



Justice Centre
for Constitutional Freedoms

In Defence of the Free Society

A submission to the Nova Scotia Barristers' Society
on Diversity, Tolerance, and Trinity Western University

by

The Justice Centre for Constitutional Freedoms

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Introduction

Some Canadians have expressed their opposition to the new law school at Trinity Western University (TWU).

This opposition is based largely (if not entirely) on one section of TWU's Community Covenant, which requires students who choose to attend TWU to abstain from "sexual intimacy that violates the sacredness of marriage between a man and a woman."

Opponents of TWU's law school argue that:

- 1) the Community Covenant discriminates against gays and lesbians;
- 2) the TWU law school will produce lawyers who will discriminate against gays and lesbians;
- 3) the TWU law school itself, by virtue of points 1) and 2) is therefore in violation of, or incompatible with, Canadian law; and
- 4) the TWU law school, by virtue of the Community Covenant, cannot competently teach law.

Opposition to the TWU law school has been based primarily on disagreement with what TWU believes about marriage and sexuality. Opponents of the TWU law school argue that adherence to the "wrong" beliefs about sexuality and marriage should disqualify a university from teaching law, even when the Federation of Law Societies of Canada (FLSC) has determined that TWU's academic standards and professional criteria have been met.

Further, the FLSC Special Advisory Committee, formed specifically to address concerns raised by opponents of the TWU law school, concluded there was no public interest reason to exclude future graduates of the TWU law program from the bar admission program.

This submission will address these arguments as well as some of the assumptions on which they are founded.

Executive Summary

The crucial importance of voluntary associations to a free society

One of the hallmarks of a free society is authentic diversity, consisting of a broad range of robust associations with differing and conflicting beliefs. In a free society with authentic diversity, a myriad of private institutions are formed on the basis of culture, ethnicity, religion, gender, political belief, and many other factors which recognize and affirm individual and group identity.

True tolerance does not consist of using “diversity” as a slogan, or using “diversity” as a basis for censoring public disagreement. Rather, true tolerance means actually accepting the authentic diversity expressed by a wide range of different associations.

In a free society, nobody is compelled to join, or agree with the beliefs of, a voluntary association, be it TWU or any other private institution. The individual’s freedom to reject the beliefs and practices of voluntary associations does not conflict with an association’s freedom to develop, teach and practice its own beliefs.

Freedom of association is rendered meaningless if private institutions cannot define and live out their own mission and purpose because those in power require (as a condition of recognizing its graduates’ qualifications to practice a profession) the institution to accept as members people who disagree with that mission and purpose.

If, in Canada, voluntary associations cannot develop, express and live out their own beliefs, without disqualification of their members from entry into a profession for which they are otherwise qualified, then Canada’s free society will be greatly diminished.

Legal competence does not require ideological conformity

Opponents of the TWU law school argue that its graduates will discriminate against gays and lesbians.

This argument pre-supposes that lawyers are incapable of advocating resolutely and effectively on behalf of clients who hold beliefs or who engage in conduct with which a lawyer disagrees.

This, in turn, is disproven every day by tens of thousands of Canadian lawyers who competently and professionally represent clients whose values, religion, socio-economic status, sexual orientation, and political beliefs are different from those of the lawyer.

Lawyers routinely act for clients whose lifestyles, behaviour and beliefs differ from their own.

The Federation of Law Societies of Canada based its approval of TWU's law school on academic and professional criteria. This is how it should be. Opinions about sex and marriage, whether held by lawyers, judges, law professors, or law students, are irrelevant.

Lawyers and law professors can advocate for change to the law

No law society in Canada imposes an ideological standard or philosophical requirement on those seeking to join its ranks. Law societies understand that good lawyers can disagree with the current state of the law (whether statutory law, or the Supreme Court of Canada's interpretation of the *Charter*) and still provide competent and professional legal services to their clients.

