C.A. No. 438894

NOVA SCOTIA COURT OF APPEAL

Between**:**

THE NOVA SCOTIA BARRISTERS' SOCIETY

Appellant

- and -

TRINITY WESTERN UNIVERSITY AND BRAYDEN VOLKENANT

Respondents

- and -

ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA; CANADIAN COUNCIL OF CHRISTIAN CHARITIES; THE CATHOLIC CIVIL RIGHTS LEAGUE AND FAITH AND FREEDOM ALLIANCE; THE ATTORNEY GENERAL OF CANADA; THE EVANGELICAL FELLOWSHIP OF CANADA AND CHRISTIAN HIGHER EDUCATION CANADA; JUSTICE CENTRE FOR CONSTITUIONAL FREEDOMS; SCHULICH SCHOOL OF LAW OUTLAW SOCIETY; THE ADVOCATES' SOCIETY; CANADIAN BAR ASSOCIATION; CHRISTIAN LEGAL FELLOWSHIP; THE CANADIAN SECULAR ALLIANCE

Intervenors

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PART 3 – LIST OF ISSUES[1]

1. The contest for liberty against oppressive and tyrannous governments or religious bodies is not new. The struggle for freedom, and specifically freedom to associate, has roots that run deeply throughout the history of human civilization. This struggle is necessitated by a truth universal to the human condition: "power tends to corrupt, and absolute power corrupts absolutely."[2] It is axiomatic that this principle frequently manifests itself in overbearing and oppressive civil authorities.
2. The appeal of the Nova Scotia Barristers' Society (the "NSBS") of the decision of the Honourable Justice Campbell[3] (hereinafter the "Appeal") asserts numerous justifications for its overreach as regards Trinity Western University ("TWU"). Principal among its appeal grounds are the twin contentions of the NSBS that it was compelled by the public interest in the legal profession to discriminate against Trinity Western University, and that it was not attempting to improperly regulate extra-jurisdictionally.
3. For the purposes of this Factum, this intervenor focuses on two resulting central issues:
    a. The right of TWU and its students to freely associate, and the concomitant obligations of the NSBS to recognize that right free from coercion and discrimination; and
    b. The illegitimacy of the NSBS' contention that it was not attempting to regulate improperly and extra-jurisdictionally, and the impact of this argument on both the standard of review and the *Charter* rights of TWU.

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[1] The Justice Centre relies on the submissions of the Respondent as to Parts 1 and 2.
[2] http://www.acton.org/research/lord-acton-quote-archive
[3] *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25 [*TWU v. NSBS*].

4. This Factum provides a brief analysis of each of the above constructs and addresses the ways in which each specifically impacts the s. 2(d) *Charter* right to freedom of association.

PART 4 – THE STANDARD OF REVIEW IS CORRECTNESS

5. This Intervenor has consistently argued that a correctness standard of review applies in all three cases involving TWU: in B.C, Ontario and Nova Scotia.

6. Recently, Chief Justice Hinkson of the Supreme Court of British Columbia affirmed that the standard of review in *TWU v. LSBC* was that of correctness.[4] In reaching this conclusion, the Honourable Chief Justice considered a number of factors, including the twin issues of procedural fairness and jurisdiction, as well as the precedent set by the Supreme Court of Canada in 2001 in the case of *Trinity Western University v. British Columbia College of Teachers*.[5] In *TWU v. BCCT*, the Court reviewed the decision not to accredit TWU's teaching program for correctness, setting a precedent for the proper standard of review in this substantially similar case.

7. Further, the Supreme Court of Canada recently emphasized the need for a correctness review of constitutional questions that are of importance to the legal system and fall outside the administrative tribunal's area of expertise. In *Mouvement laïque québécois v. Saguenay (City*), the Court applied the correctness standard to the issue of "the scope of the state's duty of neutrality that flows from freedom of conscience and religion".[6] The

[4] *Trinity Western University v. The Law Society of British Columbia,* 2015 BCSC 2326 [*TWU v. LSBC*], at para. 90.
[5] *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 [*TWU v. BCCT*].
[6] *Mouvement laïque québécois v. Saguenay (City),* 2015 SCC 16 [Saguenay] at paras 45-51.

Court found this question to be of importance to the legal system, broad and general in scope, and one that needed to be decided in a uniform and consistent manner.[7]

8. The NSBS' decision highly aberrant and non-conforming. The NSBS has misapprehended, and then misapplied its home statute, the *Legal Profession Act* (the "*LPA*"). There is no credible reading of the *LPA* which authorizes the extra-jurisdictional regulation of TWU as attempted by the NSBS in this case.[8]

9. The NSBS is a signatory to the nation-wide agreement which founded the Federation of Law Societies of Canada (the "Federation") and thus agreed with the Federation's mandate to establish a national standard for law school programs in Canada.[9] The Federation not only approved the curriculum of TWU's Law Program (the "Law Program"),[10] but specifically considered the question of TWU's Community Covenant (the "Covenant"),[11] stating:

> [I]n 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…there will be no public interest reason to exclude future graduates of the program from law society bar admission programs.[12]

10. Justice Campbell held that the Federation's Approval Committee is "the body responsible for making the determination as to whether a degree complied with those national standards."[13] If this was not the case, there would be little point to the existence of the

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[7] *Ibid.* at para. 51.
[8] See e.g. *TWU V. NSBS*, paras. 166-175; *Factum of the Respondent*, paras. 31-35.
[9] *TWU V. NSBS*, para 45.
[10] *TWU V. NSBS*, para 6.
[11] *TWU V. NSBS*, para 48.
[12] FLSC, Special Advisory Committee Report at paras. 65-66. Online: <http://www.flsc.ca/_documents/SpecialAdvisoryReportFinal>
[13] *TWU V. NSBS*, para 45.

