No.: 427840

SUPREME COURT OF NOVA SCOTIA

Between**:**

TRINITY WESTERN UNIVERSITY AND BRAYDEN VOLKENANT

Applicant

- and -

NOVA SCOTIA BARRISTERS' SOCIETY

Respondent

BRIEF OF THE INTERVENOR

Justice Centre for Constitutional Freedoms

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BRIEF OF THE INTERVENOR

FACTS AND OVERVIEW

Trinity Western University ("TWU")

1. Established by the Evangelical Free Church in 1962, Trinity Western University ("TWU") has served as an agent and "arm of the Church," with a mission "to develop godly Christian leaders: positive, goal-oriented university graduates with thoroughly Christian minds; growing disciples of Christ who glorify God through fulfilling the Great Commission, serving God and people in the various marketplaces of life."[1]

2. TWU is a unique educational institute: a voluntary private association of over 4,000 students, faculty and staff. Each individual has chosen to associate in this expressly Christian educational community. Not surprisingly, most of TWU's students self-identify as Christians.

3. TWU ranks among the top universities according to student survey data, and has consistently earned an A+ rating from the *Globe and Mail*'s Canadian University Reports.[2]

4. The Community Covenant forms an integral part of TWU's university community, by which all faculty, staff, and students commit to following Christian beliefs, rules and practices. The Community Covenant discriminates against anyone and everyone who is unwilling, or not interested in, cultivating Christian virtues such as love, forgiveness, self-control, humility, mercy, justice, and mutual submission for the good of others.

5. The Community Covenant also prohibits *activities that are legal* under Canadian law: vulgar and obscene language, the use of pornography and other materials that are degrading, dehumanizing, exploitive, hateful, or gratuitously violent; drunkenness; gossip; the misuse or abuse of substances including prescribed drugs; the use or possession of alcohol on campus; and the use of tobacco on campus. As a consequence, TWU discriminates against people who wish to engage in such activities, and those unwilling to abstain while attending TWU will consequently violate those beliefs and practices and may not be welcome to attend.

6. No person is compelled to attend TWU and it is one among hundreds of colleges and universities in Canada, including approximately 20 law schools. There are currently zero faith based law schools operating in Canada.

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1 TWU, *Our Mission*. Online: <https://www.twu.ca/academics/about/mission.html>

2 *Globe and Mail* (2012), "Report on Trinity Western University." Online: <http://www.globecampus.ca/navigator2/trinity-western-university/>

7. Like many voluntary associations in Canada, TWU discriminates against those who disagree with its Christian beliefs, goals, rules and practices. Like many other Canadian associations, TWU subscribes to beliefs that are not shared by others. TWU, however, expects those who choose to join and actively participate in their association, to refrain from certain activities that are legal, but otherwise violate their sincerely held religious beliefs and practices.

Various Approvals of TWU School of Law[3]

8. TWU submitted its law school application to both the Federation of Law Societies of Canada and the B.C. Ministry of Advanced Education on June 15, 2012. The Federation Common Law Degree Approval Committee, whose specific mandate it is to apply the national competency requirement approved by all law societies (including Nova Scotia's), granted approval to TWU School of Law on December 16, 2013. The decision came after extensive research, review, and analysis and took approximately 18 months to complete. The Federation concluded TWU's proposal was "comprehensive and is designed to ensure that students acquire each competency included in the national requirement."[4] The Nova Scotia Barristers' Society ("NSBS") concedes the "TWU program will meet the national requirement" (*TWU v. NSBS*, 2014 NSSC 331, at para. 4).[5]

9. The Federation, in its approval process, also considered in great detail (through its Special Advisory Committee) whether future TWU School of Law graduates "should be eligible to enroll in the program of any of Canada's law societies, given the requirement that all students and faculty of TWU must agree to abide by TWU's Community Covenant Agreement as a condition of admission and employment, respectively".[6] The Committee was required to make its decision considering the public interest, and after applying "applicable law, including the *Canadian Charter of Rights and Freedoms*, human rights legislation, and the Supreme Court of Canada decision in *Trinity Western University v. British Columbia College of* Teachers (2001 SCC 31)."[7]

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3 For a complete and robust review of the history behind the creation, approval, and denial of TWU across Canada refer to *Supreme Advocacy LLP*, Submission of Trinity Western to the Law Society of Upper Canada. *Written Submission for the Consideration of Convocation in Relation to the Matter of the Accreditation of the TWU School of Law*, at paras. 6-16. Online: <http://www.lsuc.on.ca/uploadedFiles/TrinityWesternUniversity SubmissiontoLSUCwithAppendices.pdf>

4 FLSC, Approval Committee Report at para. 47. Online: <http://www.flsc.ca/_documents/ApprovalCommitteeFINAL.pdf>

5 See also NSBS Resolution of April 25, 2014.

6 FLSC, Special Advisory Committee Report at para. 6, 1. Online: <http://www.flsc.ca/_documents/SpecialAdvisoryReportFinal.pdf>

7 FLSC, Special Advisory Committee Report at para. 6, 2.(b). Online: <http://www.flsc.ca/_documents/SpecialAdvisoryReportFinal.pdf>

10. After extensive review and the consideration of a legal opinion from John Laskin, the Advisory Committee (like the Approval Committee) concluded there was no public interest reason to refuse to approve TWU:

> [I]n light of applicable law none of the issues, either individually or collectively raise a public interest bar to approval of TWU's proposed law school or to admission of its future graduates to the bar admission programs of Canadian law societies…there will be no public interest reason to exclude future graduates of the program from law society bar admission programs.[8]

11. That review included and considered entry into the Nova Scotia Barristers' Society.

12. After its own specialized inquiry and legal analysis which specifically considered the religious character of TWU and its Community Covenant, the B.C. Minister of Advanced Education also approved the TWU School of Law and stated it met all quality assessment criteria.[9]

Nova Scotia Barristers' Society ("NSBS") Resolution and Regulation

13. Despite these extensive legal reviews and decisions (and itself declaring TWU grads would meet all necessary educational requirements under the national requirement) on April 25, 2014 the NSBS approved a Resolution declaring that TWU School of Law is not an approved program of law in Nova Scotia. Future TWU graduates are now, as a direct and intended result, unqualified to enter the NSBS association and legally practise law (*TWU v. NSBS*, 2014 NSSC 331, at para. 4). To fully realize its intentions under the April 25th Resolution, the NSBS amended Regulation 3.1 on July 23, 2014, which empowers NSBS Council to revoke a Federation law school approval if it determines the school "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*" (*TWU v. NSBS*, 2014 NSSC 331, at para. 5 and 18).

ISSUES

Issue No. 1: Does the NSBS Resolution of April 25, 2014 breach the freedom of association under s.2(d) of the Charter of Rights and Freedoms? If yes, was the decision correct?

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8 FLSC, Special Advisory Committee Report at paras. 65-66. Online: <http://www.flsc.ca/_documents/SpecialAdvisoryReportFinal.pdf>

9 Government of B.C., *Statement on Trinity Western University's Proposed Law Degree*, December 18, 2013. Online: <http://www2.news.gov.bc.ca/news_releases_2013-2017/2013AVED0047-001903.htm>

Issue No. 2: Does the July 23, 2014 NSBS Regulation 3.1, passed pursuant to s.4 of the Legal Profession Act, SNS 2004, c 28 breach the freedom of association under s.2(d) of the Charter of Rights and Freedoms? If yes, is the Regulation justified under s.1 of the Charter?

ARGUMENT

Legal Principles: Freedom of Association and the *Charter*

(i) Communal Associations and the Religious Practice of Beliefs

14. Freedom of association under the *Charter* has historically been exercised and explored by Canadian courts in the context of labour and political associations. The Supreme Court of Canada, however, has clearly held the freedom of association especially applies to religious groups and "is particularly important for the exercise of other fundamental freedoms, such as freedom of expression and freedom of conscience and religion" (*P.I.P.S v. Northwest Territories*, 1990 CarswellNWT 48 (SCC) at para. 38).

15. Eleven years later, this was again affirmed when the Court noted a denial of accreditation to TWU and its professional teaching graduates, on the basis of a community covenant upholding Christian beliefs and practices concerning sexuality, undeniably placed "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" (*TWU v. BCCT*, [2001] 1 SCR 772, at para. 33). The Applicants therefore benefit from s. 2(d) *Charter* protection.

(ii) What Does s. 2(d) of the *Charter* Protect?

16. The Supreme Court of Canada recently undertook a comprehensive review of the law concerning the freedom of association in *Ontario v. Fraser*, 2011 SCC 20. The majority of the Court in *Fraser* identified four predominant landmark decisions in the development of the freedom of association in Canada: (1) *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 [*Alberta Reference*][10], (2) *Dunmore v. Ontario*, 2001 SCC 94, (3) *P.I.P.S v. Northwest Territories*, 1990 CarswellNWT 48 (SCC), and more recently (4) *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27.

17. When read together, those landmark decision reveal s.2(d) of the *Charter* protects, *inter alia*, the freedom to:

(i) establish, belong to, and maintain an association (*P.I.P.S*, at para. 35);

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[10] This case belonged to a 'Trilogy' of 1987 cases. The two other cases included in the 1987 Trilogy were *PSAC v. Canada*, [1987] 1 S.C.R. 424, and *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460

(ii) achieve and pursue collective objectives and goals, including those based on unique group priorities (*Fraser,* at paras. 2, 25, 30; *Health Services*, at para. 96);

(iii) collectively embody the interests of individuals (*Dunmore*, at para. 30);

(iv) exercise collective activities meaningful to the formation and ongoing maintenance of the association (*Dunmore*, at para. 17, *Fraser*, at paras. 28-30, 47, 65);

(v) realize collective goals, as distinct from individual goals (*Fraser*, at para. 32);

(vi) satisfy the desire for social intercourse and realize common purposes (*Fraser,* at para. 2); and

(vii) communally exercise lawful rights and freedoms of individuals and in particular the freedoms of expression, conscience and religion (*Fraser,* at para. 22; *P.I.P.S*, at para. 38-39; *Alberta Reference*, at para. 143 and 154).

(iii) What is the Applicable Legal Test to Apply in s.2(d) *Charter* Claims?

18. The Supreme Court of Canada held in *Fraser* that the fundamental inquiry for a court determining if there has been a breach of s.2(d) of the *Charter* is whether, on a balance of probabilities, the Applicant has demonstrated the government law or action "substantially impairs" the ability of the association to pursue shared goals in concert (*Fraser*, at para. 64; *Health Services*, at para. 96).