The Federation of Law Societies of Canada understood these principles when providing its approval of TWU's law school, *based on academic standards and professional criteria*. Denying TWU the right to start and operate a law school on the basis of its belief about marriage would effectively repudiate a long-standing principle that lawyers need not agree with all laws in order to be competent lawyers.

National mobility standards should exclude ideology

The Supreme Court of Canada in *Reference Re Same-Sex Marriage*, 2004 SCC 79, at paragraphs 52-59, and the *Civil Marriage Act*, SC 2005, c. 33, Section 3-3.1, specifically protect the right of religious individuals and religious institutions to adhere to their faith-based definition of marriage, to the exclusion of all other definitions.

The establishment of a philosophical or ideological standard for the creation of new law schools would effectively repudiate the hard work carried out in the past decade by the Benchers and Council Members of Canada's law societies. These lawyers, and others, have devoted thousands of hours to developing national academic standards. The resulting interprovincial mobility of lawyers benefits clients, and should not be thwarted by the imposition of an ideological requirement on new law schools.

The benefits of diversity in legal education

Our legal system is based on the idea that truth best emerges through a structured adversarial contest of two (or more) opposing viewpoints.

Yet which existing law faculty in Canada can honestly claim to provide its students with significant exposure to libertarian, conservative, and religious perspectives on the law?

Canadian law students stand to benefit from more choice in the law faculties available to them. In a free society, institutional diversity within academia is a public good, not a

threat, to society as a whole. The creation of a law school which differs from others should be welcomed by those who are truly tolerant and cherish authentic diversity.

No person is exempt from criticism

The Supreme Court of Canada has held that freedom of expression serves to protect minority beliefs which the majority regard as wrong or false. The view of the majority has no need of constitutional protection; it is tolerated in any event. To facilitate the search for truth, and to develop good public policy, democracy cannot permit the censorship or silencing, whether direct or indirect, of an opponent's expression of belief. Restricting the expression of beliefs merely because they may cause hurt or offense is entirely incompatible with the Court's jurisprudence. Individuals enjoy the freedom to claim that another person's opinions are "discriminatory" or "bigoted," but in a free society the truth of such claims is determined by citizens, not by the government.

The principles governing free expression apply similarly to freedom of association. A free society cannot endure when subjective feelings of offence are recognized as a legal criterion that can be used to undermine the *Charter's* fundamental freedoms of expression and association.

TWU does not engage in illegal discrimination

There is no legal authority for the proposition that a private institution engages in illegal discrimination by virtue of its beliefs. It is not illegal for a voluntary association to define itself in a way that results in some people not wanting to join it, or pay for its services.

Every Canadian university has a code of student conduct, which students agree to abide by as a condition of attending that university. The codes of student conduct at other universities are different from TWU's code, and are far less demanding.

The nature and content of the Community Covenant is such that many (and perhaps most) Canadian students, whether gay or straight, would not want to attend TWU. To suggest that the Community Covenant "discriminates" against gays and lesbians is akin to suggesting that the Community Covenant "discriminates" against those wanting to practice any other lifestyle or behaviour prohibited by the Community Covenant (and there are many).

The Community Covenant is a barrier to attending TWU only for those who are unwilling to live by Evangelical Christian beliefs and teachings during their course of study. The claim that TWU unfairly discriminates against gays and lesbians is therefore unfounded.

The crucial importance of voluntary associations to a free society

Opposition to the TWU law school raises the fundamental question of whether, in Canada's free society, private institutions and other voluntary associations have the right to establish their own codes of conduct, and to develop and practice their own beliefs. Opponents of TWU assume that private institutions should not be permitted to develop their own codes of conduct, or to disagree with existing laws when exercising their *Charter* rights.

One of the hallmarks of a free society is authentic diversity, consisting of a broad range of robust associations with differing and conflicting beliefs. In a free society with authentic diversity, a myriad of private institutions are formed on the basis of culture, ethnicity, religion, gender, political belief, and many other factors which recognize and affirm individual and group identity. Authentic diversity consists of the fundamental differences which are expressed and lived out by thousands of private organizations in Canada, large and small.

