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

Association for Reformed Political Action

Evangelical Fellowship of Canada, Christian Higher Education Canada

Attorney General of Canada

Catholic Civil Rights League, Faith and Freedom Alliance

Christian Legal Foundation

Canadian Council of Christian Charities

Nova Scotia Human Rights Commission

Intervenors

RESPONDENT'S BRIEF

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PART I - INTRODUCTION AND OVERVIEW

1. The Nova Scotia Barristers' Society (the "Society") is the public interest regulator of the independent legal profession in Nova Scotia. The Society gains its authority from the *Legal Profession Act*[1] (the "*LPA*"), which sets the jurisdictional limits on what it can do. It gains its focus and direction not only from the *LPA*, but from its lengthy history, the current context of the practice of law, and from the values and norms reflected in society as a whole.

2. As the statutory objectives of the Society contained in the *LPA* are broad, how the Society carries out its purpose may be discerned from a variety of sources, one of which is its Strategic Framework.[2] The Framework provides that two of the Society's strategic initiatives are to (i) examine and approve regulatory changes to enhance access to legal services and (ii) advocate for enhanced access to legal services and to the justice system for equity-seeking groups (which include persons seeking equality on the basis of their sexual orientation and gender identity).

3. The recent history of the Society has been influenced significantly by the findings of the Marshall Commission in 1989.[3] As respected former President F. B. Wickwire stated in a report to the Council of the Society in 1991: "Our commitment as the governing body of the legal profession in Nova Scotia is firm; to do all that we can to eliminate discrimination in the justice system".

4. Since then there has been an evolution in the Society's purpose and role to reflect a broader mandate to improve the administration of justice in this province. The Society created an Equity Office and as recently as 2013 updated its mandate to require it to assist in fulfilling the Society's regulatory functions of maintaining public confidence in the regulation of the profession, upholding the public interest in the practice of law and seeking to improve the administration of justice in relation to equity and diversity.[4]

5. Against this backdrop, in late 2013 and early 2014 the Society was called upon to consider whether a law degree from a new law school proposed by Trinity Western University ("TWU") would be accepted by the Society for membership purposes. TWU is

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[1] *Legal Profession Act*, S.N.S. 2004, c. 28.
[2] Affidavit of Darrel Pink at Exhibit 11.
[3] Affidavit of Darrel Pink at Exhibit 1.
[4] Affidavit of Darrel Pink at Exhibit 3.

a private Christian university formed in 1962 in Langley, British Columbia.[5] It is affiliated with the Evangelical Free Church of Canada ("EFCC"). Evangelical Christians express belief in four core principles: 1) the authority of the Bible; 2) the unique work of Jesus Christ as the only means of salvation; 3) the importance of the conversion experience, and 4) an active faith, involving church attendance, devotionalism and evangelism.[6]

6. TWU requires its faculty, staff[7] and students to read, understand and pledge to the terms of its Community Covenant (the "Covenant"). It is a mandatory part of the admissions' policy that requires students to commit to "embody attitudes and to practise actions identified in the Bible as virtues and to avoid those portrayed as destructive."[8]

7. One of the actions that TWU considers destructive and from which the Covenant requires students to abstain is "sexual intimacy that violates the sacredness of marriage between a man and a woman."[9]

8. In 2013 TWU sought and obtained permission[10] from the BC Minister of Advanced Education to operate a law school in BC, commencing in 2016.

9. The Canadian Common Law Approval Committee of the Federation of Law Societies ("Approval Committee") is responsible for considering whether common law programs meet the national requirement that establish the skills and knowledge that graduates must possess to be admitted to the bar of a province. In December, 2013, the Federation of Law Societies (the "Federation") granted preliminary approval for the curriculum proposed by TWU and the matter was then considered by the Society under its statutory authority to regulate the legal profession in the province.[11]

10. In April, 2014, following a comprehensive public consultation process during which the Society received more than 150 written submissions and heard some 25 oral

