to persons who practise law in Ontario and persons who provide legal services in Ontario.²

In carrying out its functions, the Law Society must have regard for 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.³

The Law Society is required to licence applicants who apply for a class of licence in accordance with the Law Society's by-laws and who otherwise meet the requisite qualifications and requirements for entry to the Ontario bar.⁴

b. By-law 4 and Accreditation of a Canadian Law School

The Law Society's By-law 4 governs the licensing of lawyers to practice law in Ontario.⁵ Section 9 states that an applicant seeking a Class L1 licence must have one of the following:

² LSA, s. 4.1.

³ LSA, s. 4.2.

⁴ LSA, s. 27(3).

⁵ LSUC, By-law 4, Licensing.



- i. 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.
- ii. A certificate of qualification issued by the National Committee on Accreditation appointed by the Federation of Law Societies of Canada and the Council of Law Deans.⁶

By-law 4 defines “accredited law school” as “a law school in Canada that is accredited by the Society.”⁷ The *LSA* does not define “accredited.” The Oxford English Dictionary defines “accredit” as “(of an official body) give authority or sanction to (someone or something) when recognized standards have been met.”⁸ As a verb in this context, “to sanction” means to “give official permission or approval for (an action).”⁹

Since accreditation means giving official approval to a law school for the purpose of licensing future graduates, the Law Society can take a broad or narrow interpretation to the meaning of accreditation. The broad approach would be to suggest that accrediting a law school involves taking an expansive view of what the law school is doing in term of its practices, ethics, and compliance with the law; quality of legal education and programs; and determination of its graduates’ future fitness to practice law in Ontario. A narrow approach would be to take a restrictive view of accreditation within the functions of the Law Society, focusing only on the law school providing appropriate “standards of learning” for the purposes of entering the Ontario legal profession.

Some guidance is provided by the fact that the Law Society has a duty to protect the public interest and maintain and advance the cause of justice and the rule of law. In its own materials, the Law Society also acknowledges its public interest mandate to further equity and diversity values and principles in the Law Society’s policies and practices.¹⁰

Further guidance is suggested by the Supreme Court decision in *Trinity Western University v. British Columbia College of Teachers*, where the Supreme Court indicated that it was within the

⁶ By-law 4, s. 9(1) 1.

⁷ By-law 4, s. 7.

⁸ Oxford Dictionaries, “accredit” online: <http://www.oxforddictionaries.com/definition/english/accredit>.

⁹ Oxford Dictionaries, “sanction” online: <http://www.oxforddictionaries.com/definition/english/sanction>.

¹⁰ Law Society of Upper Canada, Equity Initiatives Department, FAQ, online: <http://www.lsuc.on.ca/faq.aspx?id=1034#q1213>.



jurisdiction of the BC College of Teachers (“BCCT”) to consider the alleged discriminatory practices of Trinity Western University when considering the public interest:

While the BCCT was not directly applying either the *Charter* or the province’s human rights legislation when making its decision, it was entitled to look to these instruments to determine whether it would be in the public interest to allow public school teachers to be trained at TWU.¹¹

Accordingly, the Law Society will have to determine which approach best accords with its statutory purposes and legal responsibilities.

We note that the *LSA* only provides the Law Society with a mandate to accredit law schools *in Canada*. That the Law Society does not inquire into the practices of non-Canadian law schools appears to follow from the fact that, pursuant to the *LSA*, those law schools are prevented from seeking and the Law Society is prevented from granting accreditation to them.

3. Trinity Western University

a. Overview

Trinity Western University (“TWU”) was established by statute in 1969 as a Junior College to carry out the following purpose:

The objects of the College shall be to provide for young people of any race, colour, or creed the first two years of university education in the arts and sciences with an underlying philosophy and viewpoint that is Christian and to assist students to transfer to senior colleges and universities.¹² [Emphasis added.]

The general direction and sponsorship of the College came from the General Conference of the Evangelical Free Church of America.¹³

TWU states on its website that it is a private Christian university legislated by the BC Government to serve the public. Its mission is as follows:

¹¹ *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 at para. 27 [“*TWU 2001*”].

¹² *Trinity Junior College Act*, SBC 1969, c. 44, s. 3(2) [“*TJCA*”]. This Act was amended by the *Trinity Western College Act Amendment Act, 1985*, SBC 1985, c. 63, changing the name to Trinity Western University.

¹³ *TJCA*, s. 3(3).



As an arm of the Church, to develop godly Christian leaders; positive, goal-oriented university graduates with thoroughly Christian minds; growing disciples of Christ who glorify God through fulfilling the Great Commission, serving God and people in the various marketplaces of life.¹⁴

TWU is a private university and a registered charity, incorporated under the BC *Society Act* thus rendering it a not-for-profit organization.¹⁵

b. Community Covenant Agreement

At the heart of the present controversy is TWU's Community Covenant Agreement (the "Covenant"), which prohibits, among other things, "sexual intimacy that violates the sacredness of marriage between a man and a woman."¹⁶ The full Covenant is in the Record before Convocation.

All students are required to sign the Covenant prior to being permitted to register for classes. TWU describes the Covenant as a solemn pledge creating a contractual agreement and relational bond.¹⁷ The prohibitions on enumerated conduct apply both on and off campus. Violation of the Covenant and its standards of conduct may result in disciplinary action including probation, suspension, and expulsion from TWU.¹⁸

The Covenant has changed somewhat since 2001 when the Supreme Court of Canada considered TWU's Community Standards document, as it was then titled.¹⁹ In 2001, the Supreme Court made no reference to there being a mechanism under the Community Standards document to discipline or expel a TWU student. The Court simply acknowledged, "There is no evidence before this Court that anyone has been denied admission because of refusal to sign the document

¹⁴ TWU, online: <https://twu.ca/about/>.

¹⁵ *Society Act*, RSBC 1996, c 433.

¹⁶ TWU, Community Covenant Agreement, August 2009, online: <http://www.twu.ca/studenthandbook/university-policies/community-covenant-agreement.html>.

¹⁷ *Covenant*, p. 1.

¹⁸ TWU Student Handbook, Student Accountability Process, online: <https://twu.ca/studenthandbook/university-policies/student-accountability-process.html>. See also: TWU Student Handbook, Student Accountability Policy, Possible Actions, online: <https://twu.ca/studenthandbook/university-policies/student-accountability-policy.html#actions>.

¹⁹ *TWU 2001* at para. 4.



or was expelled because of non-adherence to it.”²⁰ Indeed, it appears that the Covenant was thoroughly reviewed and revised in 2009.²¹

c. Discrimination Concern Regarding the Covenant

Enforcement of the present Covenant would appear to discriminate against three groups:

LGBT persons who wish to practice sexual intimacy during their time at TWU but are prohibited from doing so (both on and off campus) even if they are legally married (and, unlike in 2001, same sex-marriage is now legally recognized in Canada). This aspect of the Covenant appears to constitute discrimination on the basis of sexual orientation.

Women who would be prohibited from obtaining an abortion (since this contravenes the requirement to uphold a person’s “God-given worth from *conception* to death”). This aspect appears to constitute discrimination on the basis of sex, since only women can get pregnant and, by implication, seek an abortion.²²

Unmarried heterosexual persons who wish to practice sexual intimacy during their time at TWU. This aspect of the Covenant appears to constitute discrimination on the basis of marital status.

The level of concern regarding discrimination varies from pre-admission to graduation:

Time Frame	Prior to Attendance Prior to Employment	During Attendance During Employment	Graduated Law Student Former Employee
Discrimination Concern	Won’t bother to apply to be a TWU Law student or won’t apply for a job at TWU Law School <i>because of</i> Covenant	LGBTs can’t engage in sexual intimacy... Women can’t obtain an abortion... Unmarried	For lawyers: speculative and no evidence at this point whether simply because they attended TWU Law School that they would discriminate as members of the legal

²⁰ *TWU 2001* at para. 22.

²¹ TWU Website: <https://twu.ca/governance/presidents-office/community-covenant.html>.