True tolerance does not consist of using "diversity" as a slogan, or using "diversity" as a basis for censoring public disagreement. Rather, true tolerance means actually accepting the authentic diversity expressed by a wide range of different associations.

As William Galston explains it:

"[I]f we insist that each civil association mirror the principles of the overarching political community, meaningful differences among associations all but disappear; constitutional uniformity crushes social pluralism."¹

Through the exercise of freedom of association, Canada's numerous organizations protect minority rights and freedom of expression by forming a healthy and necessary barrier between the individual and the state. A free society demands that all organizations *comply with* the laws of the land, but does not demand of any organization that it *agree with* the laws of the land. In a free society, the door is always open for the expression of disagreement with existing laws, and for the peaceful advocacy of changes to existing laws.

In stark contrast, the totalitarian state pervades all aspects of social, cultural, political and religious life, demanding compliance with and adherence to the state's ideology. There are no barriers between the individual and the state, because truly independent associations are prohibited. There is no authentic diversity, and hence no need for tolerance either. Disagreement with existing laws, and peaceful advocacy of change to those laws, are forbidden both for individuals and for voluntary associations.

¹ Galston, "*Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory*", 40 Wm and Mary LR 869 at 875 (1999).

Opponents of TWU's law school would presumably agree with the principle that a free society depends on the robust exercise of freedom of association. Opponents of TWU's law school would presumably agree with the principle that citizens in a free society can create private institutions and form voluntary associations while expressing disagreement with some (or many, or all) of society's existing laws. Opponents of TWU's law school would, presumably, agree that true tolerance requires accepting authentic diversity.

And yet the argument is advanced that those who disagree with same-sex marriage should not be permitted to start or operate a law school, even when the Federation of Law Societies of Canada has approved TWU's academic standards and professional criteria.

In a free society, nobody is compelled to join, or agree with the beliefs of, a voluntary association, be it TWU or any other private institution. The individual's freedom to reject the beliefs and practices of voluntary associations does not conflict with an association's freedom to develop, teach and practice its own beliefs. A free society respects the freedom of the individual and the association, recognizing that they are not in conflict with each other.

The other side of this coin is that freedom ceases to exist when individuals are compelled to join associations they disagree with, or when associations are required to alter their mission, purpose, or belief system to suit the ideological preferences of individuals who disagree with the association.

Freedom of association is thus a two-way street: a voluntary association has the right to freely determine and live out its beliefs, and the individual has the freedom to refuse to join that association, and to reject its beliefs.

Opponents of TWU's law school are advocating for a one-way street. They cherish, and would rightfully assert, the individual's freedom not to attend TWU. Yet they would deny TWU its right to create and operate a law school, because they disagree with TWU's beliefs about marriage and sexuality. This is a demand for conformity, and a rejection of the authentic diversity that exists in a society which respects freedom of association.

Any person who disagrees with an Evangelical Christian teaching on a topic could call herself or himself a victim of discrimination on the part of TWU. Hence the significance of the fact that no person is compelled to attend TWU, or to fund it through taxation.

Freedom of association is rendered meaningless if private institutions cannot define and live out their own mission and purpose because those in power require (as a condition of recognizing its graduates' qualifications to practice a profession) the institution to accept as members people who disagree with that mission and purpose.

If, in Canada, voluntary associations cannot develop, express and live out their own beliefs, without disqualification of their members from entry into a profession for which they are otherwise qualified, then Canada's free society will be greatly diminished.

Legal competence does not require ideological conformity

If opposition to TWU's law school is not merely an attempt to impose ideological conformity on a private institution, then perhaps this opposition stems from a concern about the professional competence of TWU law school graduates.

Opponents of the TWU law school argue that its graduates will discriminate against gays and lesbians.

This argument pre-supposes that lawyers are incapable of advocating resolutely and effectively on behalf of clients who hold beliefs or who engage in conduct with which a lawyer disagrees.