Federation or its approvals, or the steps that TWU was compelled to take in seeking approval for its Law Program.[14] The NSBS was fully aware of the clearly demarcated path for the approval of the Law Program. TWU meticulously met the requirements only to be met afterwards with a previously non-existent hurdle imposed by the NSBS.

11. The result of this new hurdle, hastily placed before TWU, is apparent: *Charter* rights were dramatically and signally overridden. The *Charter* requires that such rights are not to be infringed except in certain limited exceptions. The NSBS interprets the *LPA* to permit it to override the *Charter* rights of TWU and its students. Either the NSBS is correct in this regard, or it is not, but the answer is not an ambiguous "maybe". In *Doré v. Barreau du Québec,*[15] the Court found that an administrative body's decision had to comply with the *Charter*.

12. In the sense that it provides a "yardstick" for the measurement of laws, the *Charter* is a beginning and an end for statutory interpretation. All statutes must be consistent with the Constitution, and more than this: all interpretations of statutes must be consistent with it, as well.[16] Since the NSBS relies on the authority of the *LPA* for its actions, its interpretation of the *LPA* must be consistent with the *Charter*. A Court should not and must not skip over the question of the NSBS' interpretation of the *LPA* on its way to determining the standard of review. To do so would ignore the step that the NSBS maintains it took prior to deciding to infringe TWU's rights.

13. We therefore disagree with Justice Campbell on this lone point: the NSBS decision *does* involve the interpretation of the *LPA*.[17] This should trigger a correctness standard of

[14] On the sufficiency of the approval of the Federation of Law Societies, see *TWU V. NSBS*, para 170.
[15] *Doré v. Barreau du Québec*, [2012] 1 SCR 395 [*Doré*] at para. 52.
[16] *Charter*, s. 52.
[17] See *TWU v. NSBS*, at para. 165.

review. The NSBS interpretation of the *LPA* is incorrect.[18] If it was correct, it would dramatically expand the powers of the NSBS beyond anything that the Nova Scotia legislature could bestow. The NSBS' interpretation of the *LPA* gives the NSBS the ability to use the *Charter* as a sword against any prospective law school that does not conform to its particular world view. This interpretation cannot stand.[19] The NSBS is not an arbiter and enforcer of its own notions. It is to uphold the rule of law, including the constitutional freedoms of Canadians.

14. We respectfully submit that this Honourable Appeal Court should consider why the NSBS so protests the scrutinizing eye of a correctness standard to its actions. The NSBS should have nothing to fear if it is correct.

PART 5 - ARGUMENT

The Right to Associate Freely

15. In the *Alberta Reference,* Justice McIntyre called freedom of association "one of the most fundamental rights in a free society",[20] and noted that a conquering power's first act is to restrict it.[21] However, he also noted that, with the restoration of national sovereignty and the reinstatement of the democratic state, immediate steps are taken to restore associative freedoms.[22] Freedom of association is thus an integral part of Canada's free and democratic society.

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[18] This subject is covered extensively later in this Factum.
[19] "The Charter is not a blueprint for moral conformity. Its purpose is to **protect** the citizen from the power of the state, not to **enforce** compliance by citizens or private institutions with the moral judgments of the state." – TWU v. NSBS, at para. 10. [emphasis added]
[20] *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 ["*Alberta Reference"*] para. 148.
[21] *Ibid,* para 148.
[22] *Ibid.*

16. Justice McIntyre further stated the simple proposition necessitating freedom of association: "the attainment of individual goals, through the exercise of individual rights, is generally impossible without the aid and cooperation of others."[23] The learned Justice further quoted Alexis de Toqueville:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.[24]

17. In *Mounted Police Association v. Canada (Attorney General),* the Supreme Court of Canada clarified the application of s. 2(d).[25] Writing for six of the seven Justices, McLachlin C.J. and Lebel J. held that s. 2(d) should be interpreted in "a purposive and generous fashion" and that "s. 2 (d) confers *prima facie* protection on a broad range of associational activity, subject to limits justified pursuant to s. 1 of the *Charter*."[26]

18. The NSBS violates freedom of association by preventing the approval of the compliant Law Program on the basis of an institution's beliefs, and uses the *LPA* to justify its actions. We submit that the *LPA* does not authorize the NSBS' attack on freedom of association. Only an unprincipled interpretation of the statute can bring the NSBS to such a conclusion. However, the NSBS' misinterpretation of the *LPA* does illustrate to what extraordinary lengths the NSBS has gone to justify its improper conduct.

