2014

Hfx No. 427840

Supreme Court of Nova Scotia

Between:

Trinity Western University and Brayden Volkenant

Applicants

and

Nova Scotia Barristers' Society

Respondent

and

Justice Centre for Constitutional Freedoms

The Association for Reformed Political Action

The Evangelical Fellowship of Canada and Christian Higher Education Canada

The Attorney General of Canada

The Catholic Civil Rights League and Faith and Freedom Alliance

The Christian Legal Fellowship and

The Canadian Council of Christian Charities

Intervenors

APPLICANTS' BRIEF

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FACTS AND OUTLINE

1. Nova Scotia Barristers' Society ("NSBS") refused to approve Trinity Western University ("TWU")'s law school. The applicants ask the Court to review. NSBS has no jurisdiction over law schools (as opposed to applicants for membership). The proper enquiry is not whether TWU unlawfully discriminates (which is denied), but whether a student who graduates with that law degree is qualified to practice law in Nova Scotia. NSBS cannot refuse to recognize a graduate's otherwise appropriate legal education because of the religious foundation of the law school, or the fact that while in law school the graduate associated with others who share the graduate's religious beliefs. NSBS has no authority to discriminate against students who attend a particular law school. NSBS has no authority to impose disabilities on people in Nova Scotia based on the conduct of a university in another province, or to do so on an *ad hominem* basis.

2. In the absence of evidence TWU graduates would discriminate against Nova Scotia residents (and NSBS acknowledges there is no such evidence), there is no need to balance the different Charter rights because they are not in conflict. Allowing people in BC to voluntarily agree not to engage in sexual intimacy outside of an opposite sex marriage does not limit the right of people in Nova Scotia who wish to engage in sexual intimacy on some other basis. If the Charter rights were in conflict, given the supervisory mechanisms at its disposal, NSBS has not properly balanced them. The regulation is not prescribed by law, it is not rationally connected to the conduct it seeks to avoid and it does not minimally impair the rights of the affected students.

FACTS

3. TWU, a private Christian university, sought and obtained permission from the British Columbia Minister of Advanced Education to operate a law school ("the Law School") in BC. Its students agree to cultivate Christian virtues. Its first law students graduate in 2019.

4. The Federation of Law Societies of Canada ("Federation") has a committee to determine if the program of a particular law school complies with the "National Requirement" [1]. By letter

[1] Record, NSBS 1387/33

of December 16, 2013, the Federation advised its members, including NSBS, that TWU's Application complied with the National Requirement. The Federation gave preliminary approval to TWU. (Until a law school produces its first graduates, a program that complies with the National Requirement developed by the Federation can be granted preliminary approval only; thereafter the school is subject to regular assessments.[2])

5. NSBS had established standards for students seeking to become articling clerks defining the law degree which they required. Its regulations provided in part[3]:

> **ADMISSIONS**
> **3.1 Interpretation**
> ...
> **(b) "law degree"** means i) a bachelor of laws degree or a juris doctor degree from a faculty of common law at a Canadian university approved by the Federation of Law Societies of Canada for the granting of such degree, or an equivalent qualification; ...
> ...
> **3.3 Application for enrolment as an articled clerk**
> **3.3.1** An applicant for enrolment as an articled clerk must:
> (a) be of good character;
> (b) be a fit and proper person;
> (c) be lawfully entitled to be employed in Canada;
> (d) have a law degree...

6. Upon TWU's accreditation by the Federation in December 2013, a law degree from TWU satisfied the definition of a "law degree" under regulation 3.3.1.(d).

7. The regulations establish other standards to be met by prospective articling students[4]:

> **ADMISSIONS**
> **3.4 Application for enrolment as an articled clerk**
> **3.3.1** An applicant for enrolment as an articled clerk must:
> ...
> (e) have an approved principal;
> (f) provide the Executive Director with a completed application in the form prescribed by the Committee;
> (g) provide the Executive Director with two letters of reference attesting to good character;

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[2] Record, NSBS 1387/4

[3] Record, NSBS 1667/18

[4] Record, NSBS 1667/17-18. The entire regulations appear as Record, NSBS 1667; hereafter "Regulations", and at Tab 2 of the Volume II of the Joint Book of Authorities

(h) provide the Executive Director an official transcript of the applicant's grades at each faculty of law at which the applicant studied;
(i) pay the prescribed application fee to the Executive Director;
(j) provide an Articling Agreement in the prescribed form executed by the applicant and an approved principal to the Executive Director;
(k) provide the Executive Director with a criminal record check...
(l) be proficient in the English language...
(m) provide such other information that may be required, at any time, by the Executive Director.

Decision of the Executive Director

3.3.2 The Executive Director may, where it is in the public interest to do so:
(a) approve the application and stipulate the effective date of enrolment;
(b) deny the application for reasons other than good character or fitness;
(c) obtain any additional information from the applicant or any other person regarding the good character and fitness of the applicant;
(d) where there is any issue regarding the good character or fitness of an applicant refer the application to the Committee;

Decision of the Committee

3.3.4 If an application is referred to the Committee pursuant to subregulation 3.3.2(d), the Committee shall consider the application and all the information provided by the Executive Director and may:
(a) request that the Executive Director obtain new information;
(b) approve the application, with or without terms, and stipulate the effective date of enrolment; or
(c) deny the application.
3.3.5 In the event that the approval is with terms or the application is denied, the Committee shall provide the applicant with a written decision with reasons and shall inform the applicant of their right to appeal to the Credentials Appeal Panel.
3.3.3 In the event that an application is denied pursuant to subregulation 3.3.2(b), the Executive Director shall provide the applicant with a written decision with reasons and shall inform the applicant of the internal review process.

8. In applying to be enrolled as an articled clerk, a student agrees and solemnly declares[5]:

I also hereby undertake to comply with all ethical guidelines rules governing lawyers in the Province of Nova Scotia, including the *Code of Professional Conduct*, as if the definition of "lawyer" therein includes a reference to "Articled Clerk."

(My emphasis)

9. In addition to the obligations imposed by the *Human Rights Act*, one of the ethical guidelines is the following[6]:

[5] The form is here http://nsbs.org/sites/default/files/ftp/Forms_ArticledClerks/BarAdmin_ClerkApp.pdf

[6] From the Legal Ethics Handbook of NSBS, chapter 24.

Chapter 24 – Discrimination

Rule

A lawyer has a duty to respect the human dignity and worth of all persons and to treat all persons with equality and without discrimination.

Guiding Principles
A lawyer discriminates in contravention of this Rule when a lawyer makes a distinction based on an irrelevant characteristic or perceived characteristic of an individual or group such as age, race, colour, religion, creed, sex, sexual orientation, disability, ethnic, national or aboriginal origin, family status, marital status, source of income, political belief or affiliation, if the distinction has the effect of imposing burdens, obligations, or disadvantages on an individual or on a group not imposed on others or if the distinction has the effect of withholding or limiting access to opportunities, benefits, or advantages available to individuals or groups in society.

10. This ethical guideline binds articling students during their period of articles as well as members of NSBS on their call to the bar. Articled clerks who are enrolled pursuant to Regulation 3.3 become members of NSBS[7]. NSBS has explicit authority to discipline articled clerks.[8] During their period of articles, clerks are supervised by a member of the bar who is charged with reporting on the clerk's fitness to practice law. Prior to becoming a lawyer in Nova Scotia, applicants are required to swear an oath, as follows[9]:

> "I, [name], swear/affirm that as a lawyer, I shall, to the best of my knowledge and ability, conduct all matters and proceedings faithfully, honestly and with integrity. I shall support the Rule of Law and uphold and seek to improve the administration of justice. I shall abide by the ethical standards and rules governing the practice of law in Nova Scotia."
>
> (My emphasis)

11. NSBS has a list of recommended courses for students attending law school.[10] The Law School will offer all of those courses. All but one of them are compulsory at TWU[11]; (the school allows students to choose between several commercial law courses). NSBS acknowledges that the Law School meets the National Requirement.[12]

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[7] S. 5(1)(b)

[8] For example, s. 45 *Legal Professions Act*

[9] Regulation 3.9.5

[10] Found at http://nsbs.org/become_a_lawyer/articling/policies_and_procedures

[11] Record, NSBS 1387/6

[12] Resolution, "Council accepts ... the TWU program will meet the national requirement..."

12. TWU has unequivocally stated its belief in the equal rights of all persons, guaranteed in s. 15 of the Charter[13]. Although it operates as a Christian university and has for fifty years, its students are not required to affirm or agree with TWU's theological views, and it admits students from a variety of faith traditions[14]. In particular, it does not inquire about sexual orientation on admission or enrollment.

13. Brayden Volkenant ("Brayden") is a graduate of TWU who intends to enter law school at TWU. In company with all of TWU's students, he has signed the five page Community Covenant ("the Covenant") which requires that he "treat all persons with respect and dignity....abstain from...prejudice". The Covenant articulates a traditional Christian view of sex and marriage[15]. In part, the Covenant provides:

> 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:

[13] For example, Record, NSBS 0024/10, 0024/23

[14] Record, NSBS 1387/210

[15] The Covenant appears in its entirety in Appendix "C"

- 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.

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.

14. NSBS invited submissions from the public on how it should respond to TWU's accreditation as meeting the National Requirement. About 168 submissions were received in writing, some from members of the bar, some from legal organizations in Nova Scotia or elsewhere and some from the public at large; about 25 submissions were made orally at a public meeting held for that purpose.

15. There was no evidence that Brayden or any other student at TWU, if admitted to article or practice in Nova Scotia, intended to breach the ethical obligations in chapter 24 or otherwise. Graduates of TWU have obtained law degrees at other law schools and now practice law in Canada; there was no evidence those lawyers have discriminated against anyone in their practice

of law. Graduates from TWU work as teachers and in other professions in Nova Scotia; there was no evidence they have discriminated against anyone in their professional or personal lives.

16. NSBS has agreed that it will not argue that TWU graduates should be refused qualification because of a presumption that they would be unable by virtue of their education at TWU to conduct their practice without discrimination on the basis of sexual orientation.

17. Students who attend other law schools may share the religious views of TWU. For example, Benjamin Shearer, a graduate from Schulich School of Law at Dalhousie, who was enrolled as an articling student by NSBS, has declared he shares the religious views of TWU set out in the Covenant[16]. He therefore declined his call to the bar in Nova Scotia, although he had completed all of the requirements necessary.

18. Larry Worthen, another graduate of Dalhousie Law School, declared that he became a Christian while at Dalhousie Law School[17] and that he broadly shares TWU's beliefs (although not with respect to divorce and artificial contraception)[18]. More than a hundred lawyers wrote in support of TWU's right to have a covenant which articulated a traditional Christian view of sexuality and marriage.[19] The religious views set out in TWU's Covenant are held by a number of lawyers who attended other law schools.

19. In April 2014, NSBS resolved 10-9 ("the Resolution") that:

> Council accepts the Report of the Federation Approval Committee that, subject to the concerns and comments noted, the TWU program will meet the national requirement;
>
> Council resolves that the Community Covenant is discriminatory and therefore Council does not approve the proposed law school at Trinity Western University unless TWU either:
>
> i) exempts law students from signing the Community Covenant; or
>
> ii) amends the Community Covenant for law students in a way that ceases to discriminate.

[16] Shearer Affidavit

[17] Record, NSBS 0699/225

[18] Record, NSBS 0456/1

[19] Record, NSBS 0423/3 - 0423/6

> Council directs the Executive Director to consider any regulatory amendments that may be required to give effect to this resolution and to bring them to Council for consideration at a future meeting.
>
> Council remains seized of this matter to consider any information TWU wishes to present regarding compliance with the condition.

20. Brayden and TWU filed the Notice of Judicial Review, challenging the Resolution. They argue that the Regulation that was passed three months later "to give effect to [the] resolution" is also bad.

21. Other law societies have reached conflicting decisions about whether TWU graduates will be entitled to practice law in their jurisdiction.

22. In July, after the application for judicial review was filed, NSBS enacted a new definition of law degree ("the Regulation"), as follows:

> (b) **"law degree"** means
>
> i) a Bachelor of Laws degree or a Juris Doctor degree from a faculty of common law at a Canadian university approved by the Federation of Law Societies of Canada for the granting of such degree, unless Council, acting in the public interest, determines that the university granting the degree unlawfully discriminates in its law student admissions or enrolment policies or requirements on grounds prohibited by either or both the *Charter of Rights and Freedoms* and the *Nova Scotia Human Rights Act;*

23. NSBS has acknowledged that the Resolution passed in April is a determination for the purposes of the Regulation (that TWU unlawfully discriminates in its law student admissions or enrolment policies).

ISSUES

Administrative law issues

1. NSBS has jurisdiction over members and students applying for membership; it does not have jurisdiction over law schools. Both the Resolution and the Regulation are directed at law schools, not members or students;

2. NSBS is required by the *Legal Professions Act ("LPA")* to establish standards or educational requirements. Properly interpreted, neither the Resolution nor the Regulation establishes a standard;

3. NSBS took into account matters irrelevant to its determination under the *LPA;*

4. NSBS is not given jurisdiction under the *LPA* to pass a regulation which distinguishes between graduates based on the enrollment or admission standards of the university they attended;

5. NSBS cannot pass a regulation which imposes consequences on extra territorial conduct (or pass a resolution about a law school in another province);

6. The decision was unreasonable: NSBS did not give reasons and acted without evidence;

7. Regulations (which depend on council's opinion of "unlawful discrimination") are arbitrary and therefore unlawful.

Charter Issues

8. NSBS erred in law in determining there was a conflict between Charter rights;

9. If there was a conflict, NSBS erred in balancing the Charter rights;

10. Because the Regulation depends on a discretionary interpretation of unlawful discrimination, it is not "imposed by law";

11. There was no rational connection between the Regulation and the risk of discrimination;

12. The Regulation did not minimally impair the rights of TWU graduates;

13. The absolute prohibition on TWU graduates is not proportionate.

STANDARD OF REVIEW

Summary The Court is obliged to arrive at a standard of review for each issue. However, one issue dominates: NSBS's resolution hinges on a conclusion the Covenant is unlawfully discriminatory. The applicants argue that decision is not NSBS's to make—but at least that decision is not uniquely NSBS's to make. Different bodies (the BC Minister of Advanced Education, the Federation, law societies in different provinces, professional regulators for the other graduates of TWU) have assessed the Covenant and reached conflicting decisions on whether it is unlawfully discriminatory. Given that more than a dozen bodies are assessing TWU's Covenant, correctness is the necessary standard.

Courts defer to an administrative body's decision when the legislature has delegated the decision to the administrative body and the body has expertise which the Court lacks. Neither of those rationales exists here. The legislature did not assign to NSBS the right to decide whether a law school should be approved and the Court has superior expertise in balancing competing Charter rights.

The determination whether the Covenant is unlawfully discriminatory is of general application, affecting the Federation of Law Societies, a dozen law societies, the BC Minister of Advanced Education and conceivably the professional regulator for each other program (eg nursing, teaching) TWU graduates seek admission to. The delineation and balancing of Charter rights is of general application, reviewable on a standard of correctness[20].

1. THE STANDARD OF REVIEW FOR THE REGULATION

24. Whether a regulation is valid subordinate legislation is always a question of correctness. Brown and Evans, *Judicial Review of Administrative Action* (Carswell, 2013, Looseleaf) explain:

> Standard of Review
>
> Courts apply the standard of correctness when deciding whether delegated legislation is *ultra vires*. In that regard, a distinction has been drawn between a decision to enact subordinate legislation and the legality or *vires* of the subordinate legislation itself. ...[T]he Court in *Dunsmuir* has stated that where a question is one of true *vires*, the standard of review is always correctness. Accordingly, it follows that where the issue is one of *vires* [a standard of review] analysis is unnecessary. 15:3220

[20] "...A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, [2003] 3 S.C.R. 77, **[Tab 25]**at para. 62).

2. THE STANDARD OF REVIEW FOR THE RESOLUTION

25. The *LPA* explicitly authorizes Council to act by resolution:

> **6** (3) The Council may take any action consistent with this Act by resolution.

A. Whether NSBS had jurisdiction to approve a law school is subject to correctness

26. True issues of jurisdiction are subject to a correctness standard of review:

> **59** Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. ... The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction. [21]

27. Three issues are jurisdictional: NSBS was not given the authority to approve a law school (rather than determine whether a student was qualified to practice law in Nova Scotia); the legislature did not give NSBS authority to consider the religious beliefs of a student (or the religious foundation of a school) in making that determination; and the legislature did not give NSBS authority to impose a standard on some students and not others.

28. Constitutional issues are subject to review on a correctness standard because of section 96 of the Constitution Act[22]. ("There is no doubt that when a tribunal is determining the constitutionality of a law, the standard of review is correctness"[23]). Whether NSBS has extra-territorial competence in disapproving a school in another province, and applying the Nova Scotia *Human Rights Act* to that school, is a constitutional issue.

B. Decisions made without reasons or without evidence are unreasonable

29. If the Court concludes the reasons given did not demonstrate NSBS gave due regard to the rights at issue[24] or that there was no evidence before NSBS[25], the resolution must be set aside.

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[21] *Dunsmuir v. New Brunswick,* [2008] SCJ 9,**[Tab 7]** para 59

[22] *Dunsmuir*, **[Tab 7]** para 58.