19. If the Applicant can demonstrate (on a balance of probabilities) that it is impossible to meaningfully exercise the right to associate due to a "substantial interference" caused by the government law or action (or absence thereof), a breach is made out and the onus then shifts to the state to justify the limitation under s.1 of the *Charter* (*Fraser,* at para. 47). If the government action (i.e. decision) is administrative and involves the balancing of *Charter* values, the government must demonstrate the decision interferes with the claimants *Charter* rights and freedoms "no more than is necessary given the statutory objectives" (*Doré v. Barreau du Québec*, 2012 SCC 12, at para. 7).

(iv) Note on the Applicable Standard on Judicial Review

20. When the government action under review is a discretionary administrative decision empowered under an enabling statute within a specialized area of expertise, the standard of review is normally reasonableness (*Doré*, at para. 34). The reasonableness standard may continue to be appropriate even in cases where the administrative decision maker engages in the balancing of *Charter* values. The reasonableness standard will not always be appropriate and each case demands a contextual analysis centered on showing deference is "justified on the basis of the decision-maker's expertise and its proximity to the facts of the case" (*Doré*, at paras. 54-55).

21. If, however, an administrative decision-maker engages in the assessment of a written law or regulation (or covenant) for the purpose of determining whether or not the rule is constitutionally valid, the standard of review will be correctness (*Doré*, at para. 43). The determination of whether a provision offends one or more sections of the *Charter*, and is (or is not) reasonably justified in a free and democratic society is the precise function and specialty of courts of law. Decisions made using statutory powers which are informed and founded on the determination of complex legal analyses engaging questions of constitutional law will attract a standard of correctness (*Doré*, at para. 43; *Rogers Communications Inc. v. SOCAN*, 2012 2 SCR 283, at paras. 11, 14, 20; *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 50; *TWU v. BCCT*, 2001 SCC 31, at para. 14). The standard of review applicable for both the April 25th Resolution decision and the July 23rd Regulation 3.1 is that of correctness.

(v) Interpretive Guidance Concerning the Freedom of Association

22. In *Fraser*, McLachlin C.J. and LeBel J. held the freedom of association under s.2(d) of the *Charter* "must be interpreted generously and purposively, in accordance with Canadian values and Canada's international commitments" (at para. 32). Earlier, in *Alberta Reference*, Dickson J. noted the protection of freedom of association affords a wide scope of protected activity (at para. 143). In the same case, McIntyre J., writing for the majority, also recognized that s.2(d), like other *Charter* rights, "should receive a broad and generous construction" (at para. 151) and must be interpreted considering "the language, structure, and history of the constitutional text, by constitutional tradition, and by the history, traditions, and underlying philosophies of our society" (at para. 151).

Legal Principles Applied

Issue No. 1: Does the NSBS April 25th Resolution substantially impair the ability of TWU School of Law and its students from freely associating in breach of s.2(d) of the Charter of Rights and Freedoms?

(i) What Does the April 25th Resolution Say?

23. The April 25th Resolution states:

> 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 *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 [Emphasis added].

(ii) How to Determine if the Resolution Breaches s.2(d)

24. In order to demonstrate a breach of s.2(d) of the *Charter*, the court must be satisfied the Resolution causes a substantial interference making it impossible to meaningfully exercise the right of TWU and its students to associate (*Fraser*, at para. 47). Put another way, does the Resolution substantially impair s.2(d) protected freedoms of TWU Law School and its prospective students from**:**

(i) establishing, belonging to, and maintaining an association? (*P.I.P.S*, at para. 35);

(ii) achieving and pursuing collective objectives and goals, including those based on unique group priorities? (*Fraser,* at paras. 2, 25, 30; *Health Services*, at para. 96);

(iii) collectively embodying the interests of individuals? (*Dunmore*, at para. 30);

(iv) exercising collective activities meaningful to the formation and ongoing maintenance of the association? (*Dunmore*, at para. 17, *Fraser*, at paras. 28-30, 47, 65);

(v) realizing collective goals, as distinct from individual goals? (*Fraser*, at para. 32);

(vi) satisfying the desire for social intercourse and realizing common purposes? (*Fraser,* at para. 2); and

(vii) communally exercising lawful rights and freedoms of individuals? In particular the freedoms of expression, conscience and religion? (*Fraser,* at para. 22; *P.I.P.S*, at para. 38-39; *Alberta Reference*, at para. 143 and 154).

25. In order to determine a breach it is necessary to first understand the fundamental purposes, mission, goals, interests, lawful rights and freedoms of TWU and its students (i.e. the association, its members, and fundamental collective activities).

(iii) What are the Associational Purposes, Goals, and/or Objectives of TWU and its Students?

26. One of the clearest purposes for the association of TWU and its students is to achieve the collective goal of engaging in legal studies that (when successfully completed) result in the issuance of an approved Canadian law degree which prepares and qualifies students for entry into the practice of law in Canada. Another core associational goal of TWU and its students is for legal education to take place in a religious educational community of faith which integrates both

a Christian worldview and the practice and adherence to Christian beliefs (*TWU v. NSBS*, 2014 NSSC 331, at para. 1). Summed up, the TWU School of Law has been created to (1) produce qualified legal professionals, and (2) to carry out that purpose in a religious community of faith that practises and lives out Christian beliefs as defined by the institution in its Community Covenant.