²² *Brooks v. Canada Safeway Ltd.*, [1989] 1 SCR 1219 at 1244.



		heterosexuals can't engage in sexual intimacy...	profession
		without breaching the Covenant which may lead to discipline, suspension or expulsion	For ex-employees, if they discriminate in future their conduct may be captured by human rights legislation if it occurs within a social area, but no different than any other member of the population
Level of Discrimination Concern	Some Concern because of impact on prohibited ground	High Concern as Covenant in effect at this time	Speculative Concern

4. Human Rights Law in Ontario

a. Overview of the Ontario *Human Rights Code*

Human rights law in Ontario is governed by the *Human Rights Code*.²³ The *Code* applies to every person in Ontario, including provincial public and private institutions. "Person" is broadly defined and includes an individual as well as a corporation.²⁴

The Preamble to the *Code* states that it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The *Code* aims to create a climate of understanding and mutual respect for the dignity and worth of each person.

The *Code* provides protection from discrimination in the following five "social areas":

- employment
- goods, services and facilities

²³ *Human Rights Code*, RSO 1990, c H.19 ["Code"].

²⁴ *Code* s. 46 and *Legislation Act, 2006*, SO 2006, c 21, Sch F, s. 87.



- accommodation (housing)
- membership in a vocational association (including a self-governing profession)
- contracts

There are 17 “prohibited grounds” of discrimination under the *Code*:

- race, ancestry, place of origin, colour, ethnic origin
- citizenship
- creed
- sex
- sexual orientation
- gender identity
- gender expression
- disability
- age
- marital status
- family status
- receipt of public assistance (in accommodation only)
- record of offences (in employment only)

The *Code* regulates conduct (in the above social areas and in respect of the prohibited grounds). It does not regulate thought, belief, or conscience. The *Code* has primacy over any other statute in Ontario (generally, in cases of conflict, other legislation must conform to it); and is viewed by the courts as being quasi-constitutional in nature because of its unique and fundamental importance.²⁵

The *Code* prohibits both direct and indirect discrimination. Section 9 of the *Code* provides that: “No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.”

²⁵ *Code*, s. 47(2). See also: *Tranchemontagne v. Ontario (Directors, Disability Support Program)*, 2006 SCC 14 at para. 33 [“*Tranchemontagne*”]. The Court cites *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 SCR 566 at para. 18 and *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 SCR 145 at 158.



The *Code* has provisions that provide for an exemption from the application of the *Code* or provide a statutory defence therein – what may be termed “lawful discrimination.” Broadly speaking:

- An *exemption* is available to a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination that wishes to restrict its membership to persons who are similarly identified.
- A *defence* is available to an organization that wishes to discriminate in employment on the basis of a reasonable and *bona fide* qualification (“BFOQ”).

The sections of the Ontario *Code* that are germane to the TWU Law School situation in terms of establishing an individual’s right to be free from discrimination and providing an organization with an exemption or defence are:

- Section 1 (equal treatment without discrimination in services);
- Section 5 (equal treatment without discrimination in employment);
- Section 6 (equal treatment without discrimination in the area of vocational associations, which includes membership in a self-governing profession);
- Section 18 (exemption from the *Code* for a special interest organizations); and
- Section 24 (defence to discrimination in employment based on a reasonable and *bona fide* qualification – BFOQ).²⁶

b. Interpreting and Applying the *Code*

When Convocation makes its decision whether or not to accredit TWU Law School, it is doing so under the authority of By-Law 4, section 7. The *LSA* defines Convocation as “a regular or special meeting of the benchers convened for the purpose of transacting business of the Society.”²⁷ Accreditation is a discretionary decision, not an adjudicative one. The question, therefore, arises as to whether and how Convocation must interpret and apply the *Code*. We have been unable to identify a case on point where an administrative body making a discretionary decision considers the *Code*.

²⁶ See Appendix “A” for these provisions from the Ontario *Human Rights Code*.

²⁷ *LSA*, s. 1(1).



On the one hand, the *Tranchemontagne* decision suggests that the Law Society is legally required to interpret and apply the *Code*. This approach would suggest that, even though the *Code* is not the “governing statute” of the Law Society, the *Code* is binding law on the Law Society because it is fundamental, quasi-constitutional law:

The *Code* is fundamental law. The Ontario legislature affirmed the primacy of the *Code* in the law itself, as applicable both to private citizens and public bodies. Further, the adjudication of *Code* issues is no longer confined to the exclusive domain of the intervener the Ontario Human Rights Commission (“OHRC”): s. 34 of the *Code*. The legislature has thus contemplated that this fundamental law could be applied by other administrative bodies and has amended the *Code* accordingly.²⁸ [...]

The presumption that a tribunal can go beyond its enabling statute – unlike the presumption that a tribunal can pronounce on constitutional validity – exists because it is undesirable for a tribunal to limit itself to some of the law while shutting its eyes to the rest of the law. The law is not so easily compartmentalized that all relevant sources on a given issue can be found in the provisions of a tribunal’s enabling statute. Accordingly, to limit the tribunal’s ability to consider the whole law is to increase the probability that a tribunal will come to a misinformed conclusion. In turn, misinformed conclusions lead to inefficient appeals or, more unfortunately, the denial of justice.²⁹

On the other hand, *Tranchemontagne* may be read as confined to the exercise of a statutory tribunal engaged in adjudication, whereas Convocation is engaging in a non-adjudicative discretionary and administrative decision.

We believe that, whether or not *Tranchemontagne* applies, the real question is “is it necessary to consider the *Code* to determine the dispute that is before Convocation?”³⁰ The *Code* is part of the general law and decision making bodies must take into account the *Code* in situations *where human rights issues arise*.³¹

²⁸ *Tranchemontagne* at para. 13.

²⁹ *Tranchemontagne* at para. 26.

³⁰ *CUPE Local 1999 v. Lakeridge Health Corp.*, 2012 ONSC 2051 at para. 75.

³¹ *Eagleson Co-Operative Homes Inc. v. Théberge*, 2006 CanLII 29987 (Ont. Div. Ct.)



In our view, while there may be other aspects of accreditation for Convocation to consider other than the discriminatory impact of the TWU Covenant, the central controversy regarding TWU Law School's proposal is the requirement that all students, faculty and staff sign the Covenant which imposes a code of conduct that appears to discriminate against a class of persons. The alleged discrimination may be occurring in British Columbia, but it becomes a concern for the Law Society here in Ontario because the accreditation is taking place in this province. The accreditation decision may affect whether TWU law graduates have their law degrees recognized as coming from an accredited institution.

To be clear, the Law Society is not sitting as a human rights body: there are no litigants before Convocation; the Law Society cannot offer any human rights damages or remedies; and no legal determination regarding the *Code* can occur. However, the Law Society is being asked to accredit a law school which engages in alleged discriminatory practices, so it is entitled to consider those practices (*TWU 2001*), and it has a duty to, *inter alia*, protect the public interest. The only way to properly determine if discrimination may be taking place is to look at *Code* principles. In order for the Law Society to come to a view about whether TWU Law School would be engaging in discriminatory practices it must look at *Code* jurisprudence.

While acknowledging that the accreditation decision is discretionary not adjudicative, if accreditation of TWU Law School occurs, then LGBT persons (among others) could claim that the Law Society has given its stamp of approval to a law school that practices discrimination. Conversely, if the Law Society does not accredit due to concerns around discrimination, then TWU and its supporters could claim that the Law Society has prioritized LGBT (and other) rights and discriminated against them on the basis of religion. Accordingly, we believe what the *Code* jurisprudence says about balancing rights will help provide guidance to Convocation in properly analyzing the TWU Law School situation.

c. Challenging the Law Society's Accreditation Decision

The most likely way that a party may challenge the Law Society's accreditation decision is through judicial review. The Law Society's discretionary decision will be scrutinized including with respect to how it considered TWU Law School's alleged discriminatory practices. However, another approach would be to claim breach of section 6 of the *Code* which provides the "right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination" based on the various prohibited grounds including creed, sexual orientation, gender and marital status.



If the Law Society does not accredit TWU Law School, a future TWU law graduate who is denied a license to practice law in Ontario on that basis may file an application against the Law Society for discrimination in the area of vocational associations on the basis of their creed.