[23] *Doré v. Barreau du Québec*, [2012] SCJ 12 **[Tab 6]** para 43

[24] *Doré v. Barreau du Québec*, [2012] SCJ 12, **[Tab 6]**, para 66

C. Charter Issues and Discrimination

30. A more detailed examination of the standard of review for Charter questions is in order. Because there are conflicting determinations of different tribunals, the Charter issues should be decided on a correctness standard, but that would be the result of an analysis of the Charter issues even without conflicting decisions.

(1) Conflicting decisions

> **61** Questions regarding the jurisdictional lines between two or more competing specialized tribunals have also been subject to review on a correctness basis...[26]

31. The logic behind deference is that the legislature has assigned the decision exclusively to an administrative body, and so long as it reaches a result within a range of acceptable outcomes, the decision is the administrator's to make. That logic breaks down when different administrative bodies have conflicting and overlapping jurisdiction. The BC Minister of Advanced Education has been assigned the jurisdiction to approve the Law School; NSBS has been assigned the jurisdiction to determine who is qualified to practice law in Nova Scotia. There is no necessary conflict in those roles. However, NSBS claims that the jurisdiction to determine who is qualified to practice law in Nova Scotia also gives it the jurisdiction to approve and regulate the Law School. The Applicants say NSBS does not have the authority to approve or reject a law school; if it does, its authority overlaps the BC Minister's.

32. There can be no deference to conflicting outcomes. In this case, more than a dozen different tribunals have or are considering the Covenant, and they have reached conflicting decisions. It is not workable to have inconsistent determinations of jurisdiction. If NSBS has jurisdiction to approve a law school, because that is inconsistent with the clear grant of authority to the BC Minister, it must be reviewable on a correctness standard to avoid inconsistent results.

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[25] *Toronto Board of Education v. OSSTF* [1997] S.C.J. No. 27, **[Tab 24]** para 44, because a finding based on no evidence is not just incorrect, it is unreasonable

[26] *Dunsmuir v. New Brunswick,* [2008] SCJ 9, **[Tab 7]** para 61

(2) Not an individual discipline decision

33. The standard of review for decisions of NSBS's Complaints Investigation Committee ("CIC") is settled: *Lienaux v. NSBS* [2009] N.S.J. No. 32 (C.A.) **[Tab 9]** para 14-26. The CIC enjoys deference when disciplining a member because the *LPA* assigns that responsibility to the CIC, the *LPA* contains a privative clause for discipline decisions[27], and the Complaints Investigation Committee has expertise to interpret its own statute and decide what constitutes misconduct when applying that expertise to particular facts.

34. The decision under review is not a decision made by CIC about an individual case, but a decision of NSBS council about the Covenant in the abstract. There is no privative clause for NSBS council decisions. NSBS was not considering an application to practice by a particular graduate applying its standards to that person's particular facts. The standard of review for discipline decisions of CIC is not applicable here.

35. In *Doré v. Barreau du Québec*, [2012] SCJ 12 **[Tab 6]**(*"Doré"*), the Supreme Court of Canada considered a decision to discipline a member of the Quebec bar. The Court found that reasonableness applied to professional discipline decisions of the Quebec bar. That decision should not be generalized to stand for the proposition that *all* decisions of a bar association attract that standard of review. Justice Abella makes it clear that she is speaking of disciplinary decisions only (my emphasis):

> **45** It seems to me that applying the *Dunsmuir* principles results in reasonableness remaining the applicable review standard for disciplinary panels.
>
> **53** The decisions of legal disciplinary bodies offer a good example of the problem of applying a correctness review whenever *Charter* values are implicated.

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[27] The privative clause in s. 49 is confined to decisions of the CIC or a hearing panel:

> 49 (1) Subject to this Section, every order or decision of a Complaints Investigation Committee or a hearing panel is final and shall not be questioned or reviewed in any court.
>
> (2) A party may appeal to the Nova Scotia Court of Appeal on any question of law from the findings of a hearing panel, following the rendering of a decision pursuant to subsections 45(4) or (5) or from a decision of the Complaints Investigation Committee under Section 37 or 38.

> **66** ... Disciplinary bodies must therefore demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer's right to expression and the public's interest in open discussion. As with all disciplinary decisions, this balancing is a fact-dependent and discretionary exercise.

(3) Principles of General Application

> **60** ...[C]ourts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Toronto (City) v. C.U.P.E.*, at para. 62, *per* LeBel J.). Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. [28]

36. Whether TWU (or more broadly, any private school) is entitled to teach its religious values and require those at the school to agree to abide by those values while enrolled, is of general importance to the legal system as a whole. Justice Abella in *Doré* explains the reason a different test applies to a disciplinary decision respecting an individual lawyer than to the matter here:

> **36** When *Charter* values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts. *Dunsmuir* tells us this should attract deference (para. 53...). When a particular "law" is being assessed for *Charter* compliance, on the other hand, we are dealing with principles of general application.

37. If NSBS was considering whether an individual student qualified to practice law, it would be applying Charter values to particular facts. NSBS has expertise in reaching that conclusion, and has an express grant of authority to do so[29]. That decision would be entitled to deference. NSBS disclaims having judged individual students[30] so that standard does not apply.

38. When NSBS is assessing the Covenant in the abstract, and determining whether the Covenant is unlawfully discriminatory—the same question answered by other groups---it is dealing with principles of general application. When we are considering whether the Regulation complies with the Charter, we are dealing with principles of general application. In delineating the Charter rights here and determining whether the Charter rights were in conflict, NSBS was obliged to be correct.

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[28] *Dunsmuir v. New Brunswick,* [2008] SCJ 9,[**Tab 7**] para 60

[29] *LPA* s. 5 (2)

[30] Para. 9 of its Notice of Participation

(4) NSBS had no expertise

39. If (as NSBS maintains) it was deciding whether to approve a law school, it had no expertise. This appears to be the first time NSBS has decided to approve a law school[31]. Approving this law school required NSBS to assess the evangelical Christian beliefs of TWU, the Covenant of TWU and the practices of TWU. NSBS has no expertise in assessing a religion, university codes of conduct or university practices; the Covenant is not part of NSBS's home statute. The events take place entirely in another province, so NSBS has no fact gathering powers as it would in assessing matters in Nova Scotia. By contrast, the BC Minister of Advanced Education assesses 25 post secondary institutions in BC each year; the Ministry has staff with full investigative powers and long years of experience in assessing post secondary institutions. It does so every year. A number of the post secondary institutions it assesses have a religious foundation. All of the students are at least temporarily residents of BC and the largest number will remain there. The BC Minister's expertise in approving universities is superior relative to NSBS. The logic of deference binds NSBS as well as the Court.

40. Moreover, in hearing submissions, NSBS relied on others to inform them on the issue. In *Trinity Western University v. BC College of Teachers,* [2001] S.C.J. No. 32 **[Tab 26]** ("*BC Teachers*") the fact the College relied on others was a reason for not deferring to the decision of the College[32]. The Court's observation in *BC Teachers* is applicable:

> The perception of the public regarding the religious beliefs of TWU graduates and the inference that those beliefs will produce an unhealthy school environment have, in our view, very little to do, if anything, with the particular expertise of the members of the BCCT.[33]

By hearing submissions, NSBS acknowledges it does not have expertise. NSBS does not have expertise superior to the Court's on constitutional law, even though it is made up of a majority of lawyers.

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[31] There has been no new law school in Canada for 30 years: para 17, NSBS 1387/4

[32] Para 17

[33] Para 19

(5) Precedent says the test is correctness

41. Determination of standards of review is normally governed by precedent:

> **62** ...First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of defence to be accorded with regard to a particular category of question[34].

42. *BC Teachers* determines the standard of review here is correctness. The grant of authority to NSBS is narrower, not broader, than in that case[35]. The Supreme Court of Canada determined that correctness was the proper standard to apply (my emphasis):

> **17**. ...Furthermore, [the BC College of Teachers']... expertise does not qualify it to interpret the scope of human rights nor to reconcile competing rights. It cannot be seriously argued that the determination of good character, which is an individual matter, is sufficient to expand the jurisdiction of the BCCT to the evaluation of religious belief, freedom of association and the right to equality generally. As mentioned in Pushpanathan, the expertise of the tribunal must be evaluated in relation to the issue and the relative expertise of the court itself. The BCCT asked for a legal opinion before its last denial of the TWU application; it relied on someone else's expertise with regard to the issue before us. It has set standards for teachers, but this has never included the interpretation of human rights codes. The absence of a privative clause, the expertise of the BCCT, the nature of the decision and the statutory context all favour a correctness standard.
>
> **18** We mentioned earlier that a lower standard had been applied by the Court of Appeal on the findings of the BCCT with regard to the existence of discriminatory practices and, if they are present, whether they have created a perception that the BCCT condones this discriminatory conduct. The lower standard was also applied to the BCCT finding that the school system has or has not created a risk that graduates of TWU will not provide a discrimination-free environment for all students. We do not believe that different standards should apply in these circumstances. The existence of discriminatory practices is based on the interpretation of the TWU documents and human rights values and principles. This is a question of law that is concerned with human rights and not essentially educational matters.
>
> **19** The perception of the public regarding the religious beliefs of TWU graduates and the inference that those beliefs will produce an unhealthy school environment have, in our view, very little to do, if anything, with the particular expertise of the members of the BCCT. We believe it is particularly important to note here that we are not in a situation where the Council is dealing with discriminatory conduct by a teacher, as in Ross. 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. By contrast, in Ross the actual conduct of the teacher had, on the evidence, poisoned the atmosphere of the school (Ross, supra,

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[34] *Dunsmuir v. New Brunswick,* [2008] SCJ 9 **[Tab 7]**, para 62

[35] The provision authorizing the BCCT was:

> Object
>
> **4** It is the object of the college 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 and, consistent with that object, to encourage the professional interest of its members in those matters.

> at paras. 38-40 and 101). More importantly, the Council is not particularly well equipped to determine the scope of freedom of religion and conscience and to weigh these rights against the right to equality in the context of a pluralistic society. The public dimension of religious freedom and the right to determine one's moral conduct have been recognized long before the advent of the Charter (see Saumur v. City of Quebec, [1953] 2 S.C.R. 299, at p. 329) and have been considered to be legal issues. The accommodation of beliefs is a legal question discussed in R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, and Ross. Perceptions were a concern in Ross, but they were founded on conduct, not simply beliefs. The respondent in this case argued that the refusal of accreditation would create the perception that the BCCT does not value freedom of religion and conscience and endorses stereotypical attributes with regard to TWU graduates. All this to say that even if it was open to the BCCT to base its decision on perception rather than evidence of actual discrimination or of a real risk of discrimination, there is no reason to give any deference to that decision.

43. *Doré* cites *BC Teachers* with apparent approval.[36] Because correctness was the standard the court used in *BC Teachers*, correctness is the standard here.

ARGUMENT

44. This case is about delineating and balancing rights: the right to practice a religion which adheres to certain biblical teachings and to express those teachings and associate with others who share those beliefs, and the right to be free from unlawful discrimination based on sexual orientation. However, the case is also a judicial review. *R v. Guignard*, [2002] S.C.J. 16 at para. 13 **[Tab 15]** directs us to deal with the administrative law issues before turning to the Charter. The arguments are made in the alternative: if you accept that NSBS had no jurisdiction to approve a law school, for example, you should allow the judicial review regardless of your decision on the other issues. If you determine NSBS had no jurisdiction to pass the Resolution, you should necessarily quash the Regulation. In the Resolution, NSBS directed Council to "consider any regulatory amendments that may be required to give effect to this resolution"; if the Resolution is invalid, the Regulation should be as well.

45. However, the Regulation presents two issues which do not arise as directly with the Resolution: the extra territorial effect of the Regulation and the discretion which the Regulation gives Council to determine legal issues.

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[36] At para. 32 of *Doré* **[Tab 6]**

I. NSBS HAD NO JURISDICTION TO REFUSE TO APPROVE A LAW SCHOOL

Summary NSBS's jurisdiction is to establish standards for members and to regulate the practice of law in Nova Scotia. It has no power to approve or reject or regulate a law school.

46. The Federation of Law Societies explains the point this way (my emphasis)[37]:

> The national requirement focuses on *entry to law society licensing programs* because law societies have no jurisdiction to approve law schools, which is within [in this case, BC] provincial government authority and responsibility. Law societies only have authority over their own admission rules and practices.

47. The authority to approve degree granting schools in Nova Scotia is reserved to the Minister of Education and the Governor in Council in the *Degree Granting Act*, not NSBS.[38] Because the authority to approve schools in Nova Scotia is expressly vested in the Minister of Education and the Governor in Council, it is not possible to read the *LPA* as implicitly giving NSBS that authority.

48. The legislature has not delegated authority over *any* school to NSBS. The fact NSBS's jurisdiction is over students and not schools is confirmed by the constitutional dimension. TWU is located in the province of British Columbia. The legislature of Nova Scotia (and consequently NSBS) has authority only over matters occurring within Nova Scotia. Peter Hogg, *Constitutional Law of Canada* (5th ed) **[Tab 00]**, puts the point like this:

> The sections [of the Constitution Act] allocating power to provincial Legislatures...open with the words, "In each province"; and each class of subjects listed in s. 92 as within provincial legislative power contains the phrase, "in the province" or some other indication of territorial limitation. A body of case law has established that these phrases in the Constitution Act, 1867 do impose a territorial limitation on provincial legislative power. (13-4—13-5)
>
> As a general proposition, it is plain that a province may not regulate extra-provincial activity. (13-10)

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[37] Record, NSBS 1314, at 1317

[38] *Degree Granting Act*, RSNS, 1989 c. 123 and the *Degree-Granting Institution Authorizing Regulations*, N.S. Reg. 388/2008 (September 9, 2008).

49. Nova Scotia does not have the constitutional authority to approve or regulate a law school situated wholly in another province; neither can NSBS. NSBS's only constitutional authority is limited to the graduates who come to Nova Scotia, whether under "establishing standards for members" or "regulating the practice of law in the Province". In either case the Regulation and the standards can only be directed at graduates and not at the school itself[39].

50. NSBS in its Amended Notice of Participation[40] says the authority to pass the Resolution is found in this section of the *LPA*:

> **Purpose of Society**
>
> **4.** (1) The purpose of the Society is to uphold and protect the public interest in the practice of law.
>
> (2) In pursuing its purpose, the Society shall
>
> (a) establish standards for the qualifications of those seeking the privilege of membership in the Society;
>
> (b) establish standards for the professional responsibility and competence of members in the Society;
>
> (c) regulate the practice of law in the Province.

51. For our purposes the section might be summarized as "NSBS is given the authority to establish standards for *members* and to regulate the practice of law in the Province."[41] NSBS is not given authority to approve or regulate law schools, anywhere in the *LPA*. The Federation of Law Societies was correct in its conclusion: NSBS does not have jurisdiction over law schools and is constitutionally unable to approve a law school in a different province.

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[39]The extra territorial character of the Regulation is dealt with as the fifth issue.

[40] Para 7

[41]Council is also given authority to make regulations in section 5, which provides (my emphasis):

> ....
> (8) The Council may make regulations
>
> (a) establishing requirements to be met by members, including educational, good character and other requirements, and procedures for admitting or reinstating persons as members of the Society in each of the categories of membership;

In its Notice of Participation, NSBS claims to be relying on s. 4 of the *LPA*.

52. The decision under review is, "Council does not approve the proposed law school at Trinity Western University". This is not "a standard for members". It goes on to establish conditions under which it would recognize TWU—to attempt to regulate the Law School. The Executive Committee report notes[42]:

> A resolution that does not approve TWU, should that be Council's decision, will likely be premised on Council's conclusion that TWU's Community Covenant amounts to institutionalized discrimination against individuals on account of their sexual orientation and other characteristics...

53. The Resolution stated:

> Council resolves that the Community Covenant is discriminatory and therefore Council does not approve the proposed law school at Trinity Western University

54. Was NSBS simply using short hand? Although the resolution was "TWU is not approved" was NSBS really answering the proper question, whether students who attend TWU are qualified to practice law in Nova Scotia? Consider this excerpt from the Executive Committee:

> If the Society were to deny approval of the TWU law school and TWU establishes its law school on the basis of approvals from other law societies and from the government of British Columbia, a future TWU law graduate may seek admission to the Society's Bar Admission Program.
> Assuming such a student can demonstrate that the refusal of the Society to recognize the TWU law school violates that student's right to religious freedom, the Society will need to balance the competing rights that are at play...[43]

55. The Executive Committee recognizes that a student may be qualified to practice law in Nova Scotia even though Council has refused to approve the Law School. One is not short hand for the other.

56. It is clear from this passage and others that the Executive Committee is treating the conduct of TWU separately from the conduct of students, and that "approving the law school" and "determining who is qualified to practice in Nova Scotia" are not being used

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[42] Record, NSBS 1064/13

[43] Record, NSBS 1064/14. The error of law demonstrated in this reasoning will be addressed later (the obligation is to delineate the rights first, and only if they are in conflict is it necessary to balance them).

interchangeably. NSBS was **NOT** establishing a standard for members. It was refusing to approve the Law School and attempting to regulate it. NSBS has no authority to do that.

57. That does not mean NSBS cannot consider the legal education articling students or members obtain. NSBS is required to consider the legal education they obtain. However, the student and not the school is the party being assessed. The question is not whether NSBS approves the Law School; the question is whether, *according to standards established by NSBS,* the student is qualified by his or her legal education to practice in Nova Scotia.

58. The difference is important. In the first place, the fact NSBS is given jurisdiction to establish standards for students and not to approve schools or regulate schools is important to the standard of review. NSBS acted without jurisdiction here and its Resolution must be set aside.