This, in turn, is disproven every day by tens of thousands of Canadian lawyers who competently and professionally represent clients whose values, religion, socio-economic status, sexual orientation, and political beliefs are different from those of the lawyer.

Lawyers routinely act for clients whose lifestyles, behaviour and beliefs differ from their own. For example, lawyers practicing in family law may be personally opposed to divorce, or may morally disapprove of some of the conduct of some of their clients, but this does not prevent them from providing competent legal services to their clients. Criminal defence lawyers don't care about their clients' views on marriage, nor is the lawyer's personal opinion about marriage relevant to the legal representation being provided. The Canadian Civil Liberties Association, while disagreeing entirely with the pro-life view on abortion, advocates passionately and effectively for the free expression rights of pro-lifers.

To claim that a gay lawyer is incapable of providing excellent legal representation to an Evangelical Christian client would be anti-gay bigotry. And yet, opponents of the TWU law school argue that its graduates, because of their presumed disagreement with same-sex marriage, will discriminate against gay and lesbian clients. This argument, if true, would mean that if a student commits to abstain from illegal drugs and pornography while attending TWU, this commitment will cause the student to discriminate against those who use illegal drugs or pornography. There is no evidence for such causal link. To the contrary, lawyers disprove its existence every day by representing diverse clients whose beliefs and behaviours differ from those of the lawyer.

The Federation of Law Societies of Canada based its approval of TWU's law school on academic and professional criteria. This is how it should be. Opinions about sex and marriage, whether held by lawyers, judges, law professors, or law students, are irrelevant.

Lawyers and law professors can advocate for change to the law

A democracy, by its very nature, leaves the door open for all citizens, including lawyers and law professors, to advocate for what they see as improvements to the law.

It should be noted that TWU does not oppose the federal *Civil Marriage Act*, which expressly protects the freedom of religious institutions to hold and declare their own definition of marriage, and which expressly affirms the right of all people to express publicly their diverse views on marriage.

It should also be noted that the Community Covenant specifically demands of TWU students that they “submit to the laws of this country,” which necessarily includes federal and provincial human rights legislation.

But even if TWU publicly advocated for changing Canada’s marriage laws, a free society allows it to do so, in keeping with the long-standing principle that lawyers, law students, and law professors have the right to advocate for what they see as improvements to the law.

No law society in Canada imposes an ideological standard or philosophical requirement on those seeking to join its ranks. Law societies understand that good lawyers can disagree with the current state of the law (whether statutory law, or the Supreme Court of Canada’s interpretation of the *Charter*) and still provide competent and professional legal services to their clients.

The Federation of Law Societies of Canada understood these principles when providing its approval of TWU’s law school, *based on academic standards and professional criteria*. Denying TWU the right to start and operate a law school on the basis of its belief about marriage would effectively repudiate a long-standing principle that lawyers need not agree with all laws in order to be competent lawyers.

The same principle holds true for law professors, whose teaching of the law will be informed by their personal opinions of what the law ought to be. It is not a requirement (nor should it be) that a law professor agree with all laws now in force.

Prior to the change in Canada’s marriage laws, should advocates for same-sex marriage have been precluded from creating or running a law school? Should agreement with the then-existing definition of marriage have been a litmus test for those wanting to teach or practice law?

These same questions can be fairly posed today: should opponents of same-sex marriage be precluded from creating and running a law school? Should agreement with current marriage laws be a litmus test for those wanting to teach or practice law?

National mobility standards should exclude ideology

The Supreme Court of Canada in *Reference Re Same-Sex Marriage*, 2004 SCC 79, at paragraphs 52-59, and the *Civil Marriage Act*, SC 2005, c. 33, Section 3-3.1, specifically protect the right of religious individuals and religious institutions to adhere to their faith-based definition of marriage, to the exclusion of all other definitions.