Conversely, if the Law Society does accredit TWU Law School, a claim by a person who is negatively impacted and wishes to practice law or offer legal services in Ontario may make the following argument: his or her opportunities to be licensed in Ontario are more restricted by the Law Society's accreditation of a law school that engages in discriminatory practices.

Assuming an applicant before the Human Rights Tribunal of Ontario ("HRTTO") was able to demonstrate a *prima facie* case of discrimination, it would then fall to the Law Society to defend its decision. In our view, the success of the Law Society's defence would depend on showing that it did not discriminate against an individual on a prohibited ground including because its decision was made in compliance with *Code* principles. Accordingly, we again suggest that Convocation must have regard to *Code* jurisprudence in order to properly analyze, within the TWU Law School Proposal, what human rights issues are at stake.

If the challenge to the Law Society instead proceeded under section 4 of the *Code* (i.e. accreditation as a "service"), it would appear that the Law Society's defence may be that, in making its accreditation decision, it is not offering a "service" under the *Code*. The HRTTO has held that the content and decision of a statutory decision does not constitute a "service" under the *Code*.³² In any event, even if the HRTTO were to find that the Law Society's accreditation decision constituted a service, the defence would be conducted along the same lines as in respect of section 6 (vocational association).

d. The *Code* versus the *Charter*

The *Code* and the *Canadian Charter of Rights and Freedoms*,³³ are both important human rights laws but are distinct. The *Code* applies to private and public activity within a social area (employment, services, vocational association, etc.) where a prohibited ground may be implicated. The *Code* is not part of the Constitution of Canada but is accorded quasi-constitutional status by virtue of a primacy clause and its importance to fundamental rights.

³² *Dallaire v. Les Chevaliers de Colomb – Conseil* 6452, 2011 HRTTO 639 at 29, citing *Zaki v. Ontario (Community and Social Services)*, 2009 HRTTO 1595 at paras. 7-10.

³³ *Canadian Charter of Rights and Freedoms*, Part I of the *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.



The *Charter* is part of the Constitution of Canada. It is the supreme law of the land and all federal and provincial/territorial laws, and government action under those laws, must comply with the *Charter*. The *Charter* does not directly regulate private activity or activity where there is no state involvement. Law societies and quasi-governmental institutions like universities may be subject to the *Charter* where they are found to be implementing a specific governmental policy or program, or exercising statutory authority.³⁴ Moreover, in *Doré v. Barreau du Québec*, the Supreme Court directed that law societies must take *Charter* values into account in their discretionary regulatory decisions.³⁵

In sections 15, 2(a) and 1, respectively, the *Charter* guarantees equality and freedom of religion, both subject to such reasonable limits as can be demonstrably justified in a free and democratic society.³⁶ The *Charter* and human rights laws have strongly influenced each other. Accordingly, it is correct to observe that, while the *Charter* does not regulate private activity directly, *Charter* jurisprudence has had a significant impact on the interpretation of human rights laws which, in turn, regulate private and public activity in the provinces and territories.

In summary, despite the *Charter* and the *Code* being fundamental human rights laws, a *Charter* analysis and a *Code* analysis are distinct and involve different inquiries. In this opinion, our focus is only on the *Code* although we recognize that *Charter* jurisprudence has contributed to an interpretation of the *Code*.

Following *Doré*, and in light of the lack of guidance from case law as to how to incorporate a human rights analysis into a discretionary administrative decision, it may be suggested that we should focus on “*Code* values.” This would require decision makers who are called upon to exercise their statutory discretion to do so in accordance with *Code* provisions. The *Code* is comprehensive legislation that not only prohibits discrimination but also provides exemptions and defences within the *Code*. The *Code* has its own internal balancing, which must, therefore, be regarded when examining how to ultimately fulfill the administrative body’s statutory objectives.

³⁴ See: *McKinney v. University of Guelph*, [1990] 3 SCR 229; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 at paras. 42-43; and *Pridgen v. University of Calgary*, 2012 ABCA 139 at paras. 78-99.

³⁵ *Doré v. Barreau du Québec*, 2012 SCC 12 [“*Doré*”].

³⁶ See Appendix “B” for the relevant *Charter* provisions.



5. Competing Rights

Exemption and defence clauses in the *Code* represent a legislative acknowledgment that, while discrimination on prohibited grounds is presumptively illegal, there are circumstances in which the impugned conduct may be lawfully excused because of other important values. For instance, an individual's right to be free from discrimination may compete with a group's right to restrict membership based on religious or ethnic grounds. Whether the group's "associational" right trumps the individual's "non-discrimination" right, or *vice versa*, depends on the specific context and facts of the case.

The Ontario Human Rights Commission ("OHRC") has recognized that a number of challenging human rights situations appear to be cases of "competing rights," which encompasses both *Code* rights and *Charter* rights. The OHRC has prepared a *Policy on Competing Human Rights* which lays out important principles and processes to consider when attempting to reconcile competing rights.³⁷

The *Policy* sets out eight key legal principles that organizations must consider when dealing with competing rights:

1. No rights are absolute
2. There is no hierarchy of rights
3. Rights may not extend as far as claimed
4. The full context, facts and constitutional values at stake must be considered
5. Must look at extent of interference (only *actual* burdens on rights trigger conflicts)
6. The core of a right is more protected than its periphery
7. Aim to respect the importance of both sets of rights
8. Statutory defences may restrict rights of one group and give rights to another³⁸

Policies of the OHRC are considered guidelines rather than binding law.³⁹ However, the HRTO has agreed that the OHRC's *Policy on Competing Human Rights* contains the "key legal

³⁷ Ontario Human Rights Commission, *Policy on Competing Human Rights* (January 26, 2012), online: http://www.ohrc.on.ca/sites/default/files/policy%20on%20competing%20human%20rights_accessible_2.pdf ["Policy"].

³⁸ *Policy* at p. 8.

³⁹ Section 30 of the *Code* authorizes the OHRC to prepare, approve and publish human rights policies to provide guidance on interpreting provisions of the *Code*. The OHRC's policies and guidelines set standards for how individuals, employers, service providers and policy-makers should act to ensure compliance with the *Code*. They



principles” concerning competing rights under the *Code*.⁴⁰ The OHRC’s *Policy* may provide further assistance to Convocation in conducting an analysis of competing rights.

In *R. v. N.S.*, which was decided by the Supreme Court after the OHRC’s *Policy* was released, the Court addressed the balancing of competing rights within the *Charter*.⁴¹ This case was about the freedom of religion of a witness to wear a niqab when testifying in a criminal proceeding as against an accused’s right to a fair trial. Rather than adopting either side’s “extreme” position, the Court favoured a third way: “allowing the witness to testify with her face covered unless this unjustifiably impinges on the accused’s fair trial rights.”⁴²

In its analysis of how a decision maker should seek to reconcile competing interests, the Court stated “The answer lies in a just and proportionate balance between freedom of religion on the one hand, and trial fairness on the other, based on the particular case before the Court.” A decision maker should (1) be satisfied that competing interests are truly engaged on the facts; and (2) must try to resolve the claims in a way that will preserve both rights. This latter point involves considering accommodation options and whether alternative measures would avoid the conflict.⁴³ In so doing, the Court advises against simply choosing one or the other of equally “extreme” options. This guidance from *N.S.* may assist the Law Society in reconciling competing rights within its accreditation decision.

6. Human Rights and the Accreditation Decision

a. Special Interest Organizations and Relevant Jurisprudence

Within the Law Society’s public interest mandate, it is entitled to consider alleged discriminatory practices at TWU. The *Code* requires that the Law Society ask two questions to determine if the Covenant is discriminatory:

1. Does the TWU Covenant, which all TWU Law School employees and students must sign and abide by, discriminate against anyone on grounds prohibited by the *Code*?

represent the OHRC’s interpretation of the *Code* at the time of publication:

http://www.ohrc.on.ca/en/our_work/policies_guidelines

⁴⁰ *Kacan v. Ontario Public Service Employees Union*, 2012 HRTO 1388 at para. 32.

⁴¹ *R. v. N.S.*, 2012 SCC 72 [“*N.S.*”].

⁴² *N.S.* at para. 1.

⁴³ *N.S.* at paras. 30-32.



2. If so, is TWU Law School's proposal nevertheless lawful because of an exemption or defence available under the *Code*?