59. Second, the fact jurisdiction is over students, not the school, informs the other administrative law questions. NSBS can ask "Is the student guilty of unlawful discrimination in signing the Covenant?" but not, "Is the school guilty of unlawful discrimination in having a Covenant?" NSBS is entitled to create a standard to judge whether a student is qualified; it is not entitled to judge the actions of the school. NSBS appears to conclude TWU has institutionalized discriminatory practices[44]. TWU denies that, but even if true, the issue is not what TWU does. The issue is whether the student is qualified to practice law in Nova Scotia. (The Regulation is similarly defective because it does not consider the *student's* qualifications but considers the practices of the *school.*)

60. Third, NSBS obtains jurisdiction over a particular student when that student is applying to become an articled student in Nova Scotia; the Regulations require that the student already have a law degree—the student in other words has completed law school. NSBS has no jurisdiction during the student's years of law school, or if the student chooses to article in a different province. The time when the question is answered ("is the student qualified, according to standards established by NSBS?") is after law school when the student applies to article (in accordance with Regulation 3.3.1. (f)).

[44]For example, Record, 1064/13 and 1064/14

61. NSBS has no jurisdiction to refuse to approve the school, and it is not treating that as short hand for finding the graduates are not qualified by their legal education to practice law in Nova Scotia. NSBS has acted without jurisdiction in passing a resolution refusing to approve the Law School. The Resolution made without jurisdiction (and the consequent Regulation) should be quashed.

II. NO STANDARD HAS BEEN ARTICULATED

Summary NSBS did not establish a "standard" here.

62. The authority given is to establish standards. The hallmark of a standard is that it is an objective measure of some quality by which things are judged[45]. It is not an application of that standard. It *is* establishing a standard to say that students must have taken 100 hours of class instruction; it is not the establishment of a standard but (perhaps) the application of a standard to say this particular school does not provide 100 class hours. The legislative requirement for the establishment of a standard is a protection against arbitrary decisions. It allows the Court to assess whether the standard is fairly applied.

63. NSBS is entitled to establish a standard and then apply that standard to find that a particular student's educational qualifications are deficient. The Resolution did not establish a standard about a student's qualifications or about belief, association or the signing of a covenant. The fact the legislature directed the establishment of standards does not entitle NSBS to refuse to approve the Law School (or a student) on an *ad hoc* basis without identifying a standard.

64. The Regulation suffers from the same defect. The Regulation provides that "[a law degree] approved by the Federation of Law Societies of Canada [qualifies a student]... unless Council, acting in the public interest, determines that the university granting the degree unlawfully discriminates. This is not a standard. It means no more than "a law degree is not a law degree if council determines". It might be a standard to refuse approval to a student who is

[45] For example, in Regulation 3.3 NSBS has established standards for the qualifications of members.

found guilty (by some external body) of discrimination; what the Council is doing is not establishing a standard but reserving the right to determine on an *ad hominem* basis, whether it approves of a particular school. Apart from the fact the inquiry is required to be about the student not the school, this is not a standard. This is an arbitrary determination, prohibited by the *LPA*'s requirement for standards.

65. Again, NSBS has acted without jurisdiction.

III. RELIGIOUS PRECEPTS OF TWU ARE LEGALLY IRRELEVANT

Summary In deciding whether a student's education has qualified the student to practice in Nova Scotia, it is irrelevant whether the student attended a school that has a religious nature or whether the student signed a Covenant.

66. If the Court concludes that NSBS was acting within its jurisdiction (because the Resolution establishes a standard for members, not the Law School), the Court must go on to consider whether NSBS acted on an irrelevant consideration. There is no deference owed if NSBS considered irrelevant matters in reaching their decision[46].

67. In *BC Teachers*, the Court held "In considering the religious precepts of TWU instead of the actual impact of these beliefs on the school environment, the BCCT acted on the basis of irrelevant considerations."[47]

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[46] Brown and Evans, *Judicial Review of Administrative Action* (Carswell, 2013, Looseleaf) at 15:2300 and 15:3220:

> Conceptually, acting on the basis of an irrelevant consideration or failing to take a relevant consideration into account in exercising discretion is an error in the *process* of decision. However, the exercise of a statutory power has also been referred to as *ultra vires* if based on irrelevant factors or considerations, in that it is closely related to the requirement that powers be exercised only for their statutorily intended purposes.
>
> Courts apply the standard of correctness when deciding whether delegated legislation is *ultra vires*. In that regard, a distinction has been drawn between a decision to enact subordinate legislation and the legality or *vires* of the subordinate legislation itself. ...[T]he Court in *Dunsmuir* has stated that where a question is one of true *vires*, the standard of review is always correctness. Accordingly, it follows that where the issue is one of *vires* [a standard of review] analysis is unnecessary.

[47] para 43 and see para 35, 42.

68. NSBS has done the same here. NSBS in taking into account the same religious precepts of TWU, and its (slightly revised) Covenant, instead of the actual impact of those beliefs in the legal environment where the law students are later employed, similarly acted on the basis of irrelevant considerations[48].

69. NSBS is entitled to judge the qualifications of students, their fitness and their character. Their religious beliefs, who the students associated with at law school or whether they signed a particular covenant are legally irrelevant. In their Notice of Participation, NSBS expressly acknowledges NSBS was not judging the conduct of individual students[49].

70. NSBS has acted without jurisdiction in relying on the signing of the Covenant as a reason for refusing to approve the Law School (or the legal education of graduates of the Law School, if that is what the resolution means).

IV. NSBS HAD NO JURISDICTION TO PASS A DISCRIMINATORY REGULATION

Summary In administrative law, a regulation which discriminates is valid only if the making of that distinction is authorized in the enabling legislation. The Regulation fails that test four ways: it makes a distinction:
(a) based on religious views (and more broadly, non academic criteria);
(b) between graduates of TWU and the graduates who hold the same views from other schools;
(c) based on enrollment and admission policies, rather than educational qualifications;
(d) based on Human Rights Act criteria
—none of which are authorized in the LPA.

1. Limits on administrative discrimination

As a general rule of regulatory law, a regulation cannot discriminate between persons or classes of person to whom it applies unless the enabling statute either expressly or implicitly permits such discrimination. A regulation that discriminates in that way without authority may be invalidated.

[48] The BC College of Teachers and TWU were both located in BC, so there was no constitutional impediment to the College reviewing what TWU was doing, and the College was expressly given the authority to establish "educational standards". If the Community Covenant was legally irrelevant in *BC Teachers* (when the college had statutory authority to establish educational standards for a BC teacher) the Covenant is irrelevant here (in the absence of such authority).
[49] Para 9

Paul Salembier, *Regulatory Law and Practice in Canada* (Lexis Nexis, 2004), p . 287

71. The leading case is *Montreal v. Arcade Amusements*, [1985] S.C.J. No. 16 **[Tab 10]**:

> The power to make regulations does not include a power to adopt discriminatory provisions...unless the legislation authorizing it states the contrary a regulation must apply to everyone in the same way. If the intent is to make a distinction, this must be stated.

72. In *Arcade Amusements*, the court approved the textbook statement that "any discriminatory regulation not authorized by legislation is illegal[50]" and stated that the rule was one of general application: "The principle transcends the limits of administrative and municipal law. It is a principle of fundamental freedom[51]."

73. The issue is not whether the regulatory distinction is sensible but whether the distinction drawn in the Regulation was authorized by the statute. In *R v. Sharma*, [1993] SCJ No 18 **[Tab 17]**, the court stated[52]:

> The general reasonableness or rationality of the distinction is not at issue: discrimination can only occur where the enabling legislation specifically so provides or where the discrimination is a necessary incident to exercising the power delegated by the province.

74. In *Arcade Amusements*[53]:

> It may well be that an authorization to make distinctions based on the age of children and adolescents would be useful to the City in exercising its power to adopt policing by-laws; but however useful or convenient such an authorization might be, I am not persuaded that it is so absolutely necessary to the exercise of those powers that it would have to be found in the enabling provisions, by necessary inference or implicit delegation.

75. Justice Pugsley in *Way v Covert* [1997] NSJ 204 **[Tab 28]** at para 27-29 held that the principle is not restricted to municipalities but applies as well to provincial government regulations. He observed:

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[50] At para 106

[51] At para 118

[52] At para 26

[53] At para 122

> It is clear that the Supreme Court of Canada has not limited the principle of discrimination to the field of municipal by-laws.

76. If the province cannot pass regulations which discriminate on a basis not authorized by statute, neither can NSBS. In *Clyke v. Nova Scotia* [2005] N.S.J. No. 3 **[Tab 4]** Justice Fichaud for the Court of Appeal summarized the law:

> **16** In *Forget v. Quebec (Attorney General)*, [1988] 2 S.C.R. 90 at paras. 28-30, Justice Lamer for the majority stated:
>
> > 28 In theory, the power to regulate does not include the power to discriminate. Accordingly, where a statute contains no authorization, express or implied, a discriminatory regulation may be challenged and set aside. ...
> >
> > 30 In the absence of express provisions to the contrary or delegation by necessary implication, the legislator reserves the exclusive right to discriminate.
>
> The issue is not whether the challenged regulation is "reasonable" per se. Rather, the issue is whether the statute expressly or by necessary implication permits the regulation to draw the challenged distinction. Necessary implication is determined from the statute's text and purpose.

77. There are four distinctions made that are unauthorized by the legislation: The Regulation distinguishes between students based on their religious views; the Regulation distinguishes between students who hold a traditional view of marriage, based on the law school they attended, disabling Brayden but permitting Benjamin Shearer and Larry Worthen; third, Council distinguishes between applicants for membership based on the "enrollment and admission practices" of the law school they attended; fourth, NSBS distinguishes based on the *Human Rights Act*. None of these distinctions are authorized in the *LPA*.

2. The legal authority granted by the LPA

78. The relevant authority to make regulations in the *LPA* is s. 5 (8)(b):

> establishing requirements to be met by members, including educational, good character and other requirements, and procedures for admitting or reinstating persons as members of the Society in each of the categories of membership;

79. The requirements are "requirements to be met by members", not schools.

3. Distinguishing based on non academic criteria

80. The Act grants NSBS the authority to establish requirements which includes requirements *which relate to the applicant* which go beyond mere academic criteria. Good character is a relevant, non academic criterion. However, the grant of authority is to establish requirements related to the student's qualification to practice law. There is no grant of authority to establish requirements which are unrelated. If NSBS required applicants to be left-handed, white, or Muslim, those requirements would be invalid. Those fall within the language of "other requirements" but they are not relevant measures of the student's qualification to practice law. They are distinctions not authorized by the enabling legislation.

81. In the Resolution, council acknowledges TWU will meet the National Requirement. In this proceeding, NSBS acknowledges that graduates of TWU are not predisposed to discriminate. In light of those two admissions, attendance at TWU is not related to the student's qualification to practice law. *LPA* does not give NSBS authority to impose irrelevant requirements on students.

82. Similarly, the student's religious beliefs are irrelevant to that issue. NSBS cannot in the exercise of its jurisdiction to enact "other requirements" enact religious requirements. In addition to the general principle set out in *Arcade Amusements* that the power to make rules does not include the power to make unauthorized distinctions, there are specific prohibitions on including standards which single out one religious group. *Roncarelli v. Duplessis* [1959] S.C.R. 121**[Tab 20]** is authority for finding that a general grant of discretion does not authorize regulations which single out groups on the basis of religion[54]. Even an unrestricted grant of discretion (as in that case) cannot be exercised for a purpose of targeting a particular religious group.

83. NSBS is given broad regulatory authority to establish requirements relating to a student's qualification to practice law. The requirement added by NSBS here is irrelevant to that issue and is not authorized by *LPA*. NSBS was without jurisdiction to add such a requirement.

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4. Distinguishing based on university

84. NSBS is given authority to establish requirements for students, not universities. It is not given the authority to establish differential academic requirements—requirements which apply to some students and not others. All students (not all universities) are to be subject to the same requirements.

85. Both TWU and the Schulich School of Law at Dalhousie have been found to meet the National Requirement by the Federation of Law Societies. NSBS cannot discriminate on the basis of religious belief *only* against the graduates of TWU, and not students from other law schools who hold similar beliefs (the Benjamin Shearers and the Larry Worthens). If NSBS examined everyone about their religious beliefs, it would at least be applying a standard or establishing an educational requirement. If NSBS establishes a standard, it must be a standard for qualifications for those seeking membership. It is not authorized to apply that standard to some and not others. The Regulation is clearly directed at TWU and no one else.

5. Distinguishing based on enrollment and admission policies

86. It is proper for NSBS to establish educational standards which qualify a student to practice law. "Establishing educational requirements" does not authorize Council to distinguish based on a university's enrollment or admission policies. It has already been argued that NSBS regulates students, not schools. As a result, the admission and enrollment policies of the university are legally irrelevant; the educational requirements must be directed at whether the student has been prepared by her education to practice law in Nova Scotia. If they have been prepared, NSBS is not authorized to refuse admission on the basis of the policies of their universities.

6. Applying the *Human Rights Act*

87. NSBS is not given jurisdiction to distinguish between applicants for articles based on its application of the *Human Rights Act.* Administering the *Human Rights Act* has properly been assigned to the Human Rights Commission under their statute. Just as the express grant to the

Minister of Education of authority to approve universities means we cannot read that into the powers of NSBS, so the express grant of authority to apply the *Human Rights Act* to the Human Rights Commission means we cannot read that into the powers of NSBS.

88. If a party complains to the Human Rights Commission there is a mechanism for investigation, statutory rights to process and mechanisms for assistance in presenting the case. Importantly, an independent adjudicator will decide the case. If there are Charter defects with the *Human Rights Act*, those defects can be challenged and others grounds or other exemptions read in. Here, NSBS purports (in the place of an independent adjudicator) to decide whether TWU's admission and enrollment policies are in breach of the *Human Rights Act*, *a decision which it has already made in passing the Resolution.* NSBS is not given the authority in *LPA* to usurp the authority given to the Human Rights Commission, and to do it in a way which compromises the party's right to an independent tribunal which has not already made up its mind.

89. In claiming the jurisdiction of the Human Rights Commission without providing any of these mechanisms to the parties affected, NSBS is depriving parties of the statutory rights they enjoy under that statute. NSBS is not given jurisdiction in the *LPA* to do so.

V. REGULATION CANNOT HAVE EXTRA TERRITORIAL EFFECT

Summary NSBS did not have territorial jurisdiction to pass the Resolution, which is concerned with a law school in another province. NSBS does not have jurisdiction to impose disabilities based on conduct in another province by Regulation.

1. Impugned provisions of the Regulation

(b) "law degree" means

[a law degree] approved by the Federation of Law Societies of Canada... unless Council, acting in the public interest, determines that the university granting the degree unlawfully discriminates in its law student admissions or enrolment

policies or requirements on grounds prohibited by either or both the *Charter of Rights and Freedoms* and the *Nova Scotia Human Rights Act;*

90. TWU does not unlawfully discriminate in its admission or enrollment. All students, regardless of religion or belief or sexual orientation, are free to seek admission and enroll at TWU[55]. It would be easy to conclude that the Regulation is therefore irrelevant to these proceedings.

91. NSBS has insisted that the Regulation is part of the process of implementing the Resolution and advised that in its view, the Resolution was a determination for the purposes of the Regulation that TWU unlawfully discriminates in the opinion of Council.[56]

92. Council cannot legislate extraterritorially and impose burdens in Nova Scotia based on the conduct of the school in another province.

2. Territorial limitations on legislation

93. The province with the greatest interest in the "admission or enrollment policies" of TWU is British Columbia. The university whose admission and enrollment policies are questioned is located in BC, and licenced by the government of BC. The largest number of TWU students come from BC, and all of the students are resident in BC while attending TWU. In those circumstances, it is clear that the BC Human Rights Code governs.

94. In *BC Teachers*, the Supreme Court of Canada held that TWU's admission and enrollment policies did not offend the BC Human Rights Code. Can Nova Scotia impose its Human Rights legislation on events occurring entirely in BC, between residents of BC, which are lawful under BC law?

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[55] Para. 12 of the facts sets out the references; this is conceded in para 88 of the Chenier affidavit

[56] TWU was not given notice of the fact that NSBS intended the Resolution to serve as a determination for an as-yet-to-be-passed Regulation of which they were also given no notice and no opportunity to make submissions.

95. The closest case is *Unifund v. ICBC* [2003] S.C.J. No. 39 **[Tab 27]**. In that case, residents of Ontario were travelling in BC when they were involved in a car accident. The vehicles were registered in BC and insured in BC; however, as residents of Ontario with a motor vehicle policy there, they were also entitled to no fault insurance benefits in Ontario.

96. The question for the Court was whether Ontario had legislative authority to impose obligations on a BC insurer as a result of an accident in BC by an Ontario driver. Ontario argued that it had a real and substantial connection to the accident, and that it was simply imposing consequences in Ontario on events which occurred elsewhere. The Court agreed that because of the Ontario residence of the injured person there was a real and substantial connection with Ontario, but held that was not enough to apply Ontario legislation. It found that Ontario did not have constitutional authority to impose consequences in Ontario for actions in BC:

> **50** It is well established that a province has no legislative competence to legislate extraterritorially. If the Ontario Act purported to regulate civil rights in British Columbia arising out of an accident in that province, this would be an impermissible extraterritorial application of provincial legislation...

(Here, NSBS is attempting to regulate civil rights arising out of a university enrollment or admission in British Columbia.)