(iv) The April 25th Resolution Breaches s.2(d) of the *Charter*

27. NSBS concedes in its April 25th Resolution that, but for its religious practices included in the Community Covenant, TWU meets all the nationally required educational standards. NSBS agrees that TWU is competent, qualified, and prepared to begin educating law students capable of passing law society bar admission exams for entry to the practice of law in Nova Scotia. Despite this, the April 25th Resolution demands that TWU additionally fulfill a condition precedent and either exempt law students from signing the Covenant or amend it in such a way that it ceases to discriminate.[11]

28. NSBS, however, does not have legal authority to force a religious association to alter its sincerely held religious beliefs that are collectively pursued in an effort to connect to the divine. Moreover, any such suggestion is inappropriate, disturbing, and contrary to law (*Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at para. 46; *TWU v. BCCT*, 2001 SCC 31, at para. 42). If the demand is not met, TWU will continue to be unapproved and all students who graduate from TWU will be barred from entering the NSBS bar. This barrier to admission is based exclusively on student affiliation (or association) with TWU and its collective practise of religious beliefs embodied in its Covenant.

29. Aside from *Charter* equality issues created by this type of ban (in purpose and effect on an enumerated ground)[12], the Resolution on its face directly instructs TWU to abandon its codification of biblical laws concerning the practice of sexual intimacy as reserved for marriage between "a man and a woman to the exclusion of all others" in order to become approved (*TWU v. NSBS*, 2014 NSSC 331, at para. 2; *Civil Marriage Act*, SC 2005, c 33, at s.3.1). This is a core associational goal of TWU and its students protected by s.2(d) of the *Charter*.

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[11] Although the April 25th Resolution does not specifically say so, the reference to "ceases to discriminate" must connote unlawful rather than lawful forms of discrimination which every law school in Canada necessarily engages in when, for instance a preference is provided for groups (i.e. aboriginal and mature student categories) which differentiate in admission processes on the basis of an enumerated ground under s.15 of the *Charter.*

[12] NSBS has duplicated the very same mischief it has relied on as justification for disqualifying TWU and its future graduates from being approved and entering their association.

30. If followed, this ultimatum imposed by the NSBS would result in TWU permitting active sexual intimacy outside of the biblical definition of marriage among its membership and within its community. This alteration would undermine and destroy one of TWU's fundamental associational goals of educating students in a Christian faith community. This would result in an educational environment that violates core Christian beliefs and ruin the purposes and goals the collective aspires to experience and achieve. To change the Community Covenant would be to deny their faith (i.e. change an immutable characteristic). If the Resolution were followed, it would be impossible for TWU and its students to meaningfully carry out their faith as a community considering obedience to teachings concerning sexuality are core to its religious beliefs and practices. This is a substantial impairment imposed on TWU and its students to meaningfully exercise and carry out the lawful exercise of communal religious beliefs and practices and is therefore a breach of s.2(d) of the *Charter.*

(v) Was the April 25th Decision Correct?

31. The April 25th Resolution reveals that the reason NSBS chose not to approve TWU was because "the Community Covenant is discriminatory and <u>therefore</u> Council does not approve…" (*TWU v. NSBS*, 2014 NSSC 331, at para. 2). The NSBS made a legal determination that the Community Covenant constitutes unlawful discrimination pursuant to the *Human Rights Act*, RSNS 1989, c 214, the *Charter*, or both. No court or human rights tribunal, however has made such a determination. NSBS made this legal decision in the absence of specific evidence of discrimination and therefore engaged in a theoretical legal analysis of the validity of a contractual provision (akin to reviewing the validity of a statutory provision).

32. That determination and the NSBS decision then addressed pure questions of law which attract the standard of correctness. This is an issue that is not within the NSBS's area of specialty pursuant to its enabling statute, the *Legal Profession Act*, SNS 2004, c 28. The NSBS's specialty is limited to the governance of the legal profession in the public interest and governing standards of education. NSBS is not specialized or empowered in the areas of constitutional law or human rights legislation and therefore does not merit deference concerning such determinations.

<u>The Decision was Incorrect at Law</u>

33. The April 25th Resolution decision was incorrect at law for various reasons. The primary substantive error NSBS made was concluding the TWU Covenant constitutes a form of unlawful discrimination under the *Charter* and human rights legislation.

34. First, TWU is a private non-governmental institution to whom the *Charter* does not apply (*TWU v. BCCT*, 2001 SCC 31, at para. 25). Therefore, any allegation of s.15 *Charter* equality discrimination perpetrated by TWU cannot stand considering the *Charter* has limited application to government actors (not private entities).

35. Secondly, concerning human rights legislation, NSBS also made a jurisdictional error when applying the Nova Scotia and not B.C. human rights legislation. TWU operates in Langley, B.C and is therefore subject to the *Human Rights Code*, RSBC 1996, c 210. The Nova Scotia *Human Rights Act* has no application against actors operating outside the walls of its provincial jurisdiction. Moreover, Supreme Court of Canada precedent has established that TWU is protected under exceptions included in the B.C. *Human Rights Code* designed to protect certain forms of discrimination when carried out by a religious or educational organization preferring persons of a protected class (*TWU v. BCCT*, 2001 SCC 31, at para. 32). TWU remains both an educational and religious association with the primary purpose of the promotion of an identifiable group or class (i.e. religion/Christians) and is legally permitted to prefer members of that class under s.41 of the *Human Rights Code*, RSBC 1996, c 210.