In Ontario, the TWU Law School imposition of a Covenant on its members would constitute discrimination unless TWU Law School meets the legal definition of a "Special Interest Organization" under s. 18 of the *Code*:

Special Interest Organizations

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

In the 1995 Ontario Human Rights Board of Inquiry (the "Board") case *Martinie v. Italian Society of Port Arthur and Salvatore (Sam) Federico*,⁴⁴ the Board parsed section 18 into a three-part test as follows:

1. The organization seeking exemption must show it is a religious, philanthropic, educational, fraternal or social institution;
2. Which is primarily engaged in serving the interests of its members; and
3. That its membership is restricted to the persons identified as members.⁴⁵

When interpreting human rights exemption clauses like section 18 of the *Code*, the Supreme Court of Canada has ruled that while such provisions limit individual rights they also confer and protect rights of association and, therefore, should not be given a narrow construction.⁴⁶

⁴⁴ *Martinie v. Italian Society of Port Arthur and Salvatore (Sam) Federico* (1995), 24 CHRR D/169 (Ont. Bd. Inq.) ["*Italian Society*"].

⁴⁵ *Italian Society* at p. 19.

⁴⁶ *Caldwell v. Stuart*, [1984] 2 SCR 603 at 626. See also: *Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 SCR 279 at para. 100.



The Ontario *Code* also provides a statutory defence in the area of employment where there is a reasonable and *bona fide* occupational qualification:

Special employment

24. (1) The right under section 5 to equal treatment with respect to employment is not infringed where,

(a) a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or disability employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment;

A series of cases over the last 30 years has developed the law regarding exemption and defence clauses in human rights legislation.⁴⁷ Full case briefs of these cases are provided in Appendix “D” to this opinion. These cases are directly relevant to the Law Society’s task at hand as they address competing rights within the context of human rights exemption clauses.

It is interesting to note that the case law to date involving religious institutions has arisen almost entirely from Christian institutions. But just as there is no hierarchy of rights as between religious, sexual orientation and other rights, there is also no hierarchy of religions. The multicultural nature of Ontario is evolving. It is important for the Law Society to consider whether, if another faith community proposed a law school with its own covenant that, for *bona fide* religious reasons, appeared to discriminate on other grounds (e.g. gender segregation in instruction or differentiation along caste or racial lines) the same considerations regarding TWU’s Law School accreditation should apply.

In contemplation of its accreditation decision, the Law Society should ask a series of questions that arise from the case law that will inform its decision about whether TWU Law School, through its Covenant, is entitled to lawfully discriminate because of its particular religious character:

1. Whether the *primary* purpose of the proposed TWU Law School is the promotion of the interest and welfare of an identifiable group or class of person on religious

⁴⁷ See Appendix “A” which includes the Ontario clauses and Appendix “C” for relevant provisions from other provinces.



grounds? What would that identifiable group or class or persons on religious grounds be? Does it make a difference whether the members of the identifiable group share the same faith? (*Caldwell*)

2. Who are the TWU Law School's "members" and is the TWU Law School *primarily* engaged in serving the interests of those members? Does TWU Law School restrict membership to the persons identified as those members whose interests it is primarily engaged in serving? (*Italian Society*)
3. What is the particular nature of the TWU Law School? Is it religious in character? Or is it more like a secular law school? Does the particular nature of the Law School justify the imposition of a code of conduct on all students, faculty and staff? (*Brossard*)
4. What is the TWU Law School's work or purpose? Is there a rational connection between the Covenant and the Law School's work or purpose? What degree of rationality is required (any minimal connection or something more substantial)? (*Nixon*)
5. What is the activity of the Law School? Is the activity as seen by TWU *fundamental* religious activity? (*Christian Horizons*)
6. Do the activities of the Law School further the *religious* purposes of TWU and its members? Do the activities of the Law School serve the interests of the TWU religious organization? (*Christian Horizons*)
7. What is the nature and essential duties of professors and employees at TWU Law School? Is there a direct and substantial relationship between the impugned parts of the Covenant and the abilities, qualities, or attributes needed to satisfactorily perform the particular jobs? What would be the consequences to TWU Law School if the impugned parts of the Covenant were not maintained? (*Christian Horizons*)
8. Does the activity of or at the TWU Law School constitute more of a religious activity or more of a commercial activity? Where in the spectrum would the activity of the Law School fall? (*Knights of Columbus; Eadie*)



9. What is TWU Law School's function? Is the TWU Covenant rationally connected to TWU Law School's function as opposed to just rationally connected to TWU's religious beliefs? (*Eadie*)

In three cases – *Caldwell*, *Steinbach Bible College*, and *Christian Horizons* – there was a requirement for an employee to adhere to a religious institution's code of conduct. While the present matter of TWU Law School is similar to the above-noted cases, it is also different in as much as TWU's Covenant requires both its employees and its customers (i.e. students) to adhere to a code of conduct. We have not been able to identify a case in Canada, other than *TWU 2001*, where imposing a religious code of conduct on *students* has been permitted, let alone on *students of different faiths*.

b. TWU 2001

TWU 2001 confirmed that it is within a regulator's public interest jurisdiction to consider discriminatory practices of a school seeking accreditation. This included considering TWU's Covenant; its impact on TWU students, faculty and staff; and the future conduct of TWU B.Ed. graduates teaching in the BC public school system. The majority held that in so doing, the BCCT should have considered both equality guarantees and freedom of religion in light of both the *Charter* and human rights laws.

TWU 2001 was an administrative law appeal, not a *Charter* or human rights case. As such, the Supreme Court did not conduct a human rights analysis to determine whether TWU would be exempt from human rights laws under section 41 of the *BC Code*. Instead, the majority assumed that would be the case. Indeed, the BCCT itself did not conduct a human rights exemption provision analysis.⁴⁸

We suggest that while *TWU 2001* provides some guidance in terms of the present accreditation decision, the Law Society should consider the similarities and differences between the facts in that decision and the present Law School situation, particularly as human rights law has evolved since 2001.

Despite the majority's reference to the discriminatory impact of the Community Standards document on LGBTs, because of the way the discrimination concern was framed, the

⁴⁸ Based on an analysis of the trial, appellate and Supreme Court decisions.



discrimination experienced by affected TWU students, faculty and staff *while attending or employed* by TWU was not analyzed.

The majority's delineation between belief and conduct in *TWU 2001* is different from a case of competing rights where a decision maker must reconcile a group's associational and freedom of religion right to impose a religiously based code of conduct on a student or employee and that person's individual right to be free from discrimination on the basis of sexual orientation, sex and marital status.

Since *TWU 2001*, a number of subsequent cases have interpreted human rights exemption clauses, such as the *Christian Horizons* case in Ontario, which found that a lifestyle code of conduct prohibiting homosexual behaviour was not a reasonable and *bona fide* occupational requirement that could be imposed on employees despite the employer's religious beliefs. In the BC cases of *Eadie* and *Knights of Columbus*, the BC Human Rights Tribunal employed a spectrum analysis to conclude that the respondents' activities fell closer to commercial activities than religious activities when they were offering a service to the public. In our view, the question of whether TWU Law School would be entitled to receive an exemption must be based on the law as it presently exists, which includes *TWU 2001* and subsequent case law.

The Supreme Court's decision in *Saskatchewan (Human Rights Commission) v. Whatcott*,⁴⁹ confirmed L'Heureux-Dubé's analysis in *TWU 2001* (in dissent but not on this point) that human rights law rejects the separation of sexual orientation status from conduct, or identity from practice. It is contrary to law to separate a person's status from his or her conduct.

We observe that the trend in competing rights case law is to look for viable alternatives to extreme positions. In *Whatcott*, the Supreme Court struck down as unconstitutional certain provisions prohibiting hate speech that unjustifiably compromised the right to freedom of expression while upholding certain other sections of the Saskatchewan *Human Rights Code* that prohibited hate speech against homosexuals. In *R. v. N.S.*, as indicated previously, the Supreme Court suggested that allowing a witness to testify with her face covered is acceptable unless this unjustifiably impinges on the accused's fair trial rights. And in *Christian Horizons*, only that part of the employer's "Lifestyle and Morality Statement" was struck down having to do with preventing support workers from engaging in same-sex relationships, but the rest of the Statement was left largely intact.