> **51** This territorial restriction is fundamental to our system of federalism in which each province is obliged to respect the sovereignty of the other provinces within their respective legislative spheres, and expects the same respect in return. It flows from the opening words of s. 92 of the *Constitution Act, 1867*, which limit the territorial reach of provincial legislation: "In each Province the Legislature may exclusively make Laws in relation to" the enumerated heads of power (emphasis added)....
>
> **58** ....As will be seen, a "real and substantial connection" sufficient to permit the court of a province to take jurisdiction over a dispute may not be sufficient for the law of that province to regulate the outcome.
>
> **59** In *Tolofson*, La Forest J. observed: "It seems to me self evident, for example, that State A has no business in defining the legal rights and liabilities of citizens of State B in respect of acts in their own country ... it would lead to unfair and unjust results if it did. The same considerations apply as between the Canadian provinces" (p. 1052)....

97. What NSBS is attempting to do here is to define the legal rights of "citizens" of BC who apply for admission to NSBS—based on actions of their university while they were residents of BC, subject not to the Nova Scotia *Human Rights Act*, but while subject to the BC Human Rights Code. La Forest J. in *Tolofson,* **[Tab 23]** at p. 1066:

> ... it is arguable that it is not constitutionally permissible for both the province where certain activities took

> place and the province of the residence of the parties to deal with civil liability arising out of the same activities. Assuming both provinces have legislative power in such circumstances, this would open the possibility of conflicting rules in respect of the same incident...

98. Here there are conflicting rules: NSBS wants to characterize as wrongful under its *Human Rights Act* actions which are lawful under the applicable *Human Rights Code.*

> **71** Similarly, in my view, order in the federation would be undermined if every provincial jurisdiction took it upon itself to regulate aspects of the financial impact of the British Columbia car crash in relation to its own residents at the expense of the British Columbia insurer. The Brennans' accident, for example, might have occasioned a multi-vehicle pile-up on the Upper Levels highway. On the respondent's theory, each of the injured parties and their insurers could have imposed the varying insurance arrangements of their home jurisdictions on the appellant, ICBC. The problem is not at all fanciful. All it would take is a collision involving Mr. Singh's truck and one 58-passenger tourist bus filled with out-of-province skiers heading along the Upper Levels Highway towards Whistler. Such "competing exercises" of regulatory regimes "must [page96] be avoided". The cost of such regulatory uncertainties undermines economic efficiency....

99. Here, the same problem presents: we have 13 possible regulatory responses to a university Code of Conduct, lawful where it is employed. That competing exercise of regulatory regimes must be avoided. Students may be expected to go to different jurisdictions upon graduation. *Tolofson v. Jensen* **[Tab 23]**:

> [198] A Province may not pass legislation that has the effect of imposing obligations outside the Province or has other extra-provincial consequences unless the effect is merely collateral or incidental to legislation otherwise within its power.

100. Here, the Regulation is clearly aimed not at the students but at the school (whose admission policies by definition were in place before they became students). NSBS admits the Regulation was enacted and directed at TWU following the Resolution passed against TWU (to the point where the Regulation must necessarily be challenged if the Resolution is). It has already been argued that it is not within NSBS's power to regulate or condemn a code of conduct at a university. The Regulation is intended to impose obligations on a university outside the province or on students outside the province. Those disabilities are not incidental to the proper powers of NSBS.

101. A distinction is important. Matters which speak to the character of an applicant are relevant to her qualification to practice law. NSBS is entitled to examine matters which reveal an applicant's character, even if the matters occur in another province. In this case, NSBS has

conceded in the Notice of Participation that it is *not* judging individual students. So this is not an examination of the character of an applicant (which could consider matters which occurred elsewhere). Placing a disability on a student, not based on her qualifications to practice law, but based on conduct by her in another province which does not relate to her qualification to practice law, is not within the constitutional reach of NSBS.

VI. THE DECISION WAS UNREASONABLE

Summary If NSBS had jurisdiction to refuse to approve a law school in British Columbia because TWU has a traditional Christian view of marriage which its students uphold, NSBS's decision should still be set aside on a reasonableness standard. No reasons were offered for the decision, so the decision fails the test in *Doré*. There was no evidence of student conduct, and decisions based on no evidence are unreasonable.

A decision without reasons is not reasonable

102. In *Doré,* in a passage earlier quoted, Justice Abella noted:

> **66** ... Disciplinary bodies must therefore demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer's right to expression and the public's interest in open discussion.

103. Without reasons, NSBS has not demonstrated that they have given due regard to the importance of the rights at issue[57]. Our Court of Appeal identified the test for when reasons are inadequate:

> **32** ... A protest that the Board's reasons are inadequate does not invoke a discrete right of appeal. Rather, the complaint as to an absence or paucity of reasons entails a functional inquiry: is it possible to undertake an informed, principled and valid review for error?[58]

104. The only "reasons" are the observation in the resolution that: "Council resolves that the Community Covenant is discriminatory..." It is impossible to undertake an informed, principled and valid review for error of "the Covenant is discriminatory". Council has not demonstrated that they have given due regard to the rights at issue; they have not identified what standard was

[57] One member of Council expressed his views *before* voting, but it is hard to conclude he speaks for anyone but himself (Council voted 10-9 against his recommendation).

[58] Saunders, J.A. writing in *C.R. Falkenham Backhoe v. Nova Scotia,* [2008] N.S.J. No. 158 **[Tab 3]**

used to determine the Covenant was "discriminatory"[59]. They have not identified why the rights are in conflict; they have not addressed the fact neither the Charter nor the *Human Rights Act* applies; they have not identified why the ethical rules and supervision of articling students are insufficient protection against discrimination. The decision is unreasonable.

NSBS Acted without evidence

Summary There was no evidence before NSBS that a student at TWU had engaged in discriminatory conduct. In its Notice of Participation, NSBS disclaims having judged student behaviour. Because it was acting without evidence of student behaviour, NSBS has reached an unreasonable conclusion (one founded on no evidence). NSBS found, as a substitute for evidence of student conduct, that TWU's practices were discriminatory. That is not sufficient.

1. NSBS found "institutionalized discrimination" by TWU

105. The Executive commented before the vote:

> The Executive Committee received submissions that suggest the institutionalized discrimination practices by TWU are of sufficient importance to override or limit the freedom of religion of future graduates. Any limitation on freedom of religion and any specific amendment to the Regulations must be rationally connected and proportionate to the objective of the limitation, and minimally impair the rights of those future graduates. Those issues were not considered in *British Columbia College of Teachers...*[60]
>
> A resolution that does not approve TWU, should that be Council's decision, will likely be premised on Council's conclusion that TWU's Community Covenant amounts to institutionalized discrimination against individuals on account of their sexual orientation and other characteristics...[61]

106. The resolution included the following language:

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[59] Every distinction is "discriminatory". What Council means in using the term is not that the Covenant makes a distinction, but that it "discriminates based on a prohibited ground of discrimination." Given the Supreme Court of Canada has determined neither the BC Human Rights Code nor the Charter is engaged by the Covenant, it is difficult to know what legal standard NSBS could lawfully apply.

[60] Record 1064/9. It is not clear that these are reasons in any sense. The executive of five does not speak for the 19 members of Council; the Report does not accept the submission but simply reports it; one of the executive issued his own reasons and voted to approve TWU.

[61] Record, NSBS 1064/13

> Council resolves that the Community Covenant is discriminatory and therefore Council does not approve the proposed law school at Trinity Western University unless TWU either:
>
> i) exempts law students from signing the Community Covenant; or
>
> ii) amends the Community Covenant for law students in a way that ceases to discriminate.

2. Test: Specific evidence of conduct by the student is required

107. In *BC Teachers,* the BC College of Teachers concluded "approval would not be in the public interest because of discriminatory practices of the institution"[62]. The Court ruled that was not the proper inquiry. That decision binds the analysis here and this Court is not entitled to undertake the analysis on a different basis: *Canada v. Bedford*, [2013] S.C.J No. 72 **[Tab 2]** at paras. 38 and 43-46,*per* McLachlin C.J. The proper inquiry was the behaviour of students. The same is true here:

> **19** ... 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.
>
> (b) The Evidence of Discrimination
>
> **20** There are in reality two elements to be considered under this heading: Are the internal documents of TWU illustrative of discriminatory practices? If so, are these discriminatory practices sufficient to establish a risk of discrimination sufficient to justify that graduates of TWU should not be admitted to teach in the public schools?
>
> **21** The BCCT relied on the internal documents of TWU as evidence of discrimination against homosexuals. It concluded that the inclusion of homosexual behaviour in the list of biblically condemned practices demonstrates intolerance and that this cannot be overridden by the adoption of other values. ...
>
> **33** 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. ...
>
> **38** For the BCCT to have properly denied accreditation to TWU, it should have based its concerns on specific evidence. It could have asked for reports on student teachers, or opinions of school principals and superintendents. It could have examined discipline files involving TWU graduates and other teachers affiliated with a Christian school of that nature. Any concerns should go to risk, not general perceptions.
>
> (My emphasis)

3. No such evidence here

[62] *BC Teachers* para 5

108. As already argued, NSBS has no jurisdiction over actions in BC by residents of BC. The relevant enquiry is whether the *student* has failed to meet a standard such that he or she is not qualified to practice law in Nova Scotia (or whether the student's conduct elsewhere demonstrates a defect of character which disqualifies him or her from practicising here). There was no evidence before NSBS that students at the Law School would discriminate against others based on sexual orientation, or had done so previously (and NSBS concedes TWU graduates are not predisposed by their education to discriminate). NSBS never established that as a standard, the breach of which would justify refusal to admit.

109. Members of the public expressed their opinions about the internal documents of TWU. *BC Teachers* is authority for finding those documents are not sufficient to support the conclusion NSBS should anticipate intolerant behaviour of TWU graduates. NSBS has conceded there is no such evidence.

110. A number of graduates of TWU now practice as lawyers, having obtained their legal education elsewhere. All of them signed the Covenant while at TWU; there was no evidence they have behaved intolerantly in their personal or professional lives. There was no evidence that TWU graduates are hostile to gays and lesbians or that TWU graduates will fail to uphold the basic values of non-discrimination.

111. In the absence of the specific evidence required in *BC Teachers*, it was unreasonable for NSBS to find that graduates of the Law School did not meet a standard established by NSBS for members.

VII. AD HOMINEM DISCRETION NOT AUTHORIZED BY STATUTE IS CONTRARY TO LAW

Summary The Regulation is contrary to the rule of law: it purports to give Council the ability, on an *ad hominem* basis, to decide whether to admit a particular student or not, not based on any objectively determined standard (eg. a particular grade point average or a particular course of study). An arbitrary decision is contrary to the requirement for standards.

Impugned provisions of the Regulation

(b) "law degree" means

[a law degree] approved by the Federation of Law Societies of Canada... unless Council, acting in the public interest, determines that the university granting the degree unlawfully discriminates in its law student admissions or enrolment policies or requirements on grounds prohibited by either or both the *Charter of Rights and Freedoms* and the *Nova Scotia Human Rights Act;*

112. The Regulation does not disqualify students whose university admissions or enrollment policies are contrary to the Charter or contrary to the Nova Scotia *Human Rights Act*; the Regulation disqualifies students whom council determines to disqualify. The Regulation is essentially, "A law degree is not a law degree if Council determines".

113. The difference is important.

114. In *BC Teachers*, the Supreme Court of Canada determined that the Charter did not apply to Trinity Western University. (It reached a similar decision in the *McKinney* case, concerning a public university, the University of Guelph). Accordingly, it is clear that, as a matter of law, TWU does not unlawfully discriminate contrary to the Charter.

115. As argued elsewhere, the Nova Scotia *Human Rights Act* does not apply to the actions of a BC university.

116. So it is clear that as a matter of law, TWU is not guilty of unlawful discrimination under either the Nova Scotia *Human Rights Act* or the Charter. To be unlawful it must be contrary to law; the *BC Teachers* case (and the territorial aspect) determine that TWU's conduct is not unlawful.

117. Despite the fact the TWU Covenant is not contrary to the Charter or the Nova Scotia *Human Rights Act*, can NSBS simply deem TWU to be guilty of unlawful discrimination because it suits their purposes? Can NSBS be a court on appeal from the Supreme Court of Canada, and act irrespective of the fact the Charter is limited to government conduct and

irrespective of the territorial limitations in s. 92 of the Constitution Act and decide, *whenever it wants to*?

118. The primary authority in *LPA* is to "establish standards". The legislative purpose in requiring that a standard be established is to prevent Council from making arbitrary decisions. The Regulation is not a standard: no one knows whether the Council of the day will decide that a particular university unlawfully discriminates. That is because the matter is not a standard and is not based on some independent criteria. Reserving the right to Council to decide whether a school complies (in circumstances where the Court has determined neither the Charter nor the Nova Scotia legislation applies) is inherently arbitrary, and contrary to *LPA*'s requirement for standards.

119. In *Roncarelli v. Duplessis* [1959] SCR 121 **[Tab 20]**, the Supreme Court of Canada considered a Liquor Act which gave the Liquor Commission discretion to cancel a permit for any reason whatever. The Court held that did not authorize the Commission to cancel the permit for reasons irrelevant to the enabling legislation – because of Roncarelli's practice of acting as surety for Jehovah's Witnesses, in fulfillment of what he saw as his religious obligation.

120. *LPA* similarly gives NSBS very broad discretion to prescribe educational requirements—but NSBS cannot prescribe requirements irrelevant to the enabling legislation. That same broad grant of discretion does not entitle NSBS to penalize graduates of TWU for the practice of their perfectly lawful beliefs: believing in certain tenets of the bible, associating with others of the same belief, and agreeing not to engage in sexual intimacy outside of an opposite sex marriage:

> It is a matter of vital importance that a public administration that can refuse to allow a person to enter or continue a calling which, in the absence of regulation, would be free and legitimate, should be conducted with complete impartiality and integrity; and that the grounds for refusing or cancelling a permit should unquestionably be such and such only as are incompatible with the purposes envisaged by the statute: the duty of a Commission is to serve those purposes and those only. A decision to deny or cancel such a privilege lies within the "discretion" of the Commission; but that means that decision is to be based upon a weighing of considerations pertinent to the object of the administration.
>
> 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.... "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is

> just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? the legislature cannot be so distorted.
>
> To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred..... Under the statutory language here, that is not competent to the Commission and a fortiori to the government or the respondent... what could be more malicious than to punish this licensee for having done what he had an absolute right to do in a matter utterly irrelevant to the Liquor Act? Malice in the proper sense is simply acting for a reason and purpose knowingly foreign to the administration...

VIII. NSBS ERRED IN LAW IN DELINEATING AND BALANCING CHARTER RIGHTS

1. Analysis of Charter Rights
2. Applicants' Charter Rights
   Evidence, Rights implicated, breach
3. NSBS Charter Rights
   Evidence, Rights implicated, breach
4. Is there a Conflict?
5. If there is a conflict, are the breaches saved by section 1

GENERALLY

121. *Introduction* If the Court concludes NSBS had jurisdiction to refuse to approve the Law School, did not discriminate against graduates of TWU by applying the standard only to them, and demonstrated in their reasons due regard for the rights in issue and acted on evidence in doing so, the Court must go on to consider whether there is a conflict between the freedom of religion, conscience, expression and association enjoyed by students and TWU, and the students' equality rights on the one hand, and the freedom from discrimination on the basis of sexual orientation enjoyed by residents of Nova Scotia on the other. It is only when those rights, properly delineated, are in conflict that NSBS is entitled to take the next step and balance the exercise of those rights. The applicants say NSBS acted without a proper delineation of the rights (which would have found no conflict). However, if the Charter rights were in conflict, given the supervisory mechanisms at its disposal, NSBS has not properly balanced them.

122. As already argued, apart from the Charter, NSBS's authority would be over individual students. In *BC Teachers*, the Court held that the proper inquiry for Charter purposes was the conduct of individual students, not TWU. For that reason, the Covenant is analysed in terms of student conduct here.

123. The Covenant covers a variety of conduct from smoking to prejudice. Council's real objection here is to students agreeing to abstain from sexual intimacy outside of an opposite-sex marriage. The applicants analyse the Charter issues in relation to sexual intimacy outside of an opposite sex marriage, but of course the argument applies more broadly to the Covenant as a whole.

124. There are distinct Charter rights at issue: freedom of religious belief (may students believe sexual intimacy outside of an opposite sex marriage is a sin?), freedom of association (may students choose to associate with other students who share that belief?), freedom of conscience (irrespective of their beliefs, may students sign a Covenant agreeing not to engage in sexual intimacy outside of marriage?), freedom of expression (may students sign a Covenant expressing their beliefs?), equality before the law (may NSBS treat students differently because they have exercised their religious beliefs?, and may NSBS treat evangelical Christians who attend TWU differently than evangelical Christians who attend American law schools with the same policies, and those who attend other Canadian law schools?).

CHARTER RIGHTS ARE INDEPENDENT

125. Analytically, these Charter rights are independent. Freedom of association is a freedom to create private relationships, which may have no religious component at all. A student can hold a religious belief without exercising that religious belief in concert with others. Students can hold a religious belief without signing a Covenant recording that fact, sign a Covenant without a religious belief about sexual intimacy outside of marriage, and they can abstain from sexual intimacy without signing a document proclaiming they will. The Court could answer the Charter questions either on the basis of association or religion and conscience or expression, or equality, so some separate analysis of those rights is in order.