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[23] *Ibid*, para. 152.
[24] *Ibid*.
[25] *Mounted Police Association v. Canada (Attorney General),* 2015 SCC 1 [*Mounted Police Association*].
[26] *Mounted Police Association*, at para. 60. Violent associations are an exception to s. 2(d) protection.

The Right to Associate Freely and the LPA

19. The NSBS claims to have a "broad statutory public mandate" to regulate the legal profession in Nova Scotia[27] as mandated by sections 4, 5 and 6 of the *LPA*.[28] But how broad? The sections referred to are general in nature. Section 4 speaks of protecting the public interest in the practice of law and establishing admission and professional requirements. Section 5 grants the ability to pass certain regulations for admission, practice and discipline. Section 6 provides that the Council is the governing body of the NSBS, and briefly sets out its general functions. These provisions must all be read in the context of the established provincial and national legal frameworks. They are not as "broad" as the NSBS wants them to be. These provisions are subject to the very specific and clearly-protected *Charter* rights of conscience, religion and association. They do not grant the NSBS a statutory mandate that is "broader" than the authority of Parliament,[29] the Supreme Court of Canada,[30] the province's borders,[31] or the *Charter*.[32]

The Test for Infringement of Freedom of Association under s. 2(d) of the *Charter*

20. The test for determining an infringement of s. 2(d) is whether the state conduct constitutes a substantial interference with freedom of association in either its purpose or its effects.[33] In order to determine whether there has been "substantial interference" it is necessary to first examine the purpose of s. 2(d) and the scope of protection afforded to different associations. As a private and voluntary religious, educational, and vocational association, the association of TWU is at the very core of what is protected by s. 2(d) of

[27] Appeal Factum of the Appellant, at para. 4.
[28] Appeal Factum of the Appellant, at para. 42.
[29] Federal protections for traditional marriage beliefs protected by the *Civil Marriage Act*.
[30] Jurisprudential protections for TWU in *TWU v. BCCT*.
[31] The NSBS' authority, whatever it is, extends no further than the border of Nova Scotia.
[32] The *Charter* protects freedom of association, religion and conscience from the exact type of interference displayed by the NSBS.
[33] *Mounted Police Association*, at paras. 111, 72, 121

the *Charter*.

21. In *Mounted Police Association,* McLachlin C.J. and Lebel J. took guidance from the reasons of Chief Justice Dickson in the *Alberta Reference,* affirming that the guarantee of freedom of association under s. 2(d) protects 1) the right to join with others and form associations, 2) the right to join with others in the pursuit of other constitutional rights, and 3) the right to join with others to meet on more equal terms the power and strength of other groups or entities.[34]

22. McLachlin C.J. and Lebel J. held that s. 2(d) must be interpreted in light of its context and historical origins.[35] In this regard, they noted that "[t]he historical emergence of association as a fundamental freedom … has its roots in the protection of religious minority groups."[36] They further emphasized that "[a]ssociation has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations."[37] In the *Alberta Reference*, Dickson C.J. noted the relevance of, *inter alia*, religious freedom and educational rights to the freedom of association, noting Canada's history of "giving special recognition to collectivities or communities of interest" in areas such as denominational schools, language rights, aboriginal rights and our multicultural heritage.[38]

23. Citing with approval Dickson C.J.'s explanation of the purposive approach to s. 2(d), McLachlin C.J. and Lebel J. noted:

> Through association, individuals have been able to participate in

[34] *Mounted Police Association*, at paras. 52, 53, 62 and 66.
[35] *Mounted Police Association*, at para. 47 (quoting *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p 344).
[36] *Mounted Police Association*, at para. 56.
[37] *Mounted Police Association*, at paras. 35, 57 (quoting *Alberta Reference*, at p. 366).
[38] *Alberta Reference*, at pp. 364-65.

> determining and controlling the immediate circumstances of their lives, and the rules, mores and principles which govern the communities in which they live. . . .[39]

24. Thus, what the NSBS considers intolerable "discrimination" is regarded by the Supreme Court of Canada as an indispensable element of freedom of association.[40] Every voluntary association has beliefs, rules and practices that are not agreeable to everyone, and may be offensive to some. This does not illegitimize the association. The disagreeableness of the rules or beliefs of another's private association is what makes the protection for association necessary. This, in turn, enriches the diversity of Canadian society. Our free society is predicated on the recognition of such rights, including the right to associate and to be unmolested by the state or majority opinion while doing so.