36. Aside from this precedent which remains valid law, even if the Nova Scotia *Human Rights Act* did apply to TWU (which it does not) similar protections exist comparable to the B.C. *Code* under s.6 of the *Human Rights Act*, RSNS 1989, c 214 which would similarly protect TWU's Community Covenant.

The Elephant in the Room – NSBS is Guilty of the Mischief it Alleges of TWU

37. Although the *Human Rights Act*, RSNS 1989, c 214 does not apply to TWU, it does apply to NSBS. It is worth noting that the April 25th Resolution itself is a violation of s.5 of Nova Scotia's own *Human Rights Act*, RSNS 1989, c 214 which states:

> 5(1) No person shall in respect of (g) membership in a professional association, business or trade association, employers' organization or employees' organization, discriminate against an individual or class of individuals on account of (k) religion; (l) creed; [or] (v) that individual's association with another individual or class of individuals having characteristics referred to in clauses (h) to (u).
>
> *Human Rights Act*, RSNS 1989, c 214, s.5(1)(g)(k),(l), and (v)

38. How can NSBS resolve to not approve TWU, based on reasons of unlawful discrimination, when itself through the April 25th Resolution creates a paradigm where it will refuse to allow TWU graduates into its society based on their affiliation with TWU premised on

a distinction on an enumerated ground under the *Charter* and the *Human Rights Act*, RSNS 1989, c 214?

Issue No. 2: Does the July 23, 2014 NSBS Regulation 3.1, passed pursuant to s.4 of the Legal Profession Act, SNS 2004, c 28 breach the freedom of association under s.2(d) of the Charter? If yes, is the Regulation justified under s.1 of the Charter?

(i) What Does the July 23rd Regulation 3.1 Say?

39. The Regulation 3.1 amendment was passed by the NSBS on July 23, 2014 and defines a law degree as :

> 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*.

40. The amendment to Regulation 3.1 was the "culmination" of the recognition by NSBS that "a regulatory amendment may be required to implement" the April 25th Resolution (*TWU v. NSBS*, 2014 NSSC 331, at para. 18). They are part and parcel and should be considered in concert with one another. Prior to the Regulation 3.1 amendment, NSBS deferred to law school approval decisions of the Federation of Law Societies.

41. Therefore, the intention behind the amendment to Regulation 3.1 was an attempt to legally validate the Resolution decision of April 25th to not approve TWU School of Law (effectively reversing the approvals of the Federation) and to place additional pressure on TWU to alter its Community Covenant. The Regulation 3.1 amendment specifically targets and punishes TWU graduates (while the April 25th Resolution targets TWU directly as an association).

(ii) Does Regulation 3.1 Breach s.2(d) of the *Charter*?

42. The April 25th Resolution determined TWU's Covenant constitutes unlawful discrimination. Given that determination, the Regulation 3.1 amendment now validates and perfects the means by which NSBS plans to deny TWU graduates admission to its society. The Regulation, although not specifically mentioning TWU, was intentionally directed to bar its graduates (*TWU v. NSBS*, 2014 NSSC 331, at paras. 4-5, 18).

43. Similar to the April 25th Resolution, the Regulation 3.1 amendment constitutes a breach of s.2(d) of the *Charter* if it causes a substantial interference that makes it impossible to

meaningfully exercise the right of TWU and its students to associate (*Fraser*, at para. 47; see detailed analysis above). Identified earlier, TWU and its students' core associational purposes are to produce qualified legal professionals in an educational institution while simultaneously carrying out its collective religious beliefs and practices through its Community Covenant.

44. Regulation 3.1 as now amended (like the April 25th Resolution) likewise robs TWU of its core associational purposes by barring its graduates to enter the profession of law in Nova Scotia. Canadian law schools that cannot produce Canadian lawyers able to practise anywhere in Canada is of little use (or none at all).[13]

45. Alternatively, if TWU is forced to change its Covenant to permit sexuality outside the biblical definition, it would cease to be able to fulfill its core associational goal as a religious institution premised on a commitment to the obedience of biblical principles. This would undermine TWU and its students' associational objective such that it would be impossible for them to meaningfully carry out and achieve their common goals. Put another way, a university cannot be Christian if it is not permitted to follow and carry out its faith (being forced to disobey its core biblical beliefs) and subsequently secularize.

46. Either scenario explored above (following the Resolution and complying with Regulation 3.1 or not) results in the substantial impairment of TWU and its students under s.2(d) of the *Charter*. Regulation 3.1 in conjunction with the April 25th Resolution makes it impossible for TWU and its students to meaningful exercise the faith which is core to their association (*Fraser*, at para. 47). Together they prohibit the pursuit of collective objectives and goals based on group priorities, and robs them of the collective embodiment of their interests – a Christian education in a religious community of faith (*Fraser*, at paras. 2, 25, 30; *Health Services*, at para. 96; *Dunmore*, at para. 30). Therefore, in addition to and expounding on the analysis in relation to the April 25th Resolution, the Regulation 3.1 amendment also constitutes a breach of s.2(d) *Charter*.

(iii) Can the s.2(d) Breach be Justified Pursuant to s.1 of the *Charter*?

What is the Objective and is it Pressing and Substantial?