DELINEATE, THEN BALANCE THE RIGHTS

126. The leading decision on the proper analysis, of course, is *BC Teachers* (my emphasis)[63]:

[63] The wording of the Community Covenant has been revised since the *BC Teachers* decision. It now refers to the behaviour as "in keeping with ...ideals" instead of condemning behaviours as sinful. It formerly provided,

28 The issue at the heart of this appeal is 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.

29 In our opinion, this is a case where any potential conflict should be resolved through the proper delineation of the rights and values involved. In essence, properly defining the scope of the rights avoids a conflict in this case. Neither freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute....

31 In addition, the Charter must be read as a whole, so that one right is not privileged at the expense of another. As Lamer C.J. stated for the majority of this Court in Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835, at p. 877:

> 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.

32 ... 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...

36 ... 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.

37 Acting on those beliefs, however, is a very different matter. If a teacher in the public school system engages in discriminatory conduct, that teacher can be subject to disciplinary proceedings before the BCCT. Discriminatory conduct by a public school teacher when on duty should always be subject to disciplinary proceedings.

Summary *BC Teachers* settles that Charter rights should be delineated first and a determination made whether the rights are in conflict in reality. If there is no evidence of discriminatory conduct, then both sets of rights can be enjoyed without conflict. TWU students can believe what they choose and associate with whom they choose if they do not by their conduct discriminate against others on the basis of their sexual orientation. Here, there was no evidence any student at TWU discriminated against anyone, a point conceded by NSBS. *BC Teachers* establishes that that is the test whether rights are in conflict and that the "perceptions of the public" and the

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"REFRAIN FROM PRACTICES THAT ARE BIBLICALLY CONDEMNED. These include but are not limited to... sexual sins including premarital sex, adultery, homosexual behaviour..." See para. 10 of the decision.

"discriminatory practices of the institution" are not a reason for refusing to accredit TWU students.

It is only if the delineation of the rights results in an actual conflict (because graduates are guilty of discriminatory conduct) that NSBS must go on to balance the different rights at play here. The applicants say there is no evidence of discriminatory conduct by graduates here, a point which NSBS has conceded.

EVIDENCE GROUNDING THE APPLICANTS' CHARTER RIGHTS

127. TWU and Brayden rely on seven affidavits, as follows:

128. An affidavit from Brayden establishing his standing, his religious identification and his desire to attend an evangelical Christian law school, and the fact he has signed the Covenant while at TWU;

129. An affidavit from Dr Robert Wood, Provost of TWU, setting out the history and development of TWU, its programming and its accreditation by the BC Ministry of Advanced Education, and the fact that students are free to hold and express opinions which diverge from the views of TWU (in particular in relation to homosexuality and same sex relationships) without academic consequences (para 62-67). The Covenant obliges all students to treat others with respect and dignity whether they agree with their views or not (112). Conduct or behaviour directed at someone because of his or her sexual orientation is strictly unacceptable and a violation of the Covenant (118). TWU's most common discipline issues are academic dishonesty, alcohol abuse, drug use and sexual harassment, which it understands to be similar to academic discipline issues elsewhere (129);

130. An affidavit from William Taylor, Executive Director of the Evangelical Free Church of Canada ("EFCC") setting out the relationship between TWU and the EFCC, and some of the core religious beliefs of the EFCC which inform the Covenant;

131. An affidavit from Dr Jeffrey Greenman, a theologian, offering an opinion on the historical Christian view of marriage, what evangelical Christians believe about the morality of sexual conduct and what evangelical Christian teaching is about sexual intimacy and same sex relationships, and whether the Covenant generally conforms to evangelical Christian beliefs;

132. An affidavit from Dr Gerald Longjohn offering opinion evidence on codes of conduct, what is normally included in the codes of conduct of Christian colleges and universities, what role they play in the university community, the benefits to the community of having the code of conduct and how the Covenant compares with other codes of conduct;

133. An affidavit from Dr Samuel Reimer offering opinion evidence on the evangelical subculture and the benefits to a religious subculture in having codes of conduct in strengthening their identity;

134. An affidavit from Benjamin Shearer, a graduate from the Schulich School of Law at Dalhousie who shares the beliefs set out in TWU's covenant. Although he completed his articles in Nova Scotia, he refused his call to the bar rather than become a member of an organization where he was not welcome.

1. The Nature of the Charter Rights

A. Private spaces and Freedom of Association

Summary Private organizations are entitled as an aspect of freedom of association to have conditions for membership. Students cannot be required to attend TWU and sign a Covenant, but they are free as a matter of freedom of association to choose to do so.

135. TWU is a private institution[64]. That forms an important starting point in the Charter analysis:

> **25** 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.[65]

[64] Dr Wood's affidavit

[65] *BC Teachers*, para 25

136. Although TWU is not subject to the Charter, and TWU does not enjoy equality rights under s. 15, both TWU and its students enjoy Charter rights under s. 2, and students enjoy Charter rights under s. 15. Their private relationships enjoy legal protection as a matter of freedom of association. BC Civil Liberties Association explains the importance of TWU's private status this way:

> ...[I]t is crucial to remember that TWU is not a public university and these conditions are not imposed on TWU students—they are voluntarily accepted by those students who choose to attend TWU....
> Human rights anti-discrimination laws and *Charter* guarantees of equality are of vital importance to the legal ordering of Canadian society, but they are not the only legal norms which play a role in defining and safeguarding our social relations and personal rights and freedoms. Our legal norms also create space for private relationships ordered under self-defined terms and conditions, such as those that exist between TWU, its students and faculty.
>
> The BCCLA believes that any private religious institution must have the right to its conditions for membership in accordance with the religious beliefs held by that membership. Individual members of a religious faith are similarly free to observe or reject these conditions, and to make decisions about whether they wish to belong to these institutions accordingly. These freedoms are essential to the ability of any religious group to carry on its existence. People who are not members of a particular religion (and even those who are) may not approve of or be comfortable with the beliefs of that faith. However, BCCLA's position—in accordance with the decision of the Supreme Court of Canada in *Trinity Western University*—is that the repugnance of a certain set of beliefs even to a majority of Canadians cannot be the basis to deny a public good, such as entry to a profession, to members of that faith.[66]

137. Legal norms which create space for private relationships benefit all minorities. A private Ukrainian Canadian Friendship Association is not required to offer equal programming for those from Poland or Belarus, and can require members to agree to promote Ukrainian Canadian friendship. It can conduct its meetings in Ukrainian, even though that excludes a majority of Canadians. If the Ukrainian Canadian Friendship Association must promote Polish language programming and Chinese language programming on the same basis as its own values, it is hard to understand why anyone would join. The Conservative Party of Canada can exclude those who belong to another political party, discriminating on the basis of political belief. A private Gay organization is entitled to exclude straight people. Private LGBTQ organizations are entitled to insist that all members support their values—even if that excludes those who do not.

138. TWU is a private university, founded on religious principles, such that freedom of religion in Canada is foundational to its existence. The right to selectively promote its own beliefs inheres in being a private organization; it does not depend on it being a school or a

[66] Record, NSBS 0481/6 – 0481/7

university. Every private organization defines the values that it expects members to support and those who do not support those values may be refused membership. Private organizations exist because they can do things differently than a public organization. Dr Reimer's affidavit speaks to the benefits to a religious subculture in having expectations for members.

139. A key reason for treating private relationships differently is choice. I cannot choose my race, my age or my disabilities. However, I can choose whether to join the Ukrainian Canadian Friendship Association, and whether to leave it. Because it is a matter of choice, the private relationship is not regulated the same way as a public one. The value of freedom of association was described by Chief Justice Dickson in a dissenting judgment:

> **22** Freedom of association... is one of the fundamental freedoms guaranteed by the Charter, a sine qua non of any free and democratic society, protecting individuals from the vulnerability of isolation and ensuring the potential of effective participation in society. ...
>
> **87** Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association 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; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict. T.I. Emerson, "Freedom of Association and Freedom of Expression" (1964), 74 Yale L.J. 1 at p. 1, states that:
>
> > More and more the individual, in order to realize his own capacities or to stand up to the institutionalized forces that surround him, has found it imperative to join with others of like mind in pursuit of common objectives.
>
> *Reference Re Public Service Employee Relations Act*, [1987] S.C.J. No. 10 **[Tab 18]**

140. It is precisely because NSBS and elements of society make evangelical Christians feel unwelcome that a school where they are able to associate with others who share their beliefs is so important.

141. One of the submissions to Council compared students voluntarily agreeing to abstain from sexual intimacy outside of an opposite sex marriage at TWU to Rosa Parks being forced by legislation to sit at the back of the bus in Montgomery in 1955. That misunderstands freedom of association.

142. In Parks' case, Alabama *law* required the segregation of buses. The Court in striking down the segregation of public buses in Montgomery was careful to note[67]:

> In their private affairs, in the conduct of their private businesses, it is clear that the people themselves have the liberty to select their own associates and the persons with whom they will do business, unimpaired by the Fourteenth Amendment. The Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835. Indeed, we think that such liberty is guaranteed by the due process clause of that Amendment.
>
> There is, however, a difference, a constitutional difference, between voluntary adherence to custom and the perpetuation and enforcement of that custom by law. Shelley v. Kraemer, 334 U.S. 1, 13, 68 S.Ct. 836, 92 L.Ed. 1161.

143. Even after *Browder v. Gayle* residents were free to drive their own car and to give a ride only to the people they chose to. A person in her own car could refuse to pick up hitch hikers, or pick up only her friends, or those of one sex or one race. As the operator of a private vehicle, she could insist on hitchhikers sitting in the back. The constitution creates space for private relationships while requiring non discrimination in public spaces. Private schools, such as TWU, are entitled to have a religious foundation, and to promote a particular religious viewpoint, even though public schools may not. For public spaces to be fully inclusive, there must be an alternative—a private space in which the right to hold and express minority views is protected.

144. Students cannot be obliged to attend TWU and sign the Covenant; however, they can *voluntarily* do so. Rosa Parks cannot be required to sit at the back of the bus, but she can choose to do so if there are no seats at the front. No one is required to attend TWU. TWU has designed a private space—a Covenanted university community—which will appeal to some and not others. The Longjohn and Reimer affidavits set out the benefits to the community's identity in having a code of conduct. As a private school, TWU is permitted to design a program that will appeal only to some. Because no one is obliged to attend, the private relationship is protected.

145. Many undergraduate students, regardless of their sexual identity, participate in premarital sexual intimacy. Some, regardless of sexual identity, do not. That is a choice for the individual. A student is entitled to decide not to engage in sexual intimacy outside of marriage, and to choose to live in a community where all have agreed to respect that choice.

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[67] *Browder v. Gayle* 142 F. Supp. 707 (1956)**[Tab 1]**

146. In company with all universities, TWU has expectations of conduct by its students, while they are students. Although conduct is regulated, belief is not: Students are not required to adhere to TWU's religious beliefs.[68] The affidavit evidence from Dr Longjohn and Dr Reimer establish the benefit to the expressly religious community served by TWU in having adherence to the Covenant.

147. No attempt is made to regulate conduct once students graduate or withdraw; because this is a voluntary association anyone is free to withdraw. Students can voluntarily enter that relationship if they wish and are free to leave that relationship whenever they wish.

148. In company with most university codes of conduct, much of the Covenant concerns activities that would otherwise be lawful.[69] Gossiping, prejudice, smoking, drinking, premarital sex and viewing pornography are lawful activities. However, students may agree with each other to refrain from those activities.

149. Justice Lamer famously remarked that one does not enter a church the same way as a lion's den[70]. One does not enter an evangelical Christian university and expect to conduct oneself in the same way as at a rock concert. If you choose to attend a private evangelical Christian university, the university will have different expectations of behaviour. Their right to do so is protected by freedom of association.

B. Freedom of Religion and Conscience

Summary A church is entitled to believe that sexual intimacy outside of marriage is a sin, and to recognize and perform only opposite sex marriages. Freedom of religion guarantees the right to teach and share those beliefs. In public spaces, the objective is not sameness or agreement, but freedom from discrimination.

[68] Wood Affidavit, para. 62-67, Record, NSBS 1387/210

[69] Behaviour which is otherwise criminal is already prohibited; the purpose of codes of conduct is normally to clarify expectations about what lawful behaviour is appropriate.

[70] *Descôteaux v. Mierzwinski*, [1982] S.C.J. No. 43 **[Tab 5]**

150. Freedom of religion and conscience is distinct from freedom of association. The applicants reason that there is additional protection offered by freedom of religion and conscience, that extends the right to believe and teach. Freedom of religion and conscience was described by Justice Dickson in *R v. Big M Drug Mart* [1985] S.C.J. No. 17 **[Tab 14]**:

> Freedom of Religion
>
> **94** ...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, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that....
>
> **96** What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of "the tyranny of the majority"...
>
> **120** ...[The basis of an opposition to a state religion] was no longer simply a conviction that the State was enforcing the wrong set of beliefs and practices but rather the perception that belief itself was not amenable to compulsion. Attempts to compel belief or practice denied the reality of individual conscience and dishonoured the God that had planted it in His creatures. It is from these antecedents that the concepts of freedom of religion and freedom of conscience became associated, to form, as they do in s. 2(a) of our Charter, the single integrated concept of "freedom of conscience and religion"....
>
> **123** ...For the present case it is sufficient in my opinion to say that whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose.
>
> (My emphasis)

151. A church is entitled to believe that sexual intimacy outside of marriage is a sin, and to recognize and perform only opposite sex marriages. That religious belief is protected by the Charter[71]. As Justice Dickson makes clear, the church is also entitled to *teach and disseminate*

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[71] Some of the submissions made to NSBS question whether Christian teaching necessarily condemns sexual intimacy outside of marriage. NSBS is allowed to ask is whether a person who signs the Covenant has a sincere belief in its contents; NSBS is not allowed to judge what that person's religion requires:

> **43** The emphasis then is on personal choice of religious beliefs. In my opinion, these decisions and commentary should not be construed to imply that freedom of religion protects only those aspects of religious belief or conduct that are objectively recognized by religious experts as being obligatory tenets or precepts of a particular religion. Consequently, claimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make.... In fact, this Court has indicated on several occasions that, if anything, a person must show "[s]incerity of belief" (*Edwards Books, supra*, at p. 735) and not that a particular belief is "valid".
>
> **50** ... the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or

that belief. The coercive power of the state cannot be used to change the teachings or beliefs of the religion. The right of members of the Evangelical Free Church of Canada to associate with other members of the church who share their beliefs *and to teach those beliefs* is similarly protected under s. 2 of the Charter (whether as a matter of religion, freedom of conscience, or freedom of association). Greenman's and Taylor's affidavits establish that the Covenant is congruent with the religious views of evangelical Christians. The Court is not entitled to judge those religious beliefs; it is only called upon to determine if they are sincerely held: *Syndicat Northcrest v. Amselem,* [2004] S.C.J. No. 46 **[Tab 22]**, para 46, 53. It is clear they are.

152. That protection to hold and teach evangelical Christian beliefs does not end because the Evangelical Free Church of Canada chooses to establish a private institution which is exempt from the Human Rights Code and to which the Charter does not apply. Some of the submissions to NSBS attempted to separate religious belief from religious teaching, essentially "Christians are free to believe what they want, so long as they don't teach it". An inextricable part of the freedom of religion is the right to teach.

153. Everyone who signs the Covenant agrees to "practice Christian virtues" and abstain from sin. Everyone fails. To be clear, evangelical Christians believe that without exception every person is a sinner. Those who engage in sexual intimacy outside of marriage, sin; so do those who do not engage in sexual intimacy outside of marriage. Sexual sins are no worse than other types of sin (Greenman Affidavit, para 47-52).

154. Those who self identify as gay, lesbian, bisexual or transgendered are loved by God. Evangelical Christianity and the Covenant require students to treat everyone with dignity and respect. There is no biblical rationale that would justify Christians engaging in any kind of

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implicitly, the content of a subjective understanding of religious requirement, "obligation", precept, "commandment", custom or ritual.

Syndicat Northcrest v. Amselem, [2004] S.C.J. No. 46 **[Tab 22]** para 43, 50

mistreatment of gays.[72]. A student who does not treat others with dignity and respect on the basis of sexual orientation is in breach of the Covenant.[73]

155. Our objective is a diverse and inclusive space in which individuals are free to hold and share different opinions. Our objective is not to have everyone of one opinion, and not to silence those who disagree with us. Evangelical Christians are entitled to a private space where they can share their views with likeminded, where they do not recognize same sex marriage and they prohibit sexual intimacy outside marriage. The LGBTQ community is entitled to their own private space where they can embrace same sex marriage and sexual intimacy apart from marriage. In public spaces, where same sex marriage and intimacy outside of marriage are lawful, the issue is not sameness or agreement but a freedom from discrimination. As the Court held in *Gould v. Yukon Order of Pioneers,* [1996] S.C.J. No. 29 **[Tab 8]**:

> **76** ...The very essence of our Canadian society is determined by the diversity which is permitted to flourish. Those who wish to present a different view ... are free to do so

156. In the *BC Teachers* case, the Court found that the religious precepts and Covenant were irrelevant to determining whether the university should be approved and suggested it would be improper to distinguish based on belief:

> **36** ...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.

157. That freedom of belief and the required tolerance of divergent beliefs, not the homogenization of one correct belief, is the value here.

C. Freedom of Expression

Summary Privately expressing an agreement not to engage in sexual intimacy outside of an opposite sex marriage, to like minded people, is protected expression

[72] Greenman Affidavit, para 52

[73] Wood Affidavit, para. 118.