25. TWU is an educational association of a religious minority, namely traditional Evangelical Christianity. The Covenant defines the voluntary associational experience of TWU's community by its students, staff and faculty. It creates a set of "rules, mores, and principles which govern" their Evangelical Christian community.[41] TWU exists to provide a religious community in which students participate while studying law, education and other fields in a Christian environment, something individuals can only achieve collectively.[42]

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[39] *Mounted Police Association*, at para. 35 (quoting *Alberta Reference*, at p. 365).
[40] *See also TWU v. BCCT*, at para. 34: "Freedom of religion, conscience and association coexist with the right to be free of discrimination based on sexual orientation. Even though the requirement that students and faculty adopt the Community Standards 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."
[41] *Mounted Police Association*, at para. 35.
[42] The entrenched and only worldview in which one can receive legal education in Canada is the strictly secular viewpoint taught at all Canadian law schools. This stands in contrast to the United States which has numerous private and religious law schools offering a variety offering instruction from a variety of worldviews.

The Question of Equality

26. The NSBS does not object to Evangelical Christians, or other people, practising traditional moral beliefs about marriage and sexuality as individuals. An individual who abstains from sexual relations outside of the marriage of one man and one woman while studying law at any other university in Canada (or abroad) is welcome to become a member of the NSBS. It is beyond contention that individuals who hold such beliefs are currently practising as lawyers and judges in Nova Scotia, even as this case proceeds to hearing. Thus it cannot be the "odious" beliefs or religion of individuals that the NSBS opposes so vehemently. Rather, it is the association of such individuals together in a religious community at TWU that has drawn the ire of the NSBS.

27. By way of an unfounded, vague, and poorly conceived notion of equality, the NSBS attacks the fundamental *Charter* freedom of individuals to associate in a community that has its own unique standards and expectations, voluntarily agreed to only by those wish to join that community. The right of citizens to be treated equally by government, if transformed into a new "right" to impose changes on associations that one disagrees with, destroys freedom of association as protected by the *Charter*. Again, according to de Toqueville, the natural extension of state interference of this nature is foundational societal destabilization.

28. Nothing prevents any organization in Canada from starting a school or university. Private educational institutions of all shapes, sizes and ideologies exist across the country, forming an integral part of Canada's free, diverse and vibrant civil society. Likewise, nothing prevents the LGBT community, if it desired, from creating and maintaining its own school, and admitting only individuals who would agree to conform to the community's own Code of Conduct or Community Covenant. That is the nature

of freedom and equality.

The NSBS's Decision Infringes the s. 2(d) Freedoms of TWU and its Students

29. The guarantee of freedom of association "functions to protect individuals against more powerful entities."[43] The need for judicial oversight and intervention is apparent in the within appeal. The NSBS is a powerful entity, here exercising its authority improperly. It thwarted the "legitimate goals and desires"[44] of TWU (to have a law school) by capriciously instituting its coercive and extra-jurisdictional regulation, and has done so on the basis of sentiment and perception rather than law. This is a "substantial interference" with the freedom of association.[45]

30. The Court in *R v. Big M Drug Mart Ltd.* held: "Freedom can primarily be characterized by the absence of coercion or constraint.… Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others."[46]

31. Freedom of association is not derived from, and does not depend on, freedom of conscience, religion, expression, or any other constitutional right. Rather, freedom of association is a right with its own *Charter*-protected content.[47] Thus, even if the NSBS decision is not a substantial interference with the collective exercise of freedom of religion, it is nevertheless a substantial interference with "associational activity for the purpose of securing the individual against state-enforced isolation and empowering

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[43] *Mounted Police Association*, at para. 58.
[44] *Ibid*.
[45] Freedom of association is a right of individuals and associations. *Mounted Police Association*, at para. 62.
[46] *R. v. Big M Drug Mart Ltd.*, [1985] 1. S.C.R. 295, at paras. 94-95 [emphasis added].
[47] *Mounted Police Association*, at para. 48: "Freedom of association is not derivative of these other rights. It stands as an independent right with independent content, essential to the development and maintenance of the vibrant civil society upon which our democracy rests."

individuals to achieve collectively what they could not achieve individually."[48]

32. The NSBS decision violates the fundamental purpose of s. 2(*d*) – which is "to protect the individual from 'state-enforced isolation in the pursuit of his or her ends'"[49] – by imposing conditions which directly conflict with the Federation's approval of TWU's law school,[50] thereby punishing the choice to attend TWU's Law Program. This is clearly within the "broad range of associational activity" that the Court has declared that s. 2(d) protects.[51] The NSBS denies TWU graduates their "right of full participation in society"[52] solely because those graduates chose to join the association at TWU while studying law. According to Justice Campbell, "That's not regulating a law degree. It's using the law degree to get at something else."[53]

33. The NSBS concedes that there is nothing wrong with TWU's graduates, and that there is nothing wrong with TWU's Law Program.[54] The problem lies, according to the NSBS, with TWU itself. Evangelical Christians who, <u>as individuals</u>, live according to traditional Biblical morality are perfectly eligible for membership in the NSBS. These individuals are now routinely admitted as members, without scrutiny as to their personal beliefs, provided that they study law at a university other than TWU. Justice Campbell recognized this obvious contradiction when he stated:

> Roman Catholics, to note but one example, belong to a worldwide communion of faith that does not permit women or married men to be members of the clergy. It teaches that homosexuality is a sin. It does not

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[48] *Mounted Police Association*, at para. 62.
[49] *Mounted Police Association*, at para. 58 (quoting Dickson C. J. in the *Alberta Reference*, at p. 365).
[50] The importance to Evangelical Christians of having a law school that incorporates a Christian worldview can be seen in the numerous evangelical Christian law schools in the United States, including Trinity Law School, Regent University School of Law, Liberty University School of Law, Pepperdine University, Notre Dame Law School and Oak Brook College of Law, to name just a few.
[51] *Mounted Police Association* at para. 60.
[52] *See TWU v. BCCT*, at para. 35.
[53] *TWU V. NSBS*, at para. 170.
[54] *Factum of the Respondent*, para. 21; *TWU V. NSBS*, at paras. 7.