47. Under s.1 of the *Charter*, having established a breach, the burden shifts to the government to satisfy the limit as reasonably justified and according to the framework in *R. v. Oakes*, [1986] 1 SCR 103. The objectives of the NSBS Resolution and Regulation 3.1 amendment are to confront alleged unlawful discrimination occurring in another province by

[13] See FLSC National Mobility Agreement 2013. Online: <http://www.flsc.ca/_documents/NationalMobility2013.pdf>

constructively forcing TWU to alter its Community Covenant or alternatively render its degrees useless in Nova Scotia. Is this objective pressing and substantial? (*Oakes*, at paras. 138-140; see also *Health Services* at para 138).

48. Providing further insight into the objectives of the NSBS, it is helpful to look at the context reasons for its decision. Prior to making its decision concerning TWU's proposed law school on April 25, 2014, the NSBS Council members were provided with a detailed summary of legal arguments and decision options.[14] Option C (which the Council ultimately chose) was based on the following reasoning:

> The Covenant, as is noted above, when viewed through the Nova Scotian legal lens is discriminatory and it is not saved by any exceptions in the *Human Rights Act*. TWU is allowed to believe, practice, promote and value its religious beliefs – but by requiring prospective students to execute a contract that contains discriminatory statements and by threatening discipline in the event of violation of the contract, TWU exceeds the bounds of protected religious freedom….This option does not condemn the students or future graduates as being unqualified to practice law; rather the systemic discrimination of the institution is what must be addressed and rejected…TWU has the power to take action to address this discrimination. The University can continue to believe in the sanctity of marriage between a man and a woman so long as the actions it takes in that regard do not negatively affect LGBT individuals.[15]

49. One reason NSBS's objectives are not pressing and substantial is because the Supreme Court of Canada has already determined that voluntary religious community rules concerning sexuality does not constitute unlawful discrimination. The Court has affirmed the s.2(a) and (d) freedom of individuals to adopt such rules in *TWU v. BCCT*. The NSBS attempts to avoid this binding precedent and instead has made a legal conclusion that TWU's Community Covenant is discriminatory[16] "through the Nova Scotian legal lens."[17] This determination is problematic.

50. First, this reasoning reflects a flawed appreciation of jurisdictional rules of legislative application. To speak plainly: TWU is located in B.C., not Nova Scotia. None of the alleged discrimination takes place in Nova Scotia and the Nova Scotia *Human Rights Act* does not extend to govern activities occurring other provinces. The NSBS does not, for instance, allege

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

[15] Executive Committee Memo at 17-18.

[16] Since the NSBS fail to recognize any lawful discrimination, particularly that of private voluntary associations, the NSBS states simply that it views the Community Covenant as "discriminatory." *Ibid*.

[17] *Ibid* at 17.

that a TWU law graduate would engage in illegal discriminatory conduct in Nova Scotia.[18] To the contrary, NSBS accepts that TWU grads will be capable on educational stadards (so, why deny them entry?). The jurisdictional aspect of this legal analysis is flawed since the statute relied upon does not apply to TWU. Moreover, NSBS Council is not empowered or specialized to make legal discrimination determinations of first instance as occurred in this case. That is the job of inherent courts of jurisdiction or the administrative human rights tribunals and commissions.

51. As pointed out by the Supreme Court of Canada in *R v Big M Drug Mart*, [1985] 1 SCR 295 at 353, concerning jurisdictional application of law "it seems clear that Parliament cannot rely upon an *ultra vires* purpose under s. 1 of the *Charter*." In the same manner NSBS cannot rely on an *ultra vires* purpose to justify infringing TWU's freedom of association. This constitutes both a legal error and does not reflect a pressing and substantial objective (for NSBS to govern the affairs of another province). Moreover, even if TWU were located in Nova Scotia, the Nova Scotia's *Human Rights Act* would not justify the NSBS decision considering its exemptions applicable to TWU. Therefore, it can also not be said that, limiting otherwise legally permissible actions of an association under Nova Scotia law, is a pressing and substantial objective.

52. Even if TWU's Covenant did violate the Nova Scotia *Human Rights Act*, where provisions of a human rights act violate individuals' s. 2(d) freedom of association, Courts must strike down those offending provisions, as did the Prince Edward Island Supreme Court, Appeal Division in *Condon v Prince Edward Island*, 2006 PESCAD 1(leave to appeal refused 2006 CarswellPEI 40 (SCC)).

53. In its Executive Committee Memo, NSBS references the recognition of same-sex marriage in Canada as a significant legal development that could be a basis to distinguish the Supreme Court of Canada decision in *TWU v BCCT*.[19] This argument, however, is precluded by express language of the *Civil Marriage Act*, SC 2005 c 33, s 1.1 which states:

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

[18] See TWU's Brief Re: Affidavits, dated August 25, 2014, quoting the following statement from the NSBS: "NSBS 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."

[19] Executive Committee Memo at 17.

> and woman to the exclusion of all others based on that guaranteed freedom [Emphasis added].

54. This very law that grants same-sex individuals the right to marry also protects religious organizations such as TWU which view marriage as exclusively between a man and a woman and engage in practices upholding that definition. It is another example that the Covenant uphold values that are federally legislated as not offensive, and worthy of statutory protection. It is not a pressing and substantial objective therefore for NSBS to make a decision contrary to federal laws that protect the very activity NSBS seeks to limit.

55. Therefore, in light of the preceding analysis, the NSBS objective of confronting alleged unlawful discrimination occurring in another province by constructively forcing TWU to alter its Community Covenant or alternatively rendering its degrees useless in Nova Scotia is not a pressing and substantial objective.