158. TWU asks students to sign a Covenant but it does not require students to share its religious beliefs. Some students will sign the Covenant without sharing the religious values which underlie it. A student who is already married to a person of a different sex can agree to abstain from sexual intimacy outside of marriage as a reflection of their own sexual identity without any religious component to the agreement. For some students, signing the Covenant is a matter of freedom of expression rather than freedom of religion. TWU enjoys Charter rights to expression, too: *Irwin Toy v. Quebec* [1989] S.C.J. No 36, *RJR MacDonald v. Canada* [1995] S.C.J. No 68.

159. The context of the expression is important. One is not free to shout "fire" in a crowded theatre. What one is free to express depends on the circumstances. It has already been argued that as a matter of freedom of association, students may choose to sign the Covenant.

160. It is a slightly different point to note that this is private expression, among members of a student body who by definition share the views expressed in the Covenant. It is private expression in the same way reciting doctrine at a religious service is private expression. The expression in signing the Covenant is to TWU (and implicitly to fellow students); passersby on the streets of Vancouver are not confronted with the Covenant—the only people who see it are members of the university administration (who embrace the beliefs in the Covenant). This is private expression, among like-minded people. No one who does not share the views and beliefs of TWU has to confront the expression.

161. Language which might be objectionable in other contexts may be proper when it is privately expressed. The context of the expression here is respectful. The document prohibits prejudice, and the Covenant as a whole directs members of the community to love one another. In that context, the private expression embodied in the Covenant, between people who share that belief, is protected expression.

162. Freedom of expression also supports the freedom of religion. Those who hold minority religious views (which certainly include those attending TWU) find comfort in being with others who share their beliefs—who affirm by their signing of the Covenant that although adherents

may be in the minority, they are not alone. The Longjohn and Remier affidavits point out the benefit to the community identity of the code of conduct.

D. Equality

Summary The Regulation has a discriminatory impact on evangelical Christians. It perpetuates a disadvantage which makes evangelical Christians unable to join the Nova Scotia bar (which NSBS acknowledges is unrelated to a belief they will discriminate)

> (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

163. The Supreme Court of Canada summarized the guarantee in s. 15 in *Quebec v. A*, 2013 SCC 5 **[Tab 13]** as follows:

> Withler is clear that "[a]t the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the Charter?" (para. 2 (emphasis added)). Prejudice and stereotyping are two of the indicia that may help answer that question; they are not discrete elements of the test which the claimant is obliged to demonstrate,
>
> We must be careful not to treat Kapp and Withler as establishing an additional requirement on s. 15 claimants to prove that a distinction will perpetuate prejudicial or stereotypical attitudes towards them. Such an approach improperly focuses attention on whether a discriminatory attitude exists, not a **discriminatory impact**, contrary to Andrews, Kapp and Withler.
>
> Kapp and Withler guide us, as a result, to a flexible and contextual inquiry into whether a distinction has the effect of **perpetuating arbitrary disadvantage** on the claimant because of his or her membership in an enumerated or analogous group.

161. The Regulation here works substantive inequality: it has a discriminatory impact on evangelical Christians, the persons most likely to attend TWU. It stereotypes evangelical Christians as persons predisposed to discriminate on the basis of sexual orientation; It perpetuates prejudice by suggesting that students from an evangelical Christian university are less worthy or less qualified to practice law.

The Covenant

162. One purpose of the Covenant is to ensure that students are told in advance of the character of the university and agree to attend on that basis[74]. That is in keeping with the requirement for American law schools accredited by the ABA[75]. Students who attend what purports to be a public non-denominational university are entitled to complain if (contrary to what they bargained for) they are instead required to abide by or subscribe to particular religious norms. That is not this case.

163. Students who define themselves as gay, LGBTQ or in some other way are welcome to attend TWU and some do. Many LGBTQ students would not be comfortable at TWU and would choose not to attend; many heterosexual students would similarly be uncomfortable at TWU and choose not to attend. Recognize however that some students may be both evangelical Christians and LGBTQ community members. Some LGBTQ members would *prefer* to attend TWU. TWU welcomes them.

164. As the Court pointed out in BC Teachers, the fact some LGBTQ and heterosexual students would choose not to attend TWU does not prevent those who choose not to attend from becoming teachers. Here it does not prevent those students from becoming lawyers. The students attending TWU are an addition to, not a subtraction from, law school spaces in Canada. (In fact, it increases LGBTQ access to law school as it frees up 60 spaces a year in the other 19 law schools by attracting to TWU students who would otherwise go to other law schools). But if students who subscribe to the Covenant are not entitled to attend a university where they can associate with others of similar views, their freedom of religion is not being accommodated at all.[76] Brayden and others would choose to attend a university where they are challenged to reconcile their personal beliefs and faiths as evangelical Christians with the law.

165. In 1843, the Law Society of Newfoundland did not permit Catholics to practice law. Philip Francis Little found a loophole—his admission to the bar in PEI was recognized even

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[74] Longjohn Affidavit talks about the importance of a defined identity at p. 3 of his report

[75] Record, NSBS 1341/17 para 58

[76] *BC Teachers,* para 35.

though he could not otherwise practice in Newfoundland. NSBS has left the same loophole open to evangelical Christians, who may be forgiven for thinking it is not 1843. May NSBS say "Jews are not permitted to article in Nova Scotia"? May NSBS say "evangelical Christians are not permitted to article in Nova Scotia"? The answer is obviously no. "Students who attend an evangelical Christian school are not permitted to article in Nova Scotia" attracts the same answer. Refusal to accredit graduates of the Law School must not be based on the exercise of their religious beliefs.

166. The Executive Committee hints[77] that graduates of TWU who otherwise are prevented from articling in Nova Scotia by the resolution will be accommodated if the student can establish the denial is a breach of the student's religious freedom. In the first place, this is obviously insufficient: someone may choose to attend TWU for other reasons, for example because they live close to the university. They may willingly sign the Covenant, not because of their religious belief but because they are heterosexual. Those students cannot qualify to article in Nova Scotia at all (if they are required to demonstrate a religious reason for attendance in order to obtain admission to the Nova Scotia bar). Putting additional burdens in the way of graduates of the Law School which are not asked on similar terms of others is itself discriminatory.

CHARTER BREACHES COMPLAINED OF:

167. The applicants summarize the Charter breaches here as follows:

Association

168. The Resolution prevents students who agree with the Covenant from associating with others who share the same belief at TWU unless they forfeit their ability to become articling students in the Nova Scotia bar;

Religion

[77] Record, NSBS 1064/14

169. The Resolution prevents TWU and students who share the religious views represented in the Covenant[78] from teaching and affirming that belief unless the students forfeit their ability to become articling students in the Nova Scotia bar;

Expression

170. The Resolution prevents TWU from teaching, and students who agree with the Covenant from expressing, their agreement unless the students forfeit their ability to become articling students in the Nova Scotia bar;

Equality

171. The Resolution discriminates against students who agree with the Covenant who choose to attend TWU by reinforcing a stereotype that evangelical Christians who attend TWU are unworthy of becoming lawyers and inferior to evangelical Christians who attend other law schools. It has a disproportionate impact on evangelical Christians and disadvantages them, not based on an actual disposition to discriminate but because of the university they attended;

172. The applicants say that the Regulation ("a law degree is not a law degree if council determines") is a breach of TWU's or Brayden's Charter rights as follows:

Association

173. The Regulation prevents students who agree with the Covenant from associating with others who share the same belief unless they forfeit their ability to become articling students in the Nova Scotia bar;

Religion

[78] The conclusion that TWU is not approved is not directly a religious requirement. In *Ont Human Rights v. Simpson Sears,* [1985] SCJ No 74 [**Tab 00**], the Supreme Court of Canada adopted the American rule that provisions which appear neutral on their face (in that case requiring employees to work Saturday) may be discriminatory on the basis of religion if they have a particular effect on employees who have a Saturday Sabbath. Refusing to approve TWU is a distinction which primarily affects those who hold evangelical Christian beliefs. The Supreme Court of Canada accepted that the decision by the BC College of Teachers discriminated on the basis of religion.

174. The Regulation prevents TWU and students who share the religious views represented in the Covenant from teaching and affirming that belief unless the students forfeit their ability to become articling students in the Nova Scotia bar;

Expression

175. The Regulation prevents TWU from teaching, and students who agree with the Covenant from expressing their agreement unless they forfeit their ability to become articling students in the Nova Scotia bar;

Equality

176. The Regulation discriminates against students who agree with the Covenant who choose to attend TWU by reinforcing a stereotype that evangelical Christians who attend TWU are unworthy of becoming lawyers and inferior to evangelical Christians who attend other law schools. It has a disproportionate impact on evangelical Christians and disadvantages them, not based on an actual disposition to discriminate but because of the university they attended .

177. Having delineated the Charter rights of the applicants, we must now perform a similar exercise for the Charter rights NSBS says are in conflict.

NSBS EVIDENCE

Affidavit of Darrell Pink

178. Mr Pink's affidavit is not challenged. Indeed, TWU relies on it in support of its position that the Regulation is unlawfully discriminatory against evangelical Christians contrary to NSBS's own Regulations.

179. The Pink affidavit also demonstrates the problem with the Bar Society's methodology. NSBS collects information on its members (reported at Tab 7 of Pink Affidavit). In 2014, there were 1922 respondents. 445 respondents (out of 1922) declined to answer the question; 1477 answered the question; 1202 reported, "none of the above".

180. However, the results are not reported as a percentage of those who answered the question ("41 out of 1477 are LGBT"); the results are reported as a percentage of all those in the survey, including the 445 who refused to answer, as if all 445 had answered "none of the above".

181. Here are the three primary problems with the survey information on which NSBS relies:

1. 23% don't answer

182. Because about a quarter of members refuse to answer, the result is not statistically valid. (If all 445 who refused to answer are gay, lesbian or bi-sexual, the actual number of the LGBTQ community in the Nova Scotia bar is more than 25%). We do not know where the true result lies: somewhere between 2.7% and 25% is all that we can say, because there is no sampling methodology to establish that those who did answer are representative of the total population of the bar. The conclusions cannot be generalized for those who did not answer. The valid conclusion—that somewhere between 2.7% and 25% of lawyers in Nova Scotia are members of LGBT community—is meaningless because the range is so large.

2. Number is expressed as a percentage of the total, including those who refuse to answer

183. To express the number as 2.1%, the survey assumes that *none* of those who refused to answer falls into the group. It concludes that the 41 who acknowledged being LGBTQ are the only members out of 1922 who are. *If the survey expressed the 41 as a portion of the 1477 who chose to answer, the proportion is 2.7%;* **2.7% of those who answered identified themselves as LGBTQ.**

184. If eight people hang up on a telephone survey and only one person who is 65 years old answers the questions, we don't report that one person in nine is exactly 65 years old and we don't report that 100% of the population is 65. If those who answer are representative of the total, we express the percentage out of the *total that answer the question.* If we cannot draw a

conclusion that the people who answer the survey question are representative, we don't report the answer at all.

3. Does not even count the number of evangelical Christians

185. Absent from the statistics collected by NSBS is any record of how many members identify as Christian, Jewish, Muslim, or by some other religion.

186. In the eyes of the NSBS, evangelical Christians are invisible—**they do not even count them.** Because NSBS does not record religious identification, no programming is required to ensure their numbers correctly reflect their proportion in the population as a whole.

187. Whatever lip service NSBS pays to discrimination, it has certainly made no effort to measure and determine whether the proportion of evangelical Christians practicing law in Nova Scotia mirrors either the Nova Scotian population of evangelical Christians, or the proportion of evangelical Christians seeking admission to the bar in Nova Scotia. It has taken active steps to exclude Benjamin Shearer and taken no steps to accommodate those who have been excluded. Its own ethical guidelines require:

> A lawyer discriminates in contravention of this Rule when a lawyer makes a distinction based on an irrelevant characteristic or perceived characteristic of an individual or group such as age, race, colour, religion, creed, sex, sexual orientation, disability, ethnic, national or aboriginal origin, family status, marital status, source of income, political belief or affiliation, if the distinction has the effect of imposing burdens, obligations, or disadvantages on an individual or on a group not imposed on others or if the distinction has the effect of withholding or limiting access to opportunities, benefits, or advantages available to individuals or groups in society.

188. The distinction here—based on the religious beliefs of the students who sign the Covenant—is acknowledged by NSBS to be irrelevant; still, NSBS imposes disadvantages on students who attend TWU not imposed on others and withholds admission to the bar, available to others with exactly the same beliefs.

189. Are evangelical Christians underrepresented in the Nova Scotia bar? We don't know because NSBS controls the information which is gathered from the practicing bar and despite

bringing in the Regulation, has not sought empirical evidence on the number of evangelical Christians.

190. Do the actions of the NSBS dissuade evangelical Christians from practicing law here? We know the answer to that and it is not a matter of speculation: Benjamin Shearer has filed an affidavit noting that even though he had completed his entire qualifications for call to the bar he refused his call to the bar because he shares the religious beliefs set out in the Covenant and it was clear he was unwelcome here.

191. Comment is in order on the other affidavit evidence filed by NSBS, and in particular the conclusions drawn based on the "statistics" in the Pink affidavit.

Chenier Affidavit

192. Chenier seeks to offer opinion evidence in the area of history, and in particular the history of lesbian, gay and sexual minority groups. Broadly, she sets out the history of discrimination against minority groups and the harms of exclusion. We rely on the Chenier affidavit and her answers to our questions (if permitted) to establish that these are not unique harms: evangelical Christians suffer the same harms when a professional organization excludes them from participating and stigmatizes them as different or unworthy of practicing law. Her opinion does not address how allowing students in BC to believe sexual intimacy outside of an opposite sex marriage is a sin causes harm to residents of Nova Scotia (where same sex marriage is lawful and students agree not to discriminate).

Bryson Affidavit

193. Bryson bases her opinion on a number of facts not in evidence (for example, that gays and lesbians are required to lie about their sexual orientation if they wish to attend TWU, and that they will be expelled if they are discovered to be gay or lesbian.) Other affidavit evidence establishes that assumption is false.[79] The core of Bryson's opinion – that rather than remain

[79] Wood Affidavit, especially para 62-67

celibate while at university, many gays and lesbians would choose not to attend TWU—is certainly correct; it is likely true of many heterosexual students as well.

194. Prof Bryson also speaks to the harms LGBTQ students experience to their mental health and self esteem if they feel unwelcome. She does not consider whether evangelical Christians experience the same harms if they feel unwelcome; we have requested she do so.

195. One issue for the Court is whether the Covenant at TWU has any harms in Nova Scotia. Prof Bryson has no evidence on that issue at all.

196. Professor Bryson relies on the Pink statistics without acknowledging that a quarter of survey respondents refused to answer, and without noting that of those who did answer, 2.7% identify as LGBT. She then extrapolates.

197. She observes that in Canada *as a whole* 2% of the population identifies as LGB; on a different study, in Canada *as a whole*, 2.1% identify as GLBT, whereas on a third study of Canada *as a whole*, 2.4% identify as gay, lesbian or bi-sexual. If these surveys are measuring the same population (and do not have different definitions of LGBT members as the different labels suggest) the fact they reach different results mean that it is not possible to do more than say that in Canada as a whole the correct figure lies somewhere in a range. No effort is made to explain why one figure includes 139,000 more people than the other (or to determine which definition comes closest to the definition used by the NSBS measure).

198. Moreover, Bryson does not set out a basis for determining whether Nova Scotia's population is in this respect exactly similar to the population of Canada as a whole. It may be that our population is older, or more rural, or in some other way not an exact microcosm of the Canadian population. There is no basis for reaching a conclusion from her affidavit. Even if the Canadian range is between 2% and 2.4%, that does not establish that the Nova Scotian population has that percentage.

199. Apart from these methodological criticisms, in Nova Scotia 2.7% of those who answered identify as LGBT—about 22% more than the median percentage (2.2%) which Bryson would assume as the figure for the Canadian population as a whole.

200. There is no analysis to explain her assumption that LGBT members of the Canadian population are interested in becoming lawyers in the same proportion as members of the Canadian population as a whole. (On her reasoning, one would look at the number of male nurses and conclude that the nursing body here excludes men; it is equally plausible in the absence of evidence that few men choose to go into nursing and those who do are represented in appropriate numbers). Her unexplained assumption may be correct and (unlike male nurses) LGBT members choose law in exactly the same percentage as the rest of the population, but there is no evidence or analysis to suggest it. To conclude someone is excluded we need to compare participation rates with the number of those who *desire* a particular occupation, not rates of the population as a whole. A measure of the proportion of LGBTQ law school graduates might inform that answer, but a measure of the population as a whole does not.

201. Finally, not a single member of the Nova Scotia bar obtained her legal education at TWU. All of the data relied on by Prof Bryson is based on students who have been educated at other law schools. If there is a low participation rate by members of the LGBTQ community, it is not because of TWU. It is difficult to guess how the 60 graduates from TWU a year will influence the number of LGBTQ lawyers in Canada, or Nova Scotia, but TWU certainly cannot be responsible for the existing numbers.

202. Students have graduated from TWU (in different programs) for 50 years, including students who have graduated as nurses and teachers. There is no statistical information to suggest those students have had any impact whatever on the proportion of LGBTQ nurses or teachers in BC where we have more than a decade of experience. It is likely more statistically valid to generalize from ten or twenty years of experience and actual results than it is to speculate without that information.