> recognize same-sex marriage. Many or at least some members of that faith who are lawyers presumably believe those things. There is no question whatsoever that they are able to practise as lawyers who respect the equality and dignity of LGBT people. More significantly though, it is inconceivable that Roman Catholics would be banned from practice because of their association with a church that actively teaches those beliefs and what having them in the profession says about the value of equality rights. And it could be said that being an active member of a religious denomination connotes more of an acceptance of the tenets of that faith than attending a university that imposes religious-based behavioural restrictions on students. But again, what would people think of a profession that allows such people to practise law?
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> The same presumably holds true for those who hold positions of responsibility for the governance of the profession. What does it say about equality within the profession if the President of the NSBS were a Roman Catholic, or Mormon or Evangelical Christian or Muslim who publically endorsed the belief system of that religious faith? What would it say to the LGBT community about the profession's commitment to equality? It is difficult to see that as being less significant than an articling student who may have chosen to attend a law school that may or may not reflect his or her beliefs. If the test becomes, "What does it say about equality if….?", then a hierarchy of rights has been established, with religious liberty relegated to vastly diminished status.[55]

34. As stated above, one can reasonably assume that at least some, and perhaps many, lawyers in Nova Scotia adhere to traditional religious values, including disagreement with same-sex marriage. These lawyers, law students and articling students are not subjected to additional scrutiny by the NSBS, or in any way vilified for their views by the NSBS. However, when individuals with identical moral beliefs associate together in a

[55] *TWU v. NSBS*, at paras. 259, 260.

community while studying law, the NSBS, in effect, rejects the Federation's approval of the Law Program based only on these individuals' choice to associate with each other. This violates the most basic principle that s. 2(d) protects "the right to do collectively what one may do as an individual."[56]

35. One of the results of the refusal to recognize TWU is that Evangelical Christians (and others) may only study law at secular institutions, isolated from the support and fellowship of the community at TWU. The NSBS thus ensures that only groups adhering to majoritarian secular beliefs and values are permitted to form associations that offer an accredited law program.

36. For its part, TWU requests administrative fairness: the approval of its law school on its academic and professional merits, nothing more or less. The NSBS concedes that TWU has met these requirements, and that there is no problem with the Law Program academically or professionally.[57] But the NSBS has departed from its legislative mandate by creating a different standard to evaluate TWU. This is discriminatory, in addition to violating s. 2(d) of the *Charter*.

37. It is important to recognize that the individuals appointed to regulatory bodies come and go. They are motivated by different principles and beliefs, and the "flavour" of the regulatory body shifts with the new appointees. What does not, and must not, change are the principles and obligations that govern such bodies. As the pendulum of society and culture swings back and forth between liberal and conservative, and between religious and secular, it is incumbent on all regulatory bodies—whatever their composition at the

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[56] *Mounted Police Association*, at para. 36. Section 2(d) also protects "some collective activities that have no true individual equivalents". *Ibid.* Private religious law schools, with religious codes of conduct, have operated successfully in the United States for decades with no adverse effects on the legal profession or other minorities. See e.g. Pepperdine School of Law, http://law.pepperdine.edu/.

[57] *Factum of the Respondent*, para. 20.

time—to uphold the rule of law and the fundamental freedoms that protect individuals from the tyranny of the majority. "There should be a law to the people beside its own will."[58] In Canada, this ultimate law is the *Charter*.

The Same Ground as *TWU. v. BCCT*

38. In *TWU v. BCCT*, the Supreme Court of Canada found that the failure of the BCCT to accredit TWU was a substantial interference with freedom of association.[59] There is no meaningful difference between what the BCCT sought to do, and what the NSBS now attempts.

39. The April 25th resolution of the NSBS shows the reason the NSBS did not approve TWU was "the Community Covenant is discriminatory and therefore Council does not approve…."[60] The NSBS made a legal determination that the Covenant constitutes unlawful discrimination pursuant to the *Human Rights Act*, RSNS 1989, c 214, the *Charter*, or both. No court or human rights tribunal, however has made such a determination. The Nova Scotia *Human Rights Act* does not apply to TWU as a private entity situated in British Columbia, and neither does the *Charter*.[61] Both apply to the NSBS, however.