⁴⁹ *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 ["Whatcott"].



7. From Human Rights Analysis to Discretionary Accreditation Decision

Having conducted a human rights analysis of the TWU Law School proposal, Convocation should be in a position to determine whether and to what extent discriminatory practices may be occurring. That determination, one way or another, must then be considered alongside any other discretionary considerations that Convocation may take into account in making its accreditation decision. That decision is ultimately about accrediting a Canadian law school. The Law Society is duty bound to make that decision in a manner that, *inter alia*, protects the public interest and maintains and advances the cause of justice and the rule of law.

We hope that Convocation will find our opinion of assistance in their upcoming deliberations.

Yours truly,
PINTO WRAY JAMES LLP

A handwritten signature in blue ink that reads "Andrew Pinto".

Andrew Pinto
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Appendix A – Ontario Human Rights Code Excerpts

Services

1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

Employment

4. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

Vocational associations

6. Every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

Special interest organizations

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

Special employment

24. (1) The right under section 5 to equal treatment with respect to employment is not infringed where,

(a) a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or disability employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment;



Appendix B – Charter Guarantees

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
2. Everyone has the following fundamental freedoms:
 - (a) freedom of conscience and religion;
 - (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
 - (c) freedom of peaceful assembly; and
 - (d) freedom of association.
15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.



Appendix C – Exemption Clauses

British Columbia

41 (1) If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a physical or mental disability or by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or corporation must not be considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons.

Quebec

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

Ontario

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



Appendix D – Jurisprudence

Below we present, in chronological order, the relevant decisions interpreting the various statutory defence and exemption clauses in the respective human rights legislation noted above.

Caldwell v. Stuart (sub nom. Caldwell v. St. Thomas Aquinas High School), [1984] 2 SCR 603

Twenty years ago, in the Supreme Court case of *Caldwell v. Stuart*,⁵⁰ McIntyre J. delivered a unanimous decision of the Court regarding the rights of a Catholic high school in BC to not renew a teaching contract of an employee who violated two of the Church's religious tenets: (1) marrying a divorced person; (2) in a ceremony outside the Church. This case engaged in a detailed human rights analysis on two key provisions of the then BC *Code*, sections 8 and 22.⁵¹ The Court held that the employer was justified in its decision under section 8 and also exempted from the *Code* under section 22.

The Court characterized the issue under section 8 as whether adherence to the religious tenets was a *bona fide* occupational requirement of employment. The test to be applied is as follows:

- (1) *subjectively*, is the questioned requirement imposed honestly, in good faith and in the sincerely held belief that it is imposed in the interest of the adequate performance of the work involved and not for ulterior or extraneous reasons, aimed at objectives which could defeat the purpose of the Code; and
- (2) *objectively*, is the requirement of religious conformance by Catholic teachers [in this case], reasonably necessary to assure the accomplishment of the objectives of the Church in operating a Catholic school with its distinct characteristics for the purposes of providing a Catholic education to its students?⁵²

The Court answered in the affirmative for both parts of the test:

The religious or doctrinal aspect of the school lies at its very heart and colours all its activities and programs. The role of the teacher in this respect is fundamental to the whole effort of the school, as much in its spiritual nature as in the academic. It is my

⁵⁰ *Caldwell v. Stuart (sub nom. Caldwell v. St. Thomas Aquinas High School)*, [1984] 2 SCR 603 ["Caldwell"].

⁵¹ *Human Rights Code*, RSBC 1979, c. 186. Now sections 13 and 41 of the current BC *Code*.

⁵² *Caldwell* at 622-23. See also *Ontario Human Rights Commission v. Etobicoke (Borough of)*, [1982] 1 SCR 202.



opinion that objectively viewed, having in mind the special nature and objectives of the school, the requirement of religious conformance including the acceptance and observance of the Church's rules regarding marriage is reasonably necessary to assure the achievement of the objects of the school. It is my view that the *Etobicoke* test is thus met and that the requirement of conformance constitutes a *bona fide* qualification in respect of the occupation of a Catholic teacher employed in a Catholic school, the absence of which will deprive her of the protection of s. 8 of the *Human Rights Code*. It will be only in rare circumstances that such a factor as religious conformance can pass the test of *bona fide* qualification. In the case at bar, the special nature of the school and the unique role played by the teachers in the attaining of the school's legitimate objects are essential to the finding that religious conformance is a *bona fide* qualification.⁵³

Analysing section 22, the Court stated while it imposes a limitation on rights, it also confers and protects rights: that is, such an exemption clause may limit non-discrimination rights to Mrs. Caldwell, but confers and protects associational rights on the high school.⁵⁴

Under section 22, a Court must determine the following:

- (1) Whether the institution is a charitable, philanthropic, educational, fraternal, religious or social organization or corporation;
- (2) Which is not-for-profit;
- (3) That its primary purpose is the promotion of the interest and welfare of an identifiable group or class of persons on one of the enumerated grounds listed in the section; and
- (4) Is granting a preference to members of that identifiable group or class of persons.

There was no disagreement that the high school satisfied the first three requirements; namely, that it was a religious, not-for-profit institution, the primary purpose of which was the promotion of the interests and welfare of an identifiable group or class of persons characterized by a

⁵³ *Caldwell* at 624-25.

⁵⁴ *Caldwell* at 625-26.



common religion. On the final step, the Court accepted that the identified group being given a preference was Catholic residents in the parishes served by the school. The Court upheld the Board of Inquiry's decision that the religious conduct qualifies as a "preference" within the meaning of section 22. Therefore, it was within the high school's religiously protected association rights under the exemption clause to not employ Mrs. Caldwell:

The purpose of the section is to preserve for the Catholic members of this and other groups the right to the continuance of denominational schools. This, because of the nature of the schools, means the right to preserve the religious basis of the schools and in so doing to engage teachers who by religion and by the acceptance of the Church's rules are competent to teach within the requirements of the school. This involves and justifies a policy of preferring Roman Catholic teachers who accept and practice the teachings of the Church. In failing to renew the contract of Mrs. Caldwell, the school authorities were exercising a preference for the benefit of the members of the community served by the school and forming the identifiable group by preserving a teaching staff whose Catholic members all accepted and practised the doctrines of the Church.⁵⁵

Brossard (Town) v. Quebec (Commission des droits de la personne), [1988] 2 SCR 279

Four years after *Caldwell*, the Supreme Court of Canada decided the case of *Brossard (Town) v. Quebec (Commission des droits de la personne)*,⁵⁶ which involved analysing a similar exemption clause in Quebec's *Charter of Human Rights and Freedoms*.

Brossard was another employment discrimination case, this time the issue being whether the Town of Brossard could attempt to combat nepotism by imposing a hiring policy that disqualified members of immediate families of full-time employees and town councillors from employment with the town. At the Court of Appeal, the hiring policy was deemed non-discriminatory by operation of section 20 of the Quebec *Charter*, being the similarly worded exemption clause noted above.

⁵⁵ *Caldwell* at 628.

⁵⁶ *Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 SCR 279 ["*Brossard*"].



At the Supreme Court, the majority stated: “Section 20 of the Charter deems non-discriminatory certain distinctions, exclusions or preferences which would otherwise constitute discrimination under s. 10.”⁵⁷ Section 20 reads:

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

The majority parsed this section into two separate clauses. The first operating as a “*bona fide* occupational qualification” exception (similar to the BC *Code*’s current section 13, and Ontario *Code*’s section 24(1)(a)), and the second operating as an exemption clause for certain organizations giving preference to certain members (similar to the BC *Code*’s former section 22 and current section 41, and Ontario *Code*’s current section 18).

The first exception clause should be interpreted restrictively because, as the majority states, “they take away rights which otherwise benefit from a liberal interpretation.”⁵⁸ After analysing the Town’s hiring practice, the majority decided that it was not exempted under the first part of section 20 because “the aptitude or qualification it purports to verify is not ‘required in good faith for’ the ‘employment’.”⁵⁹

The majority turned to consideration of the second part of section 20. The majority defined the purpose of the second branch as follows:

In my view, this branch of s. 20 was designed to promote the fundamental right of individuals to freely associate in groups for the purpose of expressing particular views or engaging in particular pursuits. Its effect is to establish the primacy of the rights of the group over the rights of the individual in specified circumstances.⁶⁰

...