203. What Prof Bryson's opinion mostly establishes is her bias in the matter, generalizing and reaching conclusions on evidence where it is unwarranted, without identifying the limitations on her opinion.

204. Only if you find that there was evidence of unlawful discrimination by graduates of TWU do you need to go on and decide how to balance the competing Charter rights. The applicants say that even if that were the case, it is unnecessary to place a blanket ban on all graduates of TWU.

THE RIGHTS CLAIMED ON BEHALF OF NSBS TO BE IN CONFLICT

205. While it is for NSBS to delineate the rights they say are in conflict, it appears that they rely on the right of residents of Nova Scotia to enter into same sex marriages, and to enjoy sexual intimacy outside of marriage. NSBS is not balancing the rights of students in BC to be free from unlawful discrimination in BC; it has no authority there, or over students who have not yet applied for articles and TWU, of course, is not subject to the Charter and the Covenant is lawful under that province's legislation.

206. In determining whether there is a conflict in Charter rights, NSBS is considering whether the practice of certain rights by students at an institution in BC conflict with the right of Nova Scotians to be free from unlawful discrimination once that student moves here for articles.

207. The inquiry is made at the point at which the student is considered for admission to articles in Nova Scotia. Given the concession that TWU graduates are not predisposed to discriminate on the basis of sexual orientation, and the fact that same sex marriage and sexual intimacy outside of marriage are both lawful in Nova Scotia, it is not clear how the rights could be in conflict.

THE BREACHES THEY CLAIM

Summary Legalizing same sex marriage included a *quid pro quo*: same sex couples would be allowed to marry, but churches would have the right to refuse to perform or recognize same sex marriages. The Regulation and Resolution seek to undo that compromise.

208. In the same way, it is for NSBS to identify how the rights of Nova Scotians are breached by the signing of a Covenant in BC. The only likely argument relates to a breach of s. 15, which includes a freedom from discrimination based on sexual orientation. A few observations are in order.

209. Canada in legalizing same sex marriage enacted a *quid pro quo*: Same sex couples would be allowed to marry, but churches would have the legal right to refuse to perform same sex marriages, and the right to refuse to recognize them for religious purposes. Both freedom from unlawful discrimination and religious freedom were preserved. What NSBS is trying to do here is undo that bargain—embrace same sex marriage but deny churches the religious freedom to disagree with it. *In Reference re Same Sex Marriage* [2004] S.C.J. No. 75 **[Tab 19]** the Court was asked whether churches could refuse to perform same sex marriages. The Court observed:

> **57** The right to freedom of religion enshrined in s. 2(*a*) of the *Charter* encompasses the right to believe and entertain the religious beliefs of one's choice, the right to declare one's religious beliefs openly and the right to manifest religious belief by worship, teaching, dissemination and religious practice: *Big M Drug Mart, supra*, at pp. 336-37. The performance of religious rites is a fundamental aspect of religious practice.
>
> **58** It therefore seems clear that state compulsion on religious officials to perform same-sex marriages contrary to their religious beliefs would violate the guarantee of freedom of religion under s. 2(*a*) of the *Charter*. It also seems apparent that, absent exceptional circumstances which we cannot at present foresee, such a violation could not be justified under s. 1 of the *Charter*.
>
> **59** The question we are asked to answer is confined to the performance of same-sex marriages by religious officials. However, concerns were raised about the compulsory use of sacred places for the celebration of such marriages and about being compelled to otherwise assist in the celebration of same-sex marriages. The reasoning that leads us to conclude that the guarantee of freedom of religion protects against the compulsory celebration of same-sex marriages, suggests that the same would hold for these concerns.

210. In Canada a church is entitled to provide the services it offers exclusively to its adherents. Hogg observes[80],

> ...[I]t has always been accepted without question that a religious ceremony can be denied by a church, synagogue or mosque to persons who want to get married but are not adherents of that faith. Equally accepted is the right to refuse to perform a religious ceremony that would be contrary to the particular faith.

211. TWU is entitled to say "only those who adhere to our beliefs are allowed to attend our school". However, TWU has chosen to be more expansive than that. Anyone—whether they

[80] *Constitutional Law of Canada* (5th ed) 42-17.

adhere to TWU's religious beliefs or not[81]—is welcome at TWU if they agree to regulate their conduct by the Covenant while a student at the university. That does not oblige TWU to change its beliefs or teaching. The *Same Sex Marriage Reference* guarantees the right of TWU to teach this belief and to refuse to recognize same sex marriages.

Summary The actions of students attending TWU in agreeing to the Covenant do not arise from a law. Section 15 of the Charter is accordingly not engaged

212. Private corporations are not subject to the responsibilities of equality under s. 15 of the Charter. The point was explained this way in *Sagen v. Vancouver Organizing Committee* [2009] B.C.J. No. 2293 (C.A.)[**Tab 21**], leave to appeal refused (my emphasis):

> 54 ..Section 15(1) sets out constitutional guarantees of equality that are broad in scope, but it does not constitute a general guarantee of equality. Rather, the section guarantees equality only in the way that the law affects individuals. Where the law is not implicated in discrimination or inequality, s. 15(1) is not engaged...
>
> 56 In the case before us, the appellants' greatest challenge is to demonstrate that the unequal benefit (the availability of men's, but not women's, ski jumping events) is in some way a product of "law". On the face of it, the right to compete in a ski jumping event at the Olympics Games does not appear to be a "benefit of the law". It is not a right deriving from legislation, nor is it conferred by a governmental entity. Instead, it derives from a decision by the IOC to hold an event. It is not suggested that the IOC is a law-making body....
>
> 63 This case is, in our view, unlike the situations discussed in *Douglas/Kwantlen Faculty Assn.* and *McKinney*. In those cases, the Supreme Court was considering acts of agents of the Crown whose powers were wholly derived from statute. The defendant in this case, in contrast, is a private corporation with the powers of an ordinary person. It is not an agent of the Crown. It has authority to undertake its duties under the Host City Contract without the need for additional powers delegated by the Crown.

213. The actions of students attending TWU in agreeing to the Covenant, do not arise from a law. Those actions are voluntary. The Charter does not apply. If the conflict in rights complained of by NSBS is a breach of s. 15, it has no application when the discrimination does not arise from a law.

[81] Wood Affidavit, para 62-67, Record, NSBS 1387/210

NO CONFLICT BETWEEN THE RIGHTS, PROPERLY DELINEATED

214. If there was no evidence before NSBS of discriminatory conduct by TWU graduates, then that is the end of the inquiry; the rights as delineated are not in conflict. The correct delineation of the rights allows both sets of Charter rights to operate: students can attend TWU and associate with those who share their religious beliefs; the citizens of Nova Scotia can be free from unlawful discrimination on the grounds enumerated in the Charter[82]. If the Court accepts the legal analysis in *BC Teachers'*, delineating the Charter rights in issue assesses whether allowing students to sign the Covenant and associate with others while attending TWU in British Columbia, with the equality concerns of people living in Nova Scotia. In the absence of discriminatory conduct by TWU students (and NSBS concedes there was no such evidence before it, and that it will not argue TWU students are predisposed to discriminate) there is no conflict in the rights. That is the end of the inquiry and the Resolution and Regulation must both be set aside.

215. In the alternative, if the Court finds that properly delineated, the rights are in conflict, the Court must go on to balance the rights. TWU and Brayden deny there is a conflict; we believe that students attending TWU are free to believe (for example) that sexual intimacy outside of an opposite sex marriage is a sin, without conflict with the right of same sex couples to marry, or to engage in sexual intimacy outside of marriage. If the Court finds a conflict, we then need to consider the conflict and balance the rights.

216. It is difficult to see how the rights of students while at TWU and the right of residents of Nova Scotia to be free from unlawful discrimination based on same sex marriage could be in conflict. The rights are enjoyed thousands of miles apart. Allowing students at TWU to avoid sexual intimacy apart from an opposite sex marriage has no effect whatever on the rights of

[82] In *BC Teachers*, the Court made clear that the issue was whether there was specific evidence that a student would discriminate in his future employment. No evidence was introduced to suggest a TWU student or former student has discriminated against anyone and certainly NSBS had no reason to think that Brayden intended to do so if admitted to article in Nova Scotia.

individuals in Nova Scotia to enjoy sexual intimacy either before marriage or in a same sex marriage. Allowing one right to exist does not prevent the other from existing.

217. If a conflict exists, in light of the importance of freedom of association, religion and conscience, and expression, bearing in mind the private nature of TWU, a blanket ban was not an appropriate balance of the Charter rights. Proponents of the Regulation are arguing in favour of unfettered rights on the basis of sexual orientation, not on the right to be free of unlawful discrimination. Members of the LGBTQ community in Nova Scotia have the right to be free from unlawful discrimination; they do not have the right to silence people who disagree with them. NSBS has already conceded there is no evidence that discrimination would occur; that being so, it is not necessary to silence those who do not recognize same sex marriage as religiously valid to avoid discrimination.

218. The Regulation here arises from the demeaning stereotype that students who choose to attend a school which espouses a traditional Christian view of marriage are less worthy than those that attend other schools. That is discriminatory under s. 15 of the Charter.

IS A S. 1 ANALYSIS NECESSARY?

Summary Discretionary decisions fail the *Oakes* test because they are not prescribed by law. Given the admission that students from TWU are not predisposed to discriminate, a prohibition on TWU graduates is not rationally connected to the perceived harm. The complete prohibition of TWU graduates does not minimally impair their rights and is not proportionate to the legislative objective.

219. In *Doré*, the Court considered whether the *Oakes* test was required when reviewing a disciplinary decision of the Quebec Bar. In *Doré*, the Court made it clear that in adjudicated administrative decisions, the formalities of the s. 1 analysis under the *Oakes* test are not required:

> 3 This raises squarely the issue of how to protect *Charter* guarantees and the values they reflect in the context of adjudicated administrative decisions. Normally, if a discretionary administrative decision is made by an adjudicator within his or her mandate, that decision is judicially reviewed for its reasonableness. The question is whether the presence of a *Charter* issue calls for the replacement of this

administrative law framework with the *Oakes* test, the test traditionally used to determine whether the state has justified a law's violation of the *Charter* as a "reasonable limit" under s. 1.

4 It seems to me to be possible to reconcile the two regimes in a way that protects the integrity of each. The way to do that is to recognize that an adjudicated administrative decision is not like a law which can, theoretically, be objectively justified by the state, making the traditional s. 1 analysis an awkward fit....

5 We do it by recognizing that while a formulaic application of the *Oakes* test may not be workable in the context of an adjudicated decision, distilling its essence works the same justificatory muscles: balance and proportionality. ...

36 As explained by Chief Justice McLachlin in *Alberta v. Hutterian Brethren of Wilson Colony*, ..., the approach used when reviewing the constitutionality of a law should be distinguished from the approach used for reviewing an administrative decision that is said to violate the rights of a particular individual (see also Bernatchez). When *Charter* values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts. *Dunsmuir* tells us this should attract deference...When a particular "law" is being assessed for *Charter* compliance, on the other hand, we are dealing with principles of general application.

42 Though each of these cases engaged *Charter* values, the Court did not see the *Oakes* test as the vehicle for balancing whether those values were taken into sufficient account. The same is true, it seems to me, in the administrative law context, where decision-makers are called upon to exercise their statutory discretion in accordance with *Charter* protections.

43 What is the impact of this approach on the standard of review that applies when assessing the compliance of an administrative decision with *Charter* values? There is no doubt that when a tribunal is determining the constitutionality of a law, the standard of review is correctness (*Dunsmuir*, at para. 58). It is not at all clear to me, however, based on this Court's jurisprudence, that correctness should be used to determine whether an administrative decision-maker has taken sufficient account of *Charter* values in making a discretionary decision.

220. It has already been argued the Resolution was not an adjudicated decision akin to a discipline decision. The Regulation is also clearly not an adjudicated decision; it is clear that the Regulation here is being assessed for Charter compliance. *Doré* therefore requires that we consider the *Oakes* analysis.

A. Generally

221. Is the Regulation a reasonable limit, prescribed by law which is rationally connected and minimally impairs the rights of TWU students?

222. In attempting to persuade members of Council to vote against TWU, the Executive Committee argued that passing the resolution would not prejudice students who held religious beliefs:

> If the Society were to deny approval of the TWU law school and TWU establishes its law school on the basis of approvals from other law societies and from the government of British Columbia, a future TWU law graduate may seek admission to the Society's Bar Admission Program. Assuming such a student can demonstrate that the refusal of the Society to recognize the TWU law school violates that student's right to religious freedom, the Society will need to balance the competing rights that are at play. The Society's treatment of such a future law student must meet the *Oakes* test relating to s.1 of the Charter, and the Society may need to take steps to accommodate the graduate applicants. That is, the Society's treatment of such a future TWU law school graduate must be proportionate to the pressing and substantial objective of anti-discrimination, be rationally connected, and minimally impair the Charter right to religious freedom. If Council decides not to approve the TWU law school, Council will be required to consider and adopt a Regulation or resolution with respect to such an applicant. This decision can be made in future, but in any event no later than by the time of the first such applicant.[83]

223. No such provision is contained in the Regulation, with the result that the promise made in public—that the resolution was just about TWU and not about disadvantaging its graduates because the Oakes test would be used to protect those disadvantaged—was not fulfilled.

224. The burden of proving that the Regulation is a reasonable limit on Brayden's rights is on NSBS[84] on the balance of probabilities[85]. *Oakes* sets out the constitutional test:

> **68** Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the Charter was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion". Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit.... A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions...
>
> **69** To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom"...
>
> **70** ...First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

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[83] Record, NSBS 1064/14

[84] *R v. Oakes*, [1986] S.C.J. No. **[Tab 16]**66

[85] Oakes, **[Tab 16]** para 67

225. TWU says that, *given the concession that students who graduate from TWU are not predisposed to discriminate,* the Regulation fails every branch of the *Oakes* test. There is no evidence to justify interfering with TWU's s. 2 or Brayden's s. 2 or s. 15 rights.

B. Sufficient Importance

226. Same sex marriage and sexual intimacy are both lawful in Nova Scotia. The graduates whose admission will be prevented by the Resolution and the Regulation are not predisposed to discriminate on the basis of sexual orientation. Given those facts, there is no pressing and substantial reason to impair the rights of the students.

C. Prescribed by law

227. A prohibition is not "prescribed by law" when council determines on an *ad hoc* and *ad hominem* basis whether a law degree qualifies or not.

228. In *Osborne v. Canada*, [1991] S.C.J. No. 45 **[Tab 12]** Justice Sopinka adopted the statements made by McLachlin J. in an earlier case and added (my emphasis):

> **51** Vagueness can have constitutional significance in at least two ways in a s. 1 analysis. A law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power. The uncertainty may arise either from the generality of the discretion conferred on the donee of the power or from the use of language that is so obscure as to be incapable [page626] of interpretation with any degree of precision using the ordinary tools. In these circumstances, there is no "limit prescribed by law" and no s. 1 analysis is necessary as the threshold requirement for its application is not met. The second way in which vagueness can play a constitutional role is in the analysis of s. 1. A law which passes the threshold test may, nevertheless, by reason of its imprecision, not qualify as a reasonable limit. Generality and imprecision of language may fail to confine the invasion of a Charter right within reasonable limits. In this sense vagueness is an aspect of overbreadth.

229. Here, the Regulation provides that "A law degree is not a law degree if determined by Council." That is an unlimited grant of discretion, which means a s. 1 analysis is unnecessary because the Regulation cannot be said to be a limit prescribed by law.

D. Rational connection

230. The Regulation is unfair and arbitrary, not rationally connected to the concern that evangelical Christians who attend TWU will misconduct themselves if permitted to article in Nova Scotia. Indeed, giving Council the authority to decide when a university has unlawfully discriminated is by definition an arbitrary (not a rational) decision.

231. In its Notice of Participation, NSBS disclaims judging individual students. It has conceded, as part of the application, that TWU graduates should not be refused qualification because of a presumption that they would be unable by virtue of their education at TWU to conduct their practice without unlawful discrimination on the basis of sexual orientation. There was certainly no evidence before NSBS to demonstrate graduates of TWU had discriminated on the basis of sexual orientation and it would be a breach of the Covenant for them to do so. In those circumstances, there is no rational connection between the Regulation and the desire to prevent unlawful discrimination based on sexual intimacy outside of an opposite sex marriage.

E. Minimal impairment

232. Given the other means at its disposal, the outright prohibition on graduates of TWU articling in Nova Scotia does not minimally impair TWU's s. 2 or the s. 2 and s. 15 rights of Brayden and the other graduates.

233. Ordinarily, a balancing arrived at by NSBS which was within its jurisdiction would be entitled to substantial deference. However, here, NSBS had no jurisdiction to refuse approval in the first place and acted on evidence about the school (not about the graduates). It had no jurisdiction to embark upon a balancing without first finding there was evidence of an actual conflict in rights after their proper delineation. It erred in law in doing so without that step.