40. Finally, the NSBS's decision is likely to have a chilling effect on members of religious minorities who espouse Biblical or other traditional views on sexuality and marriage, and who wish to become (or already are) lawyers in Nova Scotia. The Supreme Court of Canada recognized this in *TWU v. BCCT*, where it held "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

[58] Lord Acton, http://www.acton.org/research/lord-acton-quote-archive
[59] *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 [*TWU v. BCCT*] at para. 32.
[60] *TWU v. NSBS*, at para. 4.
[61] *TWU v. BCCT*, at para. 25.

church."[62] The NSBS's logic leads to a Canada where professional bodies attempt to scrutinize the religious (and perhaps political) beliefs of institutions, and other professionals, and to penalize or punish the "incorrect" beliefs.

The Public Interest

41. One of the key arguments that the NSBS relies on to justify its action is that of "protecting the public interest" in the legal profession. The NSBS purports to derive its authority in this regard from Section 4(1) of the *LPA*.

42. "Protecting the public interest" does not mean automatically doing whatever the public, or the majority, may want. There is no evidence to suggest that the majority of Nova Scotians oppose approval of TWU's Law Program. But even if this were the case, it would be irrelevant. The rule of law protects Canadians from the tyranny of the majority, and all its ugly effects.

43. What is in the public interest is freedom. The *Charter* protects fundamental freedoms regardless of how popular or unpopular such protection might be. This includes the freedom to associate, the freedom to believe, and the freedom to practice one's beliefs without interference or arbitrary overreach of statutory bodies.

Analysis Under s. 1

44. Having established a breach, the burden shifts to the government to satisfy the limit on *Charter* rights as reasonably justified under s. 1. We submit that the following elements of the *Oakes*[63] test are useful in determining whether the NSBS acted correctly.[64]

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[62] *TWU v. BCCT*, at para. 33.
[63] *R v. Oakes*, [1986] 1 SCR 103 ("*Oakes*").
[64] A strict application of the *Oakes* test in *discretionary* administrative decisions was rejected by the Court in *Doré*. See *Doré* at para. 5. The NSBS does not possess the discretion to dramatically misinterpret the *LPA*. Recent decisions continue to recognize value in considering the Oakes factors. *Loyola High School v. Quebec (Attorney General)*, [2015] 1 SCR 613 ("*Loyola*"), at paras. 88, 151 (McLachlin CJ and Moldaver J, concurring partially in result); see also *Saguenay*, at paras. 89-90. In *Loyola*, the Court noted that both *Oakes* and *Doré* "require that

What is the Objective and is it Pressing and Substantial?

45. The stated purpose of the NSBS' refusal of the Law Program is to prevent unlawful discrimination against LGBT individuals.

46. Prior to making its decision concerning TWU's proposed law school on April 25, 2014, the NSBS Council members were provided with a detailed summary of legal arguments and decision options.[65] Option C (which the Council ultimately chose) was based on the following flawed reasoning:

> The Covenant, as is noted above, when viewed through the Nova Scotian legal lens is discriminatory and it is not saved by any exceptions in the *Human Rights Act*. TWU is allowed to believe, practice, promote and value its religious beliefs – but by requiring prospective students to execute a contract that contains discriminatory statements and by threatening discipline in the event of violation of the contract, TWU exceeds the bounds of protected religious freedom….This option does not condemn the students or future graduates as being unqualified to practice law; rather the systemic discrimination of the institution is what must be addressed and rejected…TWU has the power to take action to address this discrimination. The University can continue to believe in the sanctity of marriage between a man and a woman so long as the actions it takes in that regard do not negatively affect LGBT individuals.[66]

47. It is not clear why the "Nova Scotian legal lens" possessed by the NSBS should take precedence over the "lenses" of the Supreme Court of Canada, Parliament, or Justice Campbell. In its Executive Committee Memo, the NSBS references a national recognition of same-sex marriage in Canada as a significant legal development that could

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Charter protections are affected as little as reasonably possible in light of the state's particular objectives." *Loyola* at para 40.

[65] *Memorandum to Council* regarding "Trinity Western University Proposed School of Law – Options for NSBS" by the NSBS Executive Committee (April 16, 2014) [Executive Committee Memo], available online at available at http://nsbs.org/sites/default/files/ftp/CouncilMaterials/2014-04-16_TWUMemoCouncil.pdf

[66] Executive Committee Memo at 17-18.

be a basis to distinguish the Supreme Court of Canada decision in *TWU v BCCT*.[67] National recognition of same-sex marriage does not nullify Supreme Court of Canada judgments and federal legislation; that is the point of the rule of law. The *Civil Marriage Act*, SC 2005 c 33, s 1.1 has not been repealed. It states:

> 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. [Emphasis added].

48. The NSBS provides no explanation as to how it might be against the public interest for individuals or for communities to hold the views on marriage and sexuality espoused in the Covenant. It is not against the public interest to form associations with a common belief and practice in regards to (among other things) marriage as a criterion for association. It is not a pressing and substantial objective for NSBS to make a decision contrary to federal laws that protect the very activity the NSBS seeks to limit. Accordingly, the objective of the NSBS to compel TWU to alter the Covenant is neither pressing nor substantial.