⁵⁷ *Brossard* at para. 44.

⁵⁸ *Brossard* at para. 56.

⁵⁹ *Brossard* at para. 86.

⁶⁰ *Brossard* at para. 100.



I am not unaware that, on the basis of my interpretation, other non-profit institutions will also be precluded from invoking this exception. A university, for example, which one would ordinarily think of as a non-profit institution of an educational nature, cannot cite the second branch of s. 20 to justify discriminatory distinctions, exclusions or preferences unless the university has a primary purpose such as the ones described above.⁶¹

The majority decided that the Town of Brossard was not a “group” exercising any form of freedom of association in its discriminatory hiring practice for the purposes of the exemption under the second branch of section 20.⁶² The majority concluded, generally speaking with regard to the interpretation of the second branch of section 20:

I would agree that, as a general rule, the distinction, exclusion or preference practised by the non-profit institution to which the second branch applies must be justified in an objective sense by the particular nature of the institution in question.⁶³

Schroen v. Steinbach Bible College, (1999) 35 CHRR D/I (Man. Bd. Adj.)

In *Schroen v. Steinbach Bible College*,⁶⁴ the Manitoba Human Rights Board of Adjudication found in favor of a Mennonite College which had terminated an Accounting Clerk after she revealed that she had converted to Mormonism. Ms. Schroen was offered a job at Steinbach Bible College (SBC), which trained students for Ministry and to become more effective Christians. The job application included a Statement of Faith, which she agreed to affirm. However, before starting her job, SBC learned that Ms. Schroen, who was raised Mennonite, had converted to the Mormon faith. SBC subsequently terminated her on the basis of her religious non-conformity and Ms. Schroen filed a complaint with the Manitoba Human Rights Commission.

The Adjudicator found that Ms. Schroen had been discriminated against but that the discrimination was based on *bona fide* and reasonable requirements or qualifications for the employment.

⁶¹ *Brossard* at para. 134.

⁶² *Brossard* at para. 122.

⁶³ *Brossard* at para. 138.

⁶⁴ *Schroen v. Steinbach Bible College*, (1999) 35 CHRR D/I (Man. Bd. Adj.) [*“Schroen”*].



Citing the Supreme Court's decision in *Ontario Human Rights Commission v. Etobicoke*, the Adjudicator articulated the test for a *bona fide* requirement as follows:

To be a bona fide occupational qualification and requirement a limitation,..., must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interest of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of *The Code*.⁶⁵

The first part of this test is subjective and counsel for all parties were in agreement that the subjective part of the test was met in this case. The Adjudicator agreed and found that the actions and intentions of SBC were *bona fide*.

Turning to the second part of the test from *Etobicoke*, the Adjudicator then considered whether the requirements for the occupation were reasonable. As a part of this inquiry, the Adjudicator considered not only the nature of the employment, but also SBC's objectives and how the job of accounting clerk relates to the overall functioning of the institution. He found that "everyone employed at SBC was expected to share in a faithful way with students espousing the Christian faith, as that was what SBC was all about."

After reviewing expert evidence with respect to Mennonite and Mormon dogma and finding that the two faiths are "diametrically opposed," the Adjudicator found that:

Considering the unique role of an accounting clerk at SBC and the unique culture of SBC including its philosophy, mission, faith, beliefs, ethics and the acceptance and observance of the Statement of Faith are reasonable and necessary to assure achievement of the religious objects of the College, it is my view that the *Etobicoke* test has been met.

As a result, the Adjudicator found that the requirement that the account clerk be of the Mennonite faith to work at SBC constituted a *bona fide* and reasonable requirement and, therefore, did not violate the *Code*.

⁶⁵ *Ontario Human Rights Commission v. Etobicoke*, [1982] 1 SCR 202 at 208 [*"Etobicoke"*].



Vancouver Rape Relief Society v. Nixon, 2005 BCCA 601

Other than the Supreme Court's decision in *Caldwell*, the leading case on s. 41 (formerly s. 22) of BC's *Code* is *Vancouver Rape Relief Society v. Nixon*.⁶⁶ In this case, the British Columbia Court of Appeal upheld the right of a feminist non-profit organization to reject a transgendered volunteer by identifying itself in such a way as to exclude persons who lacked the experience of being treated as a woman since birth.

The Vancouver Rape Relief Society ("Relief Society") is a non-profit feminist organization "whose mandate is to provide services to women victims of male violence and to fight violence against women."⁶⁷ Ms. Nixon claimed discrimination as a post-operative male-to-female transgendered woman who was denied the opportunity to participate in the provision of peer counseling services provided by the Relief Society. Ms. Nixon was herself a victim of male intimate-partner violence and wanted to "give something back." After responding to an advertisement for volunteers, Ms. Nixon was successfully pre-screened to ensure that she agreed with the Relief Society's collective political beliefs. However, at the first training session, a facilitator identified Ms. Nixon as transgendered, based on her appearance. Ms. Nixon was then asked to leave because "a woman had to be oppressed since birth to be a volunteer at Rape Relief and [...] because she had lived as a man she could not participate."⁶⁸

Ms. Nixon was awarded \$7,500 by the BC Human Rights Tribunal for her claim,⁶⁹ but the decision was set aside on judicial review.⁷⁰ At the Court of Appeal, the Honourable Madam Justice Saunders concluded that, "the behavior of the Society meets the test for 'discrimination' under the *Human Rights Code*, but it is exempted by s. 41."⁷¹

Citing *Caldwell*, the Court of Appeal confirmed that s. 41 preserves the right to associate by permitting the preference of one member of an identifiable group over another.⁷² The Court concluded that s. 41 operates such that a group can prefer a sub-group of those whose interests it was created to serve, given good faith, and provided there is a rational connection between the

⁶⁶ *Vancouver Rape Relief Society v. Nixon*, 2005 BCCA 601 ["Nixon"].

⁶⁷ *Nixon* at para. 3.

⁶⁸ *Nixon* at para. 4.

⁶⁹ 2001 BCHRT 1.

⁷⁰ 2003 BCSC 1936.

⁷¹ *Nixon* at para. 9.

⁷² *Nixon* at para. 51.



preference and the entity's work or purpose. Leave to the Supreme Court of Canada was sought but denied.

In *Nixon*, the BC Court of Appeal rejected arguments by the appellant that it should adopt the analysis in the Supreme Court's decision in *Brossard*, which was decided subsequent to *Caldwell*. The BC Court of Appeal chose not to apply the Supreme Court's analysis from *Brossard* on the basis that s. 20 of the Quebec *Charter of human rights and freedoms* "rolled the defence of *bona fide* occupational requirement and a group rights exemption into the same provision [...] in a way that engaged the issue of justification for the group rights exemption."⁷³ The BC Court of Appeal saw no analogous requirement in s. 41 of the *Code* and, therefore, did not read the test set out in *Brossard* as determinative. A cursory reading of *Brossard* suggests, however, that the Supreme Court explicitly separated the BFOR analysis from the group rights exemption analysis in s. 20. Accordingly, while the British Columbia courts have declined to follow *Brossard*, the Supreme Court decision remains binding in Ontario.

Ontario (Human Rights Commission) v. Christian Horizons, 2010 ONSC 2105 (Div Ct)

The leading case in Ontario regarding section 24(1)(a) of the Ontario *Code* is *Ontario (Human Rights Commission) v. Christian Horizons*, decided by the Divisional Court.⁷⁴ Christian Horizons is a not-for-profit corporation that self-identifies as an Evangelical Christian ministry. It operates residential homes in Ontario and provides care and support services to individuals with developmental disabilities. It required that all members and employees adopt and sign a Doctrinal Statement that included a Lifestyle and Morality Statement prohibiting, among other things, homosexual relationships. The applicant at the Human Rights Tribunal level was Connie Heintz who was employed by Christian Horizons as a support worker. She was a person of "deep Christian faith" and also a lesbian. When Christian Horizons learned of Heintz's sexual orientation, they informed her she was not in compliance with the Lifestyle and Morality Statement. Ms. Heintz eventually resigned after commencing a medical leave of absence due to workplace stress surrounding the fall out after she came out to Christian Horizons.