234. Even then, in seeking to balance the rights of evangelical Christians to Charter freedoms and the rights of the Nova Scotia community to be free from unlawful discrimination, it engaged in a blanket disapproval of the school—an outright prohibition is not much of a balance. In those circumstances, deference is not appropriate. Here, there are ample mechanisms in place to balance the rights:

- Students are supervised by a principal during their articles
- Before commencing articles students sign an oath agreeing not to discriminate
- NSBS supervises the student for a year before allowing him or her to practice
- During that time NSBS has supervisory jurisdiction over both student and principal
- If the student becomes a lawyer, NSBS has supervisory jurisdiction over them thereafter
- NSBS instructs and examines the student (however it wishes) during articles to satisfy itself the student is a proper candidate to practice
- Students swear a further oath on becoming members agreeing not to discriminate
- Students are governed by the Nova Scotia Human Rights Act while students and lawyers

235. Logically, students applying to article in Nova Scotia should not be held to as high a standard as teachers in BC. In the first place, as the *BC Teachers* case holds, teachers are a medium for the transmission of values. As soon as they are certified, they have sole authority in the classroom where they work without other adults present and with limited supervision. They deal with children who are impressionable because of their age and inclined to be guided by their teacher. They take no oath. They have tenure which makes their discipline and removal difficult. Students are legally obliged to attend school; most students have no choice or control over the teacher they are assigned; they take whomever is the teacher that year for their school grade.

236. While lawyers assist clients in difficulty, it is no part of the lawyer's professional job to act as a medium for the transmission of values. Most clients can change lawyers in the event lawyer and client disagree, and many do. Students are obliged to go to school, but no one is obliged to have a lawyer. Most clients choose their lawyer. Like the teacher, in his professional life, the articling student is subject to the Human Rights Act.

F. Proportionality

237. In balancing the freedom of expression, religion, conscience and association of TWU and the students at TWU, and the equality rights of the students at TWU, NSBS was obliged to consider the other mechanisms at its disposal to ensure that students did not misconduct

themselves once they became articled clerks. They were required to weigh the differences between the role of the teacher and the lawyer. Given the oath students now take, the supervision they receive from their principal, the examination of students by NSBS before the student is admitted to practice, the further oath and ethical supervision provided by NSBS, there are ample mechanisms available to ensure no unlawful discrimination occurs. The balance chosen here – the blanket disapproval of the school – is not a proper balance. The absolute ban on TWU graduates enacted by the Regulation is out of proportion to the legislative objective.

RELIEF REQUESTED

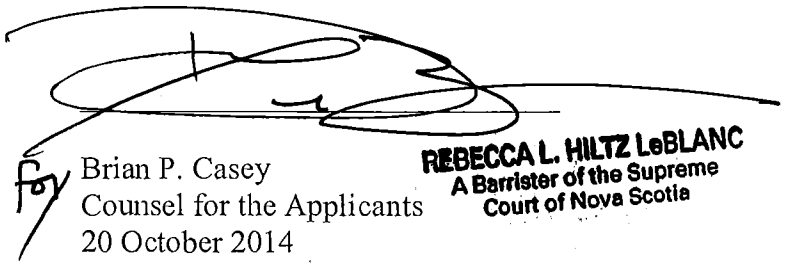
TWU and Brayden ask:

1. That the Resolution and Regulation of NSBS be quashed; and

2. An order in the nature of mandamus be issued requiring NSBS to admit as articled clerks on a non discriminatory basis those graduates of TWU's Law School who otherwise satisfy the criteria of the Regulations for admission;

3. Their costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



Brian P. Casey
Counsel for the Applicants
20 October 2014

APPENDIX "A"
List of cases

Tab	Case
1.	*Browder v. Gayle* 142 F. Supp. 707 (1956)
2.	*Canada v. Bedford,* [2013] S.C.J. No. 72
3.	*C.R. Falkenham Backhoe v. Nova Scotia,* [2008] N.S.J. No. 158
4.	*Clyke v. Nova Scotia,* [2005] N.S.J. No. 3
5.	*Descôteaux v. Mierzwinski,* [1982] S.C.J. No. 43
6.	*Doré v. Barreau du Québec*, [2012] S.C.J 12
7.	*Dunsmuir v. New Brunswick,* [2008] S.C.J 9
8.	*Gould v. Yukon Order of Pioneers,* [1996] S.C.J. No. 29
9.	*Lienaux v. NSBS,* [2009] N.S.J. No. 32 (C.A.)
10.	*Montreal v. Arcade Amusements*, [1985] S.C.J. No. 16
11.	*Ont Human Rights v. Simpson Sears,* [1985] SCJ No 74
12.	*Osborne v. Canada*, [1991] S.C.J. No. 45
13.	*Quebec v. A* [2013] S.C.J. No. 5
14.	*R v. Big M Drug Mart,* [1985] S.C.J. No. 17
15.	*R v. Guignard*, [2002] S.C.J. 16
16.	*R v. Oakes*, [1986] S.C.J. No. 7
17.	*R v. Sharma*, [1993] S.C.J No 18
18.	*Reference Re Public Service Employee Relations Act,* [1987] S.C.J. No. 10
19.	*Reference re Same Sex Marriage,* [2004] S.C.J. No. 75

20.	*Roncarelli v. Duplessis,* [1959] S.C.R. 121
21.	*Sagen v. Vancouver Organizing Committee,* [2009] B.C.J. No. 2293 (C.A.)
22.	*Syndicat Northcrest v. Anselem,* [2004] S.C.J. No. 46
23.	*Tolofson v. Jensen,* [1994] S.C.J. No. 110
24.	*Toronto Board of Education v. OSSTF,* [1997] S.C.J. No. 27
25.	*Toronto (City) v. C.U.P.E.*, [2003] 3 S.C.R. 77
26.	*Trinity Western University v. BC College of Teachers,* [2001] S.C.J. No. 32
27.	*Unifund v. ICBC,* [2003] S.C.J. No. 39
28.	*Way v Covert,* [1997] N.S.J 204

APPENDIX "B"
Table of Statutory References

In addition to the excerpts below, the complete *Legal Professions Act*, and Regulations appear in the Joint Exhibit Book.

Resolution:

Council accepts the Report of the Federation Approval Committee that, subject to the concerns and comments noted, the TWU program will meet the national requirement;

Council resolves that the Community Covenant is discriminatory and therefore Council does not approve the proposed law school at Trinity Western University unless TWU either:

i) exempts law students from signing the Community Covenant; or

ii) amends the Community Covenant for law students in a way that ceases to discriminate.

Council directs the Executive Director to consider any regulatory amendments that may be required to give effect to this resolution and to bring them to Council for consideration at a future meeting.

Council remains seized of this matter to consider any information TWU wishes to present regarding compliance with the condition.

Regulation:

(b) **"law degree"** means

i) a Bachelor of Laws degree or a Juris Doctor degree from a faculty of common law at a Canadian university approved by the Federation of Law Societies of Canada for the granting of such degree, unless Council, acting in the public interest, determines that the university granting the degree unlawfully discriminates in its law student admissions or enrolment policies or requirements on grounds prohibited by either or both the Charter of Rights and Freedoms and the Nova Scotia Human Rights Act;

Excerpts from *Legal Professions Act*, 2004, c. 28:

Purpose of Society

4. (1) The purpose of the Society is to uphold and protect the public interest in the practice of law.

(2) In pursuing its purpose, the Society shall

(d) establish standards for the qualifications of those seeking the privilege of membership in the Society;

(e) establish standards for the professional responsibility and competence of members in the Society;

(f) regulate the practice of law in the Province.

5 (2) No person may become a member of the Society or be reinstated as a member unless the Council is satisfied that the person meets the requirements established by the regulations.

(8) The Council may make regulations

(a) establishing requirements to be met by members, including educational, good character and other requirements, and procedures for admitting or reinstating persons as members of the Society in each of the categories of membership;

6 (3) The Council may take any action consistent with this Act by resolution.

49 (1) Subject to this Section, every order or decision of a Complaints Investigation Committee or a hearing panel is final and shall not be questioned or reviewed in any court.

(2) A party may appeal to the Nova Scotia Court of Appeal on any question of law from the findings of a hearing panel, following the rendering of a decision pursuant to subsections 45(4) or (5) or from a decision of the Complaints Investigation Committee under Section 37 or 38.

Excerpts from NSBS Regulations – April 2014 version

ADMISSIONS
3.1 Interpretation

...

(b) "law degree" means i) a bachelor of laws degree or a juris doctor degree from a faculty of common law at a Canadian university approved by the Federation of Law Societies of Canada for the granting of such degree, or an equivalent qualification; ...

...

3.4.1 Application for enrolment as an articled clerk

3.3.1 An applicant for enrolment as an articled clerk must:
(a) be of good character;
(b) be a fit and proper person;
(c) be lawfully entitled to be employed in Canada;
(d) have a law degree...
(e) have an approved principal;
(f) provide the Executive Director with a completed application in the form prescribed by the Committee;
(g) provide the Executive Director with two letters of reference attesting to good character;
(h) provide the Executive Director an official transcript of the applicant's grades at each faculty of law at which the applicant studied;
(i) pay the prescribed application fee to the Executive Director;
(j) provide an Articling Agreement in the prescribed form executed by the applicant and an approved principal to the Executive Director;
(k) provide the Executive Director with a criminal record check...
(l) be proficient in the English language...
(m) provide such other information that may be required, at any time, by the Executive Director.

Decision of the Executive Director

3.3.2 The Executive Director may, where it is in the public interest to do so:
(a) approve the application and stipulate the effective date of enrolment;
(b) deny the application for reasons other than good character or fitness;
(c) obtain any additional information from the applicant or any other person regarding the good character and fitness of the applicant;
(d) where there is any issue regarding the good character or fitness of an applicant refer the application to the Committee;

Decision of the Committee

3.3.4 If an application is referred to the Committee pursuant to subregulation 3.3.2(d), the Committee shall consider the application and all the information provided by the Executive Director and may:
(a) request that the Executive Director obtain new information;
(b) approve the application, with or without terms, and stipulate the effective date of enrolment; or
(c) deny the application.
3.3.5 In the event that the approval is with terms or the application is denied, the Committee shall provide the applicant with a written decision with reasons and shall inform the applicant of their right to appeal to the Credentials Appeal Panel.
3.3.3 In the event that an application is denied pursuant to subregulation 3.3.2(b), the Executive Director shall provide the applicant with a written decision with reasons and shall inform the applicant of the internal review process.

Application for Admission as an articled clerk:

I also hereby undertake to comply with all ethical guidelines rules governing lawyers in the Province of Nova Scotia, including the Code of Professional Conduct, as if the definition of "lawyer" therein includes a reference to "Articled Clerk."

Application for Call to the bar:

"I, [name], swear/affirm that as a lawyer, I shall, to the best of my knowledge and ability, conduct all matters and proceedings faithfully, honestly and with integrity. I shall support the Rule of Law and uphold and seek to improve the administration of justice. I shall abide by the ethical standards and rules governing the practice of law in Nova Scotia."

Legal Ethics Handbook of NSBS

Chapter 24 – Discrimination

Rule

A lawyer has a duty to respect the human dignity and worth of all persons and to treat all persons with equality and without discrimination.

Guiding Principles
A lawyer discriminates in contravention of this Rule when a lawyer makes a distinction based on an irrelevant characteristic or perceived characteristic of an individual or group such as age, race, colour, religion, creed, sex, sexual orientation, disability, ethnic, national or aboriginal origin, family status, marital status, source of income, political belief or affiliation, if the distinction has the effect of imposing burdens, obligations, or disadvantages on an individual or on a group not imposed on others or if the distinction has the effect of withholding or limiting access to opportunities, benefits, or advantages available to individuals or groups in society.

Excerpts from *Degree Granting Act*, RSNS, 1989 c. 123;

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3 No institution shall directly or indirectly

(a) grant degrees;

(b) provide a program of post-secondary study leading to a degree conferred by an institution in or outside the Province;

(c) advertise a program of post-secondary study offered in the Province leading to a degree conferred by an institution in or outside the Province; or

(d) sell, offer for sale, or provide by agreement for a fee, reward or other remuneration, a diploma, certificate, document or other material that is, or indicates or implies the granting or conferring of, a degree,

unless the institution

(e) is authorized by an Act of the Legislature to grant degrees;

(f) is a public institution authorized by an Act of a legislature of a province to grant degrees;

(g) is an institution authorized by the Governor in Council.

APPENDIX "C"
Trinity Western University Code of Conduct

TRINITY WESTERN UNIVERSITY

Community Covenant Agreement

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.

2. Christian Community

The University's acceptance of the Bible as the divinely inspired, authoritative guide for personal and community life[1] 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.[2] This ongoing God-enabled pursuit of a holy life is an inner transformation that actualizes a life of purpose and eternal significance.[3] Such a distinctly Christian way of living finds its fullest expression in Christian love, which was exemplified fully by Jesus

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The Biblical passages cited in this document serve as points of reference for discussion or reflection on particular topics. TWU recognizes the necessity of giving careful consideration to the complexities involved in interpreting and applying biblical passages to contemporary issues and situations.

[1] Deuteronomy 6:4-9; Psalm 19:7-11; 2 Timothy 3:16

[2] Matthew 6:31-33; Romans 8:1-17; 12:1-2; 13:11-14; 16:19; Jude 20-23; 1 Peter 2:11; 2 Corinthians 7:1.

[3] 2 Peter 1:3-8; 1 Peter 2:9-12; Matthew 5:16; Luke 1:74-75; Romans 6:11-14, 22-23; 1 Thessalonians 3:12-13, 4:3, 5:23-24; Galatians 5:22; Ephesians 4:22-24, 5:8.

Christ, and is characterized by humility, self-sacrifice, mercy and justice, and mutual submission for the good of others.[4]

This biblical foundation inspires TWU to be a distinctly Christian university in which members and others observe and experience truth, compassion, reconciliation, and hope.[5] 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.

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[6]
- live exemplary lives characterized by honesty, civility, truthfulness, generosity and integrity[7]
- communicate in ways that build others up, according to their needs, for the benefit of all[8]
- treat all persons with respect and dignity, and uphold their God-given worth from conception to death[9]
- 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[10]
- 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[11]
- exercise careful judgment in all lifestyle choices, and take responsibility for personal choices and their impact on others[12]
- 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.[13]

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

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[4] Matthew 22:37-40; 1 Peter 5:5; Romans 13:8-10; 1 John 4:7-10; Philippians 2:1-5; 1 Corinthians 12:31b-13:8a; Romans 12:1-3, 9-10; John 15:12-13, 17; 1 John 3:10-11, 14-16; Ephesians 5:1-2,21.
[5] From TWU's "Envision the Century" Strategic Directions Document, p 5 ("Ends").
[6] Galatians 5:22-24; Colossians 3:12-17; Isaiah 58:6-8; Micah 6:8.
[7] Proverbs 12:19; Colossians 3:9; Ephesians 4:25; Leviticus 19:11; Exodus 20:16; Matthew 5:33-37.
[8] Ephesians 4:29; Proverbs 25:11; 1 Thessalonians 5:11.
[9] Genesis 1:27-28; Psalm 139:13-16; Matthew 19:14; Proverbs 23:22.
[10] Romans 13:1-7; 1 Peter 2:13-17; Genesis 1:28; Psalm 8:5-8; 2 Thessalonians 3:6-9.
[11] Genesis 2:24; Exodus 20:14,17; 1 Corinthians 7:2-5; Hebrews 13:4; Proverbs 5:15-19; Matthew 19:4-6; Malachi 2:16; Matthew 5:32.
[12] Proverbs 4:20-27; Romans 14:13,19; 1 Corinthians 8:9,12-13, 10:23-24; Ephesians 5:15-16.
[13] James 5:16; Jude 20-23; Romans 12:14-21; 1 Corinthians 13:5; Colossians 3:13.

- communication that is destructive to TWU community life and inter–personal relationships, including gossip, slander, vulgar/obscene language, and prejudice[14]
- 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[15]
- sexual intimacy that violates the sacredness of marriage between a man and a woman[16]
- 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.

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.[17] 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,[18] work, study and recreation, service and rest.

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[14] Colossians 3:8; Ephesians 4:31.
[15] Exodus 20:15; Ephesians 4:28.
[16] Romans 1:26-27; Proverbs 6:23-35.
[17] Galatians 5:1,13; Romans 8:1-4; 1 Peter 2:16.
[18] Ephesians 5:19-20; Colossians 3:15-16; Hebrews 10:25.

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.[19] 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.[20] Honouring and upholding these principles, members of the TWU community strive for purity of thought and relationship,[21] respectful modesty,[22] personal responsibility for actions taken, and avoidance of contexts where temptation to compromise would be particularly strong.[23]

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,[24] but it also strongly warns against drunkenness and addiction, which overpowers wise and reasonable behaviour and hinders personal development.[25] The Bible commends leaders who abstained from, or were not addicted to, alcohol.[26] 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

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[19] 1 Corinthians 6:18-19.
[20] Genesis 2:24; Exodus 20:14,17; 1 Corinthians 7:2-5; Hebrews 13:4; Proverbs 5:15-19; Matthew 19:4-6.
[21] Matthew 5:27-28; 1 Timothy 5:1-2; 1 Thessalonians 4:3-8; Job 31:1-4; Psalm 101:2-3.
[22] 1 Peter 3:3-4; 1 Timothy 2:9-10
[23] 1 Corinthians 6:18; 10:13; 2 Timothy 2:22; James 4:7.
[24] Deuteronomy 7:13, 11:14, Psalm 104:15; Proverbs 3:10; Isaiah 25:6; John 2:7-11; 1 Timothy 5:23.
[25] Genesis 9:20-21; Proverbs 20:1; 31:4; Isaiah 5:11; Habakkuk 2:4-5; Ephesians 5:18.
[26] Daniel 1:8, 10:3; Luke 1:15; 1 Timothy 3:3,8; Titus 2:3.

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,"[27] recognizing that truth and beauty appear in many differing forms, may be disguised, and may be seen in different ways by different people.

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.

[27] Philippians 4:8.