Is Regulation 3.1 Rationally Connected to Confronting Discrimination?

56. Assuming (for argument's sake) that combating discrimination by a non-government entity outside of Nova Scotia by Nova Soctians is a pressing and substantial objective, Regulation 3.1 would appear to be rationally connected to this inter-jurisdictional objective of one province combatting discrimination in another by use of its own human rights legislation.

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

57. Is it then minimally impairing to the associational rights of TWU and its law students to refuse to approve their law school and degree on account of the Community Covenant? No.

58. NSBS under the *Legal Profession Act* is empowered to regulate its members by imposing its own requirements and standards concerning education. The bar admission exams, articling, and continuing legal education are examples of such standards. They are all ways (currently in place) which address the objective of combating discrimination through educational standards in the legal profession within Nova Scotia. NSBS has exclusive power over what educational exams, courses, requirements, etc. are required to combat what it sees as unlawful discrimination. NSBS has the power to force all its members to answer questions and complete courses concerning equality law in Canada that address issues of unlawful discrimination.

59. Demanding TWU and its students alter sincerely held religious beliefs (or suffer the consequences) is nothing short of an imposition of secular beliefs on a religious community. This type of mandatory secularization of a religious group would be the reverse of antiquated mischief, previously caused by the *Lord's Day Act*, which forced mandatory observance of

religious days on everyone. The *Lord's Day Act* was extinguished almost 30 years ago in *R. v. Big M Drug Mart Ltd*., [1985] 1 S.C.R. 295. Is now the time to bring this type of alienating and forced imposition back into our society.

Are the Effects of the NSBS Decision Proportional?

60. Under the *Oakes* analysis the court must consider whether there is "proportionality between the deleterious and the salutary effects of the measures" (*Dagenais v CBC,* [1994] 3 SCR 835 at 889) or "whether the benefits of the impugned law are worth the cost of the rights limitation" (*Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567, at para. 77).

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

> Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve.

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

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

63. Empowering the government to reject a religious association's beliefs and rules with a right to impose changes on that association removes the ability of the group to "to interact with, support and be supported by their fellow humans in the varied activities in which they choose to engage" (*Alberta Reference*, at para. 88) and to "stand up to the institutionalized forces" that surround them (*Alberta Reference*, at para. 87). Allowing the NSBS decision would contribute to extinguishing the only faith-based law school in Canada (the rest are all secular and have similar ideological worldviews different than those of many religious faith groups).

64. Undermining freedom of association cripples individuals in their struggle "to be independent of government control" (*Alberta Reference*, at para. 89) by attacking "the bulwark of political liberty," "the cornerstone of civil liberties and social and economic rights alike" (*Alberta Reference*, at para. 153), and "community life, human progress and civilized society" (*Alberta Reference*, at para. 86). The NSBS Resolution and Regulation, if permitted to stand, will rob Christian legal education the right to meaningfully operate in Canada. The breakdown of

these hallmarks of freedom causes the effect of progressing one step closer towards a regime which governs and polices religious thought to conform to sectarian ideals.

65. The NSBS decision undermines the ability of individuals "to participate in determining and controlling the immediate circumstances of their lives and the rules, mores and principles which govern the communities in which they live" (*Alberta Reference*, at para. 86). This type of government intrusion is more similar to totalitarian states who fail to tolerate group activity because of the powerful check it might have on state power or ideological views (*Alberta Reference*, at para. 154).

66. Permitting government actors to impose changes on voluntary religious associations they disagree with affects not only TWU, but Canada's "multiplicity of organized groups, clubs and associations which further many different objectives, religious, political, educational, scientific, recreational and charitable" (*Alberta Reference*, at para. 154). Would it also be permissible, for instance, for a government actor to force a members-only same-sex group to permit membership to straight persons? And if not, to deny them a benefit unless they change their membership rules? This too would be a violation of s.2(d) of the *Charter*.

67. In *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, La Forest J. held at 317 that "the community interest embodied in the freedom of association" might be expressed as "the interest of society at large in the contributions in political, economic, social and cultural matters which can be made only if people are free to work in concert." People cannot be considered free to work in concert if a government who disagrees with their goals, and objective (or beliefs) acquires the right to impose changes on the association because it is different than mainstream ideology. For those reasons, the deleterious effects of the NSBS Resolution and Regulation are severe as towards TWU, its graduates, and all voluntary associations with membership rules and restrictions in Canada.

The Salutary Effects of the NSBS Decision

68. Forcing TWU to change its Community Covenant may theoretically benefit some LGBT individuals who are legally married under Canadian law, by allowing them to attend one university that is entirely founded on traditional evangelical Christian beliefs and teachings. But if TWU's voluntary community was forced by law to abandon its rules and practices in regard to sexuality and marriage, it would cease to be a traditional evangelical Christian university. The benefit to one section of society then could result in the extinguishment of another (the sole Christian law school in Canada). It would come at such a great cost and forcefully redefine

TWU's religious beliefs and practices at the hands of what can only be described as ultimatum pressure tactics.

69. The victory achieved by using the force of law to enable married LGBT individuals to attend a traditional evangelical Christian university may therefore not entirely be realized. The law school may cease to exist robbing not only LGBT individuals who wish to adhere to the Community Covenant but also Christian law students currently battling for positions in other Canadian law schools. What are the actual benefits for LGBT individuals? Unless TWU itself voluntarily chooses to eliminate its adherence to the traditional evangelical view of marriage and sexuality, the NSBS decision will be of no benefit to anyone. If TWU did end up relinquishing its religious commitment to the biblical definition of marriage (something it has refused to do, in spite of years of vilification), what would be the likely benefit then? LGBT would have another university to choose from and conservative Christians who desire to study law from a Christian perspective in a practicing Christian community would have no alternative options in Canada.