At the Tribunal level, Heintz and the Ontario Human Rights Commission argued that she suffered discrimination in employment because she was terminated due to her sexual orientation,

⁷³ *Nixon*, para. 52.

⁷⁴ *Ontario (Human Rights Commission) v. Christian Horizons*, 2010 ONSC 2105 (Div Ct) ["*Christian Horizons* (Div Ct)"], var'g (*sub nom*) *Heinz v. Christian Horizons*, 2008 HRTO 22 ["*Christian Horizons* (HRTO)"].



and that the Lifestyle and Morality Statement violated the *Code*. Christian Horizons argued that it qualified under the special employment exemption in the *Code* (section 18), which permitted it to restrict hiring or give employment preference to individuals who identified with its creed, and that the Lifestyle and Morality Statement was a *bona fide* and reasonable qualification given the nature of the employment.

The Tribunal sets out its interpretation of the steps required for an organization to bring itself within the protection/exemption of s. 24(1)(a):

1. It must bring itself within the class of enumerated organizations;
2. It must establish it is primarily engaged in serving the interest of persons identified by one of the prohibited grounds of discrimination; and
3. It seeks to restrict employment to persons similarly identified.

If the organization passes this three part test, then it must satisfy the Tribunal that the qualification is justified by the nature of the employment.⁷⁵

The Tribunal reviewed past jurisprudence regarding special employment exemption sections in human rights legislation and summarized the common themes running through these cases:

1. Most deal with religious schools where the persons served (students and families) were all adherents to the creed of the organization, and the purpose of the organization was religious indoctrination, education and formation;
2. The job of the employee to whom the qualification applied was to carry out the religious indoctrination, education and formation; and
3. The organizations were either private, or publicly funded religious schools which enjoyed Constitutional protection.⁷⁶

With respect to the three-part test under section 24(1)(a), the Tribunal concluded: (1) Christian Horizons is a religious organization; (2) it is primarily engaged in serving the interests of persons

⁷⁵ *Christian Horizons* (HRTO) at para. 97.

⁷⁶ *Christian Horizons* (HRTO) at para. 109.



identified by disability, not persons identified by their creed; and (3) it restricts employment and gives preference to persons similarly identified by a common creed. Thus the Tribunal decided that Christian Horizons failed on the second branch of the test.

The Tribunal then considered whether the Lifestyle and Morality Statement was a reasonable and *bona fide* qualification due to the nature of the employment and decided that it was not. The Tribunal concluded that Ms. Heintz was discriminated against in employment on the basis of her sexual orientation.

The Tribunal's decision was appealed by Christian Horizon to the Ontario Superior Court of Justice, Divisional Court. The Divisional Court allowed the appeal in part, varied the Tribunal's Order, but ultimately upheld the Tribunal's decision that Ms. Heintz suffered discrimination in employment on the basis of her sexual orientation. The Divisional Court found that the Tribunal erred in its interpretation of section 24(1)(a) with respect to the second branch of the test – namely the primary purpose of the organization seeking protection/exemption under the clause – but that the Tribunal's decision (that the Lifestyle and Morality Statement was not a reasonable and *bona fide* qualification) was reasonable.

The Divisional Court went on to state the correct interpretation of the second branch of s. 24(1)(a):

The language and purpose of the provision require an analysis of the nature of the particular activity engaged in by a religious organization to determine whether it is seen by the group as fundamentally a religious activity. This must be followed by an assessment of whether that activity furthers the religious purposes of the organization and its members, thus serving the interests of the members of the religious organization. If the organization falls within the exemption, a BFOQ assessment must follow.⁷⁷

Despite its ruling on the Tribunal's error regarding the second branch of the s. 24(1)(a) test, the Divisional Court upheld the Tribunal's ruling regarding the reasonable and *bona fide* qualification, holding that the Lifestyle and Morality Statement was not a BFOQ:

In the process conducted by Christian Horizons, however, there is no evidence that the leadership of Christian Horizons did a close examination of the nature and

⁷⁷ *Christian Horizons* (Div Ct) at para. 73.



essential duties of the position of support worker and why adherence to a L & M Statement, including a ban on same sex relationships, is necessary in relation to those duties, or that such was taken into account by the employees when they made recommendations for the list to be included in the L & M Statement. It was just assumed that a morality code of some kind was required.⁷⁸

...

A discriminatory qualification cannot be justified in the absence of a direct and substantial relationship between the qualification and the abilities, qualities or attributes needed to satisfactorily perform the particular job.⁷⁹

Eadie and Thomas v. Riverbend Bed and Breakfast and others (No. 2), 2012 BCHRT 247;
Smith and Chymyshyn v. Knights of Columbus and others, 2005 BCHRT 544

In *Eadie v. Riverbend Bed and Breakfast*,⁸⁰ a 2012 decision of the BC Human Rights Tribunal, a male same-sex couple filed a complaint alleging that Riverbend's owners discriminated against them on the basis of sexual orientation when their reservation was cancelled after the owners learned that they were gay. The respondents, invoking their freedom of religion, characterized the case as one about competing rights. They suggested that, because the B&B was run through their home, their genuinely held religious convictions required them to prevent behavior which God prohibited (such as sexual intercourse between persons of the same sex). The owners suggested that a valid distinction existed between one's home and a business (such as a hotel).

The Tribunal had no difficulty finding that the ground of sexual orientation was engaged by the complaint. The Tribunal also found that the Riverbend B&B was offering a service customarily available to the public. The Tribunal rejected the respondents' argument that a distinction should be made between sexual orientation and sexual conduct and that, had the complainants provided certain assurances that they would not engage in sexual relations, they may have been provided with accommodation. In the Tribunal's view, the Supreme Court of Canada had rejected the

⁷⁸ *Christian Horizons* (Div Ct) at para. 95.

⁷⁹ *Christian Horizons* (Div Ct) at para. 103.

⁸⁰ *Eadie and Thomas v. Riverbend Bed and Breakfast and others (No. 2)*, 2012 BCHRT 247 ["*Eadie*"].



legitimacy of drawing a line between sexual orientation and conduct: *Egan v. Canada*, and *TWU 2001* (L'Heureux Dubé J. in dissent, but not on this point).⁸¹

The Tribunal held that the complainants had proven a *prima facie* case of discrimination based on sexual orientation and that the burden shifted to the B&B owners to prove a *bona fide* and reasonable justification for their conduct.

The Tribunal noted that both parties relied on an earlier British Columbia Human Rights Tribunal decision, *Smith and Chymyshyn v. Knights of Columbus*.⁸² We consider *Knights* to be an important decision and relevant to the question of the proper interpretation of reconciling religious and equality rights in contested situations. Therefore, we quote, at some length, from the *Eadie* Tribunal's summary of the *Knights* decision:

Knights involved a Catholic Mens' organization that rented out a hall located near the Parish church, on property owned by the Catholic Church and Archdiocese (para. 2). The Parish priest had the final say about what activities would take place in the hall. Parish Church groups had priority in renting the hall, but the hall was also rented to the general public. The organization's signage made no reference to any restrictions on the hall's use.

The complainants in *Knights* were a lesbian couple who rented the hall for their wedding reception. The Respondents subsequently learned that the purpose of the rental was related to a same-sex wedding, which was contrary to the Catholic Church's teachings. The reservation was cancelled, and the complainants made alternate arrangements for the reception. The complainants acknowledged that, had they known that the hall was operated by a Catholic organization, they would not have rented the premises.

The Tribunal concluded that the complainants had proven a *prima facie* complaint of discrimination. The Tribunal also found that the Knights had breached s. 8 of the *Code* by failing to accommodate the complainants to the point of undue hardship.

In particular, the Tribunal held that:

⁸¹ *Egan v. Canada*, [1995] 2 SCR 513. The *Eadie* Tribunal's perspective on this point was unanimously affirmed by the Supreme Court's 2013 decision in *Whatcott* (described below).