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[5] This issue is in litigation in another Province, but for purposes of this proceeding the society is prepared to consider TWU to be private notwithstanding some public grant monies received by TWU.
[6] Reimer Affidavit at paragraph 48.
[7] Part-time staff at the Law School will be exempted from this requirement.
[8] Trinity Western Community Covenant Agreement, Tab A at p. 2.
[9] Tab A at p. 3.
[10] Under the *Degree Authorization Act*, SBC 2002, c 24, a condition of approval is acceptance of the degree by the regulator of the profession. While the Benchers of the BC Law Society initially approved the proposed degree, a recent decision through the referendum of its members resulted in the Benchers rescinding their approval. See online at http://www.lawsociety.bc.ca/page.cfm?cid=3997&t=Proposed-TWU-law-school-not-approved-for-Law-Society's-admission - program. At the time of writing this Brief, the implications of this decision to the Ministerial approval of the law degree remain uncertain.
[11] Canadian Common Law Approval Committee Report, Record, NSBS001387 at p. 2.

submissions, the Society passed a resolution accepting the Approval Committee's Report that the proposed curriculum of TWU meets national requirements for common law programs, and approved the proposed law school on the condition that TWU either exempt law students from the mandatory requirement to agree to the Covenant or amend the Covenant in a way that ceases to discriminate ("the Resolution"). The Society also resolved to make any necessary amendments to its regulations to implement the Resolution.[12]

11. On May 29, 2014, the Applicants filed an Application for Judicial Review of the Resolution.

12. On July 23, 2014, the Society amended its regulations in accordance with the Resolution. The Regulation was amended to define a "law degree" as one approved by the Federation, unless Council determines that the university granting the degree unlawfully discriminates in its admissions or enrolment requirements.[13]

13. The Society brought a motion before the Court to have the Application for Judicial Review also be considered as an Application in Court so that both the Resolution and the Regulation could be considered by the Court with a full record. Justice Coady granted the request.[14]

14. There are a number of issues of administrative and constitutional law raised in the present case. The Applicants and the Intervenors have raised questions regarding the Society's jurisdiction "to approve law schools" as well as what they describe as infringements of the *Canadian Charter of Rights and Freedoms* ("*Charter*") under section 2(a) freedom of religion; section 2(b) freedom of expression; section 2(d) freedom of association; and section 15(1) equality. Finally, they argue that the Supreme Court of Canada's decision in *Trinity Western University v. BC College of Teachers* 2001 SCC 31 ("*BC Teachers*") is binding and conclusive.

15. The Society takes the position that throughout the various processes at play in this case it acted entirely within its jurisdiction in accordance with properly interpreted authority under the *LPA*. The Society made a reasonable decision when it decided to grant

[12] NSBS Council Meeting Minutes, April 25, 2014, Record, NSBS001255. The Resolution is attached as Tab B.
[13] The Regulation, Regulations made pursuant to the *Legal Profession Act*, S.N.S. 2004, c. 28, Record, NSBS001875 at p. 18. The Regulation is attached as Tab C.
[14] *Trinity Western University v. Nova Scotia Barristers' Society* 2014 NSSC 331.

approval to a law degree from TWU, conditional on the requirement to exempt law students from or to amend the Covenant.

16. The Society did not violate future TWU students' *Charter* rights. While the *Charter* does protect freedom of religion and association it does not require the Society to validate or support conduct that discriminates against others. The Regulation prohibiting discrimination is not directed at the content or exercise of Evangelical Christian or any other religious belief. It does not regulate expression, belief or association at all. Those who hold evangelical beliefs are not singled out. Instead, it is the law degree from schools that engage in discriminatory conduct that is singled out.

17. In the following lengthy pages of legal arguments about the applicable standard of review, jurisdictional and "true" jurisdictional issues, principles of extra-territorial application of law, the application of *Charter* rights and human rights legislation, among other things, it is sometimes easy to lose sight of what this case is about and what it is not about.

18. This case is not about precluding TWU graduates who hold religious beliefs from seeking membership in the legal profession in Nova Scotia.

19. This case is about recognizing that TWU, in seeking regulatory approval from the Society, has left the purely private sphere where some discrimination may be permitted on religious grounds, and has entered the public domain of statutorily regulated professions where different rules apply and different obligations exist.

20. This case is about whether the Society, as the public interest regulator of the legal profession in Nova Scotia, with a mandate to promote equity and diversity, should endorse a law school's admission and enrolment policy that requires LGB students to denounce their constitutionally protected sexual orientation, in exchange for a law degree.