Adhering to the “correct” view of sexuality and marriage (or any other topic) is not a bona fide occupational requirement for lawyers. Therefore, Canada’s national standards for legal practice should not require adherence to – or rejection of – any particular religious or philosophical belief.

The establishment of a philosophical or ideological standard for the creation of new law schools would effectively repudiate the hard work carried out in the past decade by the Benchers and Council Members of Canada’s law societies. These lawyers, and others, have devoted thousands of hours to developing national academic standards. The resulting interprovincial mobility of lawyers benefits clients, and should not be thwarted by the imposition of an ideological requirement on new law schools.

Canada’s Law Societies cannot require lawyers who are currently practicing to adhere to any particular worldview or belief system, whether religious or non-religious, and this includes a wide range of differing beliefs about sexuality and marriage.

Opponents of the TWU law school do not suggest that current lawyers should be disbarred (or re-educated) on account of their personal beliefs about sexuality and marriage.

If those now practicing law can do so competently and professionally while disagreeing with same-sex marriage, why should new lawyers be held to an ideological standard?

The benefits of diversity in legal education

Our legal system is based on the idea that truth best emerges through a structured adversarial contest of two (or more) opposing viewpoints.

Yet which existing law faculty in Canada can honestly claim to provide its students with significant exposure to libertarian, conservative, and religious perspectives on the law?

Good advocates fully understand the position of their opponents, but today few Canadian law students are taught a full and balanced range of worldview perspectives that are important to understanding current debates. Uniformity of thought can lead to intellectual laziness, and to the academic disease of Groupthink, thereby stifling the development of better ways of thinking and doing. Some who shout the loudest for

“tolerance” and “diversity” may in fact be the most intolerant of any *real* diversity in opinion or ideology.

Canadian law students stand to benefit from more choice in the law faculties available to them. In a free society, institutional diversity within academia is a public good, not a threat, to society as a whole. The creation of a law school which differs from others should be welcomed by those who are truly tolerant and cherish authentic diversity.

No person is exempt from criticism

In Canada’s free society, religious adherents of various faiths frequently experience criticism – sometimes expressed with hatred, contempt, or ridicule – of their most cherished beliefs. Many faith adherents, including law students, find themselves in this situation on a daily basis. True tolerance means accepting, or at least putting up with, vigorous (and even unfair) attacks against one’s own sincerely held beliefs. For the individual whose beliefs are criticized or ridiculed, a free society affords the choice of ignoring the criticism or peacefully responding to it.

The Supreme Court of Canada has held that freedom of expression serves to protect minority beliefs which the majority regard as wrong or false. The view of the majority has no need of constitutional protection; it is tolerated in any event. To facilitate the search for truth, and to develop good public policy, democracy cannot permit the censorship or silencing, whether direct or indirect, of an opponent’s expression of belief. Restricting the expression of beliefs merely because they may cause hurt or offense is entirely incompatible with the Court’s jurisprudence. Individuals enjoy the freedom to claim that another person’s opinions are “discriminatory” or “bigoted,” but in a free society the truth of such claims is determined by citizens, not by the government.

The principles governing free expression apply similarly to freedom of association. A free society tolerates the authentic diversity among private institutions which results from freedom of association.

A free society cannot endure when subjective feelings of offence are recognized as a legal criterion that can be used to undermine the *Charter*’s fundamental freedoms of expression and association.

TWU does not engage in illegal discrimination

There is no legal authority for the proposition that a private institution engages in illegal discrimination by virtue of its beliefs. It is not illegal for a voluntary association to define itself in a way that results in some people not wanting to join it, or pay for its services.

For example, if a health clinic provides reiki treatments, which some religious adherents regard as an occult practice, those religious adherents do not become victims of discrimination by virtue of the clinic's health services being commonly available to the public. Those who regard reiki as morally wrong have the freedom to seek health care elsewhere, but do not enjoy the right to stop the clinic from providing it, or proclaiming its merits. In this example, illegal discrimination would only occur if the clinic refused to provide reiki treatments to religious adherents. The religious adherents' disagreement with reiki does not constitute discrimination, and does not entitle them to demand that the clinic change its beliefs or its practices.