Does the NSBS Decision Minimally Impair TWU's Freedom of Association?

49. The NSBS under the *LPA* is empowered to regulate its members by imposing its own requirements and standards concerning education, but not concerning the religious beliefs and practices of students while they study law. The bar admission exams, articling requirements, and continuing legal education are examples of such standards. They are all

[67] Executive Committee Memo at 17.

ways (currently in place) which address the objective of combating discrimination in the legal profession within Nova Scotia. The NSBS has exclusive power over what educational exams, courses, requirements, etc., are required to combat what it sees as unlawful discrimination. The NSBS has the power to force all its members to answer questions and complete courses concerning equality law in Canada that address issues of unlawful discrimination.

50. Demanding that TWU and its students alter the religious nature of their association (or suffer the consequences) is nothing short of an imposition of secular beliefs on a religious community. It is maximum impairment. This type of mandatory secularization of a religious group is the reverse of the antiquated mischief caused by the *Lord's Day Act,* which forced mandatory observance of religious days on everyone. The *Lord's Day Act* was overturned 30 years ago in *R. v. Big M Drug Mart Ltd*. Irrespective of whether secularists, religionists, liberals or conservatives hold power, this type of coercive oppression has been rejected by the Supreme Court of Canada and must continue to be rejected for the preservation of liberty in a free society.

Are the Effects of the NSBS Decision Proportional?

51. Under the *Oakes* analysis, the Court must consider whether there is "proportionality between the deleterious and the salutary effects of the measures"[68] or "whether the benefits of the impugned law are worth the cost of the rights limitation".[69]

52. This requirement was further explained in *Hutterian Brethren*, at paragraph 74:

> Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the

[68] *Dagenais v CBC*, [1994] 3 SCR 835 at 889.
[69] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, at para. 77.

> severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve.

The Deleterious Effects of the NSBS Decision on Canada's Voluntary Associations

53. The underlying principle of the NSBS decision – that a government body can dictate the imposition of changes to the rules and practices of voluntary religious associations – is contrary to the benefits provided by freedom of association under s. 2(d) of the *Charter*.

54. Allowing the government to sanction a religious association and its members for their beliefs and rules, by giving those who disagree with that association the legal right to impose changes on that association, removes the ability of the group to "to interact with, support and be supported by their fellow humans in the varied activities in which they choose to engage" and to "stand up to the institutionalized forces" that surround them.[70] Allowing this appeal, and upholding the NSBS decision, would contribute to extinguishing the only faith-based law school in Canada.

55. Undermining freedom of association cripples individuals in their struggle "to be independent of government control" as doing so attacks "the bulwark of political liberty," "the cornerstone of civil liberties and social and economic rights alike" and "community life, human progress and civilized society".[71] The breakdown of these hallmarks of freedom pushes Canada's free society one step closer toward a regime which polices religious and conscientious thought with a view to imposing conformity with secular or majoritarian ideals.

56. The NSBS decision undermines the ability of individuals "to participate in determining and controlling the immediate circumstances of their lives and the rules, mores and

[70] *Alberta Reference*, paras. 91, 92, and 154.
[71] *Ibid*, paras. 93, 154, and 90, respectively.

principles which govern the communities in which they live".[72] This type of government intrusion is found in totalitarian states, which refuse to tolerate free and diverse group activity because of the powerful check it might have on state power or ideological views.[73] The NSBS decision, if permitted to stand, will inevitably, by precedent, reduce the vitality of all minority perspective, religious and non-religious, in legal education and other spheres of education.

57. Permitting government actors to impose changes on voluntary associations affects not only TWU, but Canada's "multiplicity of organized groups, clubs and associations which further many different objectives, religious, political, educational, scientific, recreational and charitable".[74] Would it also be permissible, for instance, for a government actor to force or pressure voluntary LGBT associations to permit membership to "straight" persons, or to persons who disagree with the LGBT group's beliefs and rules? This, too, would be a violation of s.2(d) of the *Charter.*

58. In *Lavigne v. Ontario Public Service Employees Union*, La Forest J. held that "the community interest embodied in the freedom of association" might be expressed as "the interest of society at large in the contributions in political, economic, social and cultural matters which can be made only if people are free to work in concert."[75] People cannot be considered free to work in concert if a government imposes changes on the association because it does not conform to majority opinion or a secular ideology. For these reasons, the deleterious effects of the NSBS Resolution and Regulation are severe for TWU and its students, and for all voluntary associations in Canada that have membership rules and restrictions.

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[72] *Ibid*, at para 90.
[73] *Ibid*, at para 155.
[74] *Ibid*, para. 155.
[75] *Lavigne v. Ontario Public Service Employees Union,* [1991] 2 SCR 211, at para. 235.

The Salutary Effects of the NSBS Decision

59. The stated purpose of the NSBS' refusal of the Law Program is to prevent unlawful discrimination against LGBT individuals. It should therefore be easily discernible how the NSBS is helping LGBT individuals with its decision against TWU, but it is not.