⁸² *Smith and Chymyshyn v. Knights of Columbus and others*, 2005 BCHRT 544 ["*Knights*"].



- a) The standard adopted by the Knights was that they do not rent the hall for purposes that are contrary to their core Catholic beliefs.
- b) The function being performed in renting the hall not only included its rental, but also that the hall could only be rented and/or used for events that would not undermine the Knights' relationship with the Catholic Church.
- c) The standard, given its purpose, was rationally connected to the function.
- d) The standard was adopted in good faith and in the belief that it was reasonably necessary for the fulfillment of the purpose or goal.
- e) Everyone is entitled to hold and manifest their own sincerely held religious beliefs and to declare those beliefs. However, this right is not absolute: see discussions paras. 94-106.
- f) While accepting that the Knights could not be compelled to act in a manner contrary to their core religious belief that same-sex marriages were morally wrong, the Knights did not accommodate the complainants to the point of undue hardship. In particular, they did not consider the effect their actions would have on the complainants and did not take steps that would have recognized the inherent dignity of the complainants and their right to be free from discrimination (paras. 123-124).

The Tribunal adopted a "spectrum analysis" in respect of the third branch of the *Meiorin* test. At one end of the spectrum was a Catholic parish church and at the other end of the spectrum was a commercial space with no religious affiliation (para. 110). The Tribunal concluded that the Knights' hall fell somewhere between those ends of the spectrum:

In the Panel's view, the issue presented in this case lies at neither end of the spectrum, but somewhere along the continuum, requiring a delicate balance. This was a Hall available to the public, regardless of religion; but it was also a Hall that could not be used for an event that was contrary to core Catholic beliefs.



The Panel accepts that a person, with a sincerely held religious belief, cannot be compelled to act in a manner that conflicts with that belief, even if that act is in the public domain. This conclusion is supported by the Supreme Court of Canada's decision in *Trinity Western* and the Ontario Divisional Court's decision in *Brockie*. The Panel accepts that the Knights are entitled to this constitutional protection and therefore cannot be compelled to act in a manner that is contrary to their core religious beliefs. The Panel also finds that, although the Knights were not being asked to participate in the solemnization of the marriage, renting the Hall for the celebration of the marriage would have required them to indirectly condone the celebration of a same-sex marriage, an act that is contrary to their core religious beliefs. (paras. 112-113).

The Tribunal went on to state that the Knights had to accommodate the complainants by taking steps which did not violate their beliefs, such as "meeting with the complainants to explain the situation, formally apologizing, immediately offering to reimburse the complainants for any expenses they had incurred and, perhaps offering assistance in finding another solution." (para. 124).⁸³

Ultimately, in *Knights*, the Tribunal ruled that the Knights did not have to rent out their hall to a lesbian couple who wanted to have their same-sex marriage reception at the hall; however, the Knights fell short of their human rights obligations in terms of communicating the decision and ameliorating its effects on the couple.

An important aspect of the *Knights* decision, not referred to in *Eadie*, was the Knights' alternative defence that, under section 41 of the *BC Code*, they were entitled to prefer members of their own religious group in the renting of the hall, and that such a preference did not constitute discrimination under the *BC Code*. This defence was rejected by the Tribunal in *Knights*:

As argued by the Knights, in order to bring themselves within the protections afforded by s. 41 of the *Code*, they must establish first, that they are a non-profit organization that has as its primary purpose the promotion of the welfare of an identifiable group characterized by a common religion, and second that, in denying

⁸³ *Eadie* at paras. 121-126.



the rental of the Hall, they were granting a preference to members of an identifiable group.

As we set out above, there is no question that the Knights are a not-for-profit organization, and that the Hall is operated on this basis. The Panel accepts that the purpose of the Knights is to promote the interests of the Catholic Church, a religious organization that may be entitled to the protection in s. 41 of the *Code*.

However, although the Knights are closely associated with the Catholic Church, the real issues is whether the Knights, in denying the Hall, were granting a preference to an identifiable group, namely those of the same religious affiliation. In the Panel's view, they were not and therefore the protection of s. 41 is not available to them.

The Hall was not only rented to those in the Catholic community, to members of the Knights and their families, or to those who share the Catholic Church's core religious beliefs. The Hall was available to the public, regardless of the person's or group's religious affiliation. There was no preference granted to the Knights or Catholics in the rental or access to the Hall. In fact, the evidence was clear that there was no preference granted to any individual or group based on religion. The evidence did not suggest that a person's religion factored into the rental agreement.⁸⁴

Returning to the *Eadie* decision (the refusal by B&B owners, for religious reasons, to rent a room to a gay couple), the Tribunal characterized the B&B respondents concern as saying that they are "evangelical Christians whose religious beliefs prohibit them from permitting certain conduct which they believe to be immoral from occurring in their home. They say that their religious belief is that to permit such behaviour implicates them, morally and spiritually, in that conduct."⁸⁵

The complainants, on the other hand, argued that unlike *Knights*, *Trinity*, *Caldwell* or *Christian Horizons*, the B&B owners, while conscientiously religious, were not a religious organization with a mandate to advance their religious values. The test was not whether the refusal to rent the room was rationally connected to the owners' religious beliefs but rather, whether it was rationally connected to the Riverbend B&B's function.

⁸⁴ *Knights* at paras. 132-135.

⁸⁵ *Eadie* at para. 128.



The *Eadie* Tribunal found that the function of the Riverbend B&B was to offer temporary accommodation, without any express restriction, to the general public. It was the B&B owners' personal and voluntary choice to operate a business in their home that catered to the general public. The purported standard of restricting accommodation in single bed rooms to married heterosexual couples was not rationally connected to the public function or purpose of the B&B. The *Eadie* Tribunal also found, in considering the "spectrum" analysis adopted in *Knights*, that the Riverbend B&B case fell more towards the commercial end of the spectrum. The B&B was not operated by a Church or religious organization: "While the business was operated by individuals with sincere religious beliefs respecting same-sex couples, and to of a portion of their personal residence, it was still a commercial activity."⁸⁶

The Tribunal made no finding on whether, if the owners had restricted their clientele to only the Christian community, it would have made a difference to the decision. Ultimately, the Tribunal found that the Riverbend B&B and its owners had breached the *BC Code* by failing to provide a service without discrimination on the basis of sexual orientation and by failing to accommodate the complainants.

Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC 11

The issue in *Saskatchewan (Human Rights Commission) v. Whatcott*,⁸⁷ was whether section 14(1)(b) of the *Saskatchewan Human Rights Code*⁸⁸ (a provision prohibiting hate speech) was constitutional in light of Whatcott's rights to freedom of religion and freedom of expression under the *Charter*. This case involved Whatcott's distribution of flyers denigrating homosexuality on the basis of his religious beliefs. A unanimous Supreme Court concluded that although s. 14(1)(b) did violate his rights under ss. 2(a) and 2(b) of the *Charter*, the infringement was justified under section 1.

Whatcott is relevant to the present matter for two reasons: (i) it addresses the balancing of competing *Charter* rights (freedom of religion and expression with equality rights); and (ii) it confirms the law's approach to sexual orientation versus sexual behaviour.

⁸⁶ *Eadie* at para. 165.

⁸⁷ *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 ["Whatcott"].

⁸⁸ *Saskatchewan Human Rights Code*, SS 1979, c S-24.1.



First, instead of placing internal limits on *Charter* rights and freedoms, the Court prefers balancing *Charter* rights under s. 1.⁸⁹ In carrying out this s. 1 analysis, the Court held that the prohibition in s. 14(1)(b) of the Saskatchewan *Code* against hate speech was a reasonable limit on Whatcott's freedoms of religion and expression and in this way upheld the equality rights of individuals on the basis of their sexual orientation.

Second, the Court adopted L'Heureux-Dubé's analysis in *TWU 2001* (in dissent but not on this point), that human rights law rejects the separation of sexual orientation status from conduct, or identity from practice. Accordingly, while it may be possible for homosexuals to refrain from homosexual activity, and while organizations may accept homosexuals but not their sexual activities, the law will treat a ban on homosexual activity no differently than a ban on homosexuals themselves.⁹⁰

⁸⁹ *Whatcott* at para. 154.

⁹⁰ *Whatcott* at para. 123.