Students choosing to attend TWU, as part of that decision, choose to adhere to the Community Covenant. The Community Covenant asks students to commit themselves to practicing Evangelical Christian teachings, including:

- cultivating Christian virtues, such as love, joy, peace, patience, kindness, goodness, faithfulness, gentleness, self-control, compassion, humility, forgiveness, peacemaking, mercy and justice;
- living exemplary lives characterized by honesty, civility, truthfulness, generosity and integrity;
- treating all persons with respect and dignity, and upholding their God-given worth from conception to death;
- being 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;
- encouraging and supporting other members of the community in their pursuit of these values and ideals, while extending forgiveness, accountability, restoration, and healing to one another;
- abstaining from harassment or any form of verbal or physical intimidation, including hazing;
- abstaining from the use of materials that are degrading, dehumanizing, exploitive, hateful, or gratuitously violent, including, but not limited to pornography;
- abstaining from drunkenness, under-age consumption of alcohol, the use or possession of illegal drugs, and the misuse or abuse of substances including prescribed drugs.

Every Canadian university has a code of student conduct, which students agree to abide by as a condition of attending that university. The codes of student conduct at other universities are different from TWU's code, and are far less demanding.

The nature and content of the Community Covenant is such that many (and perhaps most) Canadian students, whether gay or straight, would not want to attend TWU. To suggest that the Community Covenant "discriminates" against gays and lesbians is akin to suggesting that the Community Covenant "discriminates" against those wanting to practice any other lifestyle or behaviour prohibited by the Community Covenant (and there are many).

There are Christians who feel attracted to the same sex and who agree with Evangelical Christian teachings about sex and marriage, for whom the Community Covenant poses no barrier to attending TWU. TWU already has gay students in attendance.

In short, the Community Covenant is a barrier to attending TWU only for those who are unwilling to live by Evangelical Christian beliefs and teachings during their course of study. The claim that TWU unfairly discriminates against gays and lesbians is therefore unfounded.

About the author

John Carpay is President of the Justice Centre for Constitutional Freedoms. He earned his B.A. in Political Science at Laval University, and his LL.B. from the University of Calgary. John has defended constitutional rights and freedoms in the Alberta Court of Queen's Bench (*Boissoin v. Lund*), Saskatchewan Court of Appeal (*Whatcott v. Saskatchewan Human Rights Commission*), Federal Court of Appeal (*Benoit v. Canada*), and Supreme Court of Canada (*R. v. Kapp*). He acts for seven students who are suing the University of Calgary in the Alberta Court of Queen's Bench (*Wilson v. University of Calgary*) in defence of their campus free speech rights, and for Darcy Allen in his constitutional challenge to the government's health care monopoly (*Allen v. Alberta*).

In 2010, John Carpay was presented with the *Pyramid Award for Ideas and Public Policy*, in recognition of John's work in constitutional advocacy and in building a non-profit legal foundation. John Carpay serves on the Board of Advisors of iJustice, an initiative of the Centre for Civil Society, India.

About the Justice Centre for Constitutional Freedoms

"Never doubt that a small group of thoughtful, committed people can change the world. Indeed, it is the only thing that ever has."

The free and democratic society which the *Canadian Charter of Rights and Freedoms* holds out as our ideal can only be fulfilled by honouring and preserving Canada's traditions of freedom of expression, freedom of conscience and religion, freedom of association, other individual rights, constitutionally limited government, the equality of all citizens before the law, and the rule of law.

The Justice Centre for Constitutional Freedoms (JCCF) was founded for the purpose of advancing and promoting the core principles of freedom and equality through education and litigation. The JCCF is a registered charity and issues official tax receipts to donors for donations of \$50 or more. The JCCF is funded entirely by the voluntary donations of

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