60. Refusing TWU law graduates does not increase available law school positions for LGBT individuals. It does not negate the existence of the Covenant. The NSBS concedes that law graduates from TWU are no threat to LGBT individuals. If they were, they would be subject to professional discipline by the NSBS, and by Law Societies in all provinces. Further, TWU law graduates will be called to the bar in other provinces, and then admitted to the Nova Scotia Bar through the existing reciprocity agreements. The NSBS refusal to admit TWU graduates profits the NSBS nothing, nor does it assist LGBT individuals. It only hurts TWU and its graduates.

61. TWU is not going to change its religious beliefs or practices in order to please the NSBS, or any other provincial Law Society. The closure (or non-opening) of TWU's Law Program is a net loss for the *Charter*'s fundamental freedoms, and also a specific loss for any student who wished to join and belong to a voluntary religious community while studying law. It is a loss for any private organization that wishes to start its own law school based on its own creed or criterion, including those held dear by the LGBT community. Finally, all persons who hoped to go to law school at TWU would instead be competing against LGBT students for the same number of available positions at secular law schools. .

The Weight of the Infringement of TWU's Freedom of Association

62. As discussed above, the individuals who make up TWU – the faculty, staff and students – all enjoy the constitutionally-protected *Charter* freedom of association. Exercising this

freedom, each member has voluntarily chosen to adhere to a Community Covenant whereby they seek to live according to Evangelical Christian values, including those pertaining to sexuality, while they pursue their academic and career objectives.

63. While many of TWU's values (which encompass far more than only matters of sexual morality) would not be shared by many Canadians, the small university of less than 4,000 students appears to be thriving, even to the point of attempting to open a law school. There is clearly a segment of the population that identifies with the values embraced at TWU, and is willing to pay higher-than-average tuition rates to pursue their education at TWU. By requiring that TWU change its religious commitment expressed in the Covenant, the NSBS's decision directly targets the collective exercise of individual TWU members' *Charter* and lawful rights protected under s. 2(d).

64. The subject of human sexuality is not only a gender and orientation issue, it is also an issue of conscience and religion. To require TWU to change its obviously deeply-held religious practices and rules concerning sexuality, in order for TWU to receive equal treatment and be permitted to fully participate in society, imposes a very high cost for individual TWU members. TWU was formed by an evangelical denomination as a specifically Christian educational institution, based on evangelical beliefs and teachings. It cannot change the Covenant because it cannot change the (protected) religious beliefs that underpin the Covenant. In a very real sense, the ultimatum from the NSBS to alter the Covenant as a condition of approval is an ultimatum directed at the collective conscience of TWU and, by necessary extension, all religious and non-religious miniorirties.

Outcome on the Proportionality of Effects

65. It is apparent that the harm of the NSBS decision could adversely extend to the freedom of association of thousands of Canadian charities, cultural groups, educational institutions, political clubs, and other voluntary associations in a manner that outweighs its potential benefits. The NSBS decision results in no apparent benefit to the legal community, to Canadian society, or to LGBT individuals. The deleterious effects, however, are severe and oppressive.

66. The NSBS decision therefore lacks a pressing and substantial objective, and is not proportional if such pressing and substantial objective does exist. Consequently, the NSBS's decision is not justified under s. 1 as a reasonable limit on freedom of association.

Conclusion

67. The test for determining *Charter* infringements is not that of reasonableness. The *Charter* speaks of "fundamental" freedoms that are guaranteed, subject only to limited exceptions. The requirement, under s. 1, that government "demonstrably justify" its infringement of *Charter* freedoms does not allow for arbitrary discretion based merely on reasonableness. Yet this is what the NSBS attempts to do.

68. Freedom of association is a universal principle of a free and democratic society. Canada's recognition of this essential right pre-dates the *Charter.*[76] Under the *Charter*, Canada expressly recognizes the "fundamental" freedom of association[77] and guarantees its protection under s. 2(d). The Supreme Court of Canada has adopted "a generous approach" to freedom of association "centred on the purpose of encouraging the

[76] *Ibid*, paras 149, 168.

[77] This express constitutional protection for the freedom of association in Canada stands in contrast to the United States, where freedom of association is only regarded as a derivative right. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

individual's self-fulfillment and the collective realization of human goals, consistent with democratic values, as informed by 'the historical origins of the concepts enshrined' in s. 2(*d*). . . ."[78] Freedom of association is not compatible with the NSBS' attempt to create of a new right for individuals to impose changes on groups they disagree with.

69. The NSBS far overreaches the legitimate but limited authority it has been granted under the *LPA*, and ignores the freedoms it is charged with protecting. It is apparent that it has proceeded, not from the foundation of a legal analysis, but from a foundation of public sentiment. The question that should concern government bodies such as the NSBS is not "will we be popular?" but "will we uphold the fundamental freedoms on which Canada's free society is based?"

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of February, 2016.

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[78] *Mounted Police Association*, at para 46.

Appendix - Cases Cited

Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37

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Dore v. Quebec (Tribunal des professions), 2012 SCC 12

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