21. This case is about the Society's role and its obligation to ensure equal opportunity to access the legal profession, and ultimately the judiciary, to historically disadvantaged persons.

22. The Society respectfully asks the Court to uphold the Regulation and Resolution, both of which are within its legal authority and statutory purpose and consistent with the *Charter.*

CLEARING UP MISCONCEPTIONS

23. The Applicants and the Intervenors base their submissions on what the Society says are a number of misconceptions that must be addressed at the outset.

A. The Applicants and Some Intervenors Misconstrue the Reasoning Underlying the Society's Resolution and Regulation

24. The Society does not assert that Evangelical Christians generally, or TWU graduates specifically, should be disqualified from entry into the profession of law in Nova Scotia because of a tenet of their faith, or because their education at TWU would result in a propensity to discriminate against LGB persons. The Society accepts that Evangelical Christians are entitled to hold beliefs which others may characterize as homophobic and the Society does not question the sincerity of those beliefs. The Society welcomes Evangelical Christians to practice law in Nova Scotia, just as believers in other faiths and atheists are also welcome. Lawyers in Nova Scotia are expected to abide by the *Human Rights Act*[15] (the "HRA"), in their capacity as employers and service providers and are expected to comply with the duty to treat all persons with equality and without discrimination in accordance with the Society's ethical standards and rules.[16] The Society does not assert or assume that TWU graduates are incapable of complying with these laws, standards or rules.

25. The Society's position on this issue was reflected in an express acknowledgment to the Applicants when the parties were making decisions on the admission of affidavit evidence:

> The Society 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]

26. The Society's position reflects a philosophy about equality of opportunity: that no person should be presumed, by virtue of their beliefs alone, to be incapable of complying with the ethical obligations of the profession, and all persons should be given an equal

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[15] *Human Rights Act*, R.S.N.S. 1989, c. 214.
[16] See paragraphs 6-8 of the Applicants' Brief, where these requirements are accurately set forth.
[17] This acknowledgment was accurately set out in the Applicants' Brief at paragraph 16. It is at times however, incorrectly characterized as an evidentiary acknowledgment that there is "no evidence" of intolerance towards LGB persons or predisposition to discriminate by TWU graduates: paragraphs 109, 214, 217, 225. The Society has not sought such evidence since, even if there is discriminatory conduct by particular individuals, that should not rule out the opportunity for other members of a religious group to comply with ethical requirements.

opportunity to participate in the profession unless and until their actual conduct becomes unethical, or is otherwise contrary to law.

27. The Resolution also reflects this position as it invites TWU to exempt law students from the obligation to sign the Covenant as one method of securing the Society's approval for a "law degree" from TWU for purposes of the Society's admissions regulation. Clearly, what offends the Society is not the belief that any sexual conduct outside of marriage between a man and a woman is morally repugnant but the requirement that LGB persons, both married and unmarried, pledge to a covenant of self-denial.

28. The misconception about the Society's position leads to serious error in identifying, for both statutory *ultra vires* analysis purposes and *Charter* analysis purposes, the "pressing and substantial" public interest concern that justifies the impugned Resolution and Regulation. This "pressing and substantial" analysis is only necessary in the event that the regulation and resolution otherwise infringe *Charter* rights of TWU, prospective TWU law graduates or Evangelical Christians.[18]

29. The concern is not to keep Evangelical Christians out of the profession in this Province. Instead, the goal is to ensure that LGB persons, as a historically disadvantaged minority, do not experience unnecessary barriers to entry, and are not made unwelcome in the legal and judicial professions in Nova Scotia. The Society cannot approve the *de facto* reservation of all of the spaces in one of only 19 common law schools in Canada[19] exclusively for heterosexual persons.[20] This goal is reflected in the Society's Policy 2.5.1, namely, to "identify and then seek to eliminate barriers to entry to the legal profession from members of historically disadvantaged communities."[21] The Society's concern is not with the beliefs of its members, but with the diversity of the profession. This in turn is linked to the public interest in the due administration of justice by the

[18] For reasons discussed below, there is no applicable infringement. The public interest mandate of the Society, is highly relevant, however, to the *ultra vires* issues.
[19] Affidavit of Darrel Pink, Paragraph 33, indicates there are currently 18 common law schools in Canada and TWU would accordingly be the 19th.
[20] The Society adopts the unanimous analysis in *