70. In assessing the weight of the benefits that might accrue from the NSBS decision, this Court needs to consider the *TWU v. BCCT* precedent, by which the Supreme Court of Canada has upheld TWU's policies concerning sexuality. The Supreme Court held the refusal to grant educational accreditation to TWU on account of its community's religious nature was unjustified. If the prohibition of sexuality outside of biblical marriage is lifted, LGBT individuals attending TWU would then be permitted to engage in sex, albeit only if married under Canadian law. This may convince more LGBT individuals to choose to join TWU, and perhaps even attend its law school. In light of these factors and considerations, the benefits to be derived from the NSBS exist, but do not outweigh the deleterious effects to TWU and its students.

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

71. As discussed above, the individuals who make up TWU – the faculty, staff and students – all have a constitutionally protected *Charter* right to freedom of association. Exercising this right, each member has voluntarily chosen to adhere to a Community Covenant whereby they seek to live according to Evangelical Christian values, including those pertaining to sexuality, while they pursue their academic and career objectives.

72. While many of TWU's values, not only those relating to sexuality, would not be shared by the many Canadians, the small university of less than 4,000 students appears to be thriving, even to the point of attempting to open a law school. There is clearly a segment of the population that identifies with the values embraced at TWU and is willing to pay higher-than-average tuition

rates to pursue their education at TWU. By requiring that TWU change its religious commitment expressed in its Community Covenant, the NSBS's decision directly targets the collective exercise of individual TWU members' *Charter* and lawful rights protected under s 2(d).

73. The issue of human sexuality is not only a gender issue, it is also an issue of conscience and religion. To require TWU to change its obviously deeply-held religious practices and rules concerning sexuality in order for TWU to receive equal treatment and be permitted to fully participate in society is very high cost for individual TWU members. TWU was formed by an evangelical denomination as a specifically Christian educational institution, based on evangelical beliefs and teachings. To require that TWU omit the area of human sexuality from the purview of its collective beliefs, practices and rules directly affects those individuals who seek to make TWU their own.

Conclusion on the Proportionality of Effects

74. The JCCF herein submits that the harm of the NSBS decision could adversely extend to the freedom of association of thousands of Canadian charities, cultural groups, educational institutions, political clubs, and other voluntary associations in a manner that outweighs its potential benefits. The NSBS decision more than likely will result in little benefit, as TWU is not inclined to change its sincerely held religious beliefs protected under s.2(a) of the *Charter*. Further, even if TWU did change its practices and rules as set out in the Community Covenant, the benefit to LGBT individuals would be little or negligible, as most LGBT individuals would likely not feel comfortable in attending an institution that espouses evangelical Christian views.

75. On the other hand, the deleterious effects on the individuals who make up TWU would be severe. The NSBS decision attempts to force them to repudiate their individual, collective and publicly expressed commitment to living according to evangelical Christian beliefs that includes rules on sexuality. If they do not, as a collective, they will be denied approval to their law school and will instead be treated individually as second-class law graduates, solely because they collectively express their commitment to their religious view of sexuality.

76. In summary, the NSBS decision lacks both a pressing and substantial objective and is not proportional. Consequently, the NSBS's decision is not justified under s.1 as a reasonable limit on freedom of association.

CONCLUSION: NOT FREE TO ASSOCIATE

77. The decision of the Nova Scotia NSBS unjustifiably violates the *Charter* s. 2(d) rights of TWU law students and prospective students. The underlying principle on which this decision is based threatens every voluntary association in Canada with the risk of being compelled, by a government body who disagrees with the association's core beliefs, rules and practices.

78. The NSBS decision cannot be upheld without also accepting the principle that going forward this creates a precedent that the state can constructively force associations to change their internal rules and policies (in this case religious teachings and rules concerning sexuality) it deems to be unlawful (in the absence of a court doing so). This principle has no basis in Canadian law, and is utterly incompatible with the freedom of association guaranteed by section 2(d) of the *Charter*.

79. Further, the NSBS decision is based on equating illegal discrimination practised by government with legal and necessary discrimination practised by voluntary associations. This error is serious because it ignores s.32 of the *Charter*, by which the *Charter* applies only to government. The NSBS decision cannot be upheld without accepting the erroneous principle that voluntary associations are required to refrain from discrimination when they are specifically protected in human rights legislation. Section 2(d) of the *Charter* and human rights legislation protects private voluntary associations in some cases when they discriminate against those who fail to align with its goals, rules or practices. The *Charter* and Nova Scotia *Human Rights Act* does however prohibit the government (NSBS) from violating individual freedom of association in a professional association based on an enumerated ground. The NSBS' decision does not have a pressing and substantial objective. It is not legally permissible for NSBS to apply Nova Scotia human rights law to a private institution in another province to remedy "discrimination" alleged to occur elsewhere.

80. Finally, the benefits that may result from the NSBS decision grossly outweigh the detriment to TWU and its students and their protected s.2(d) *Charter* freedom of association.

Dated at Calgary Alberta, this 28th day of October, 2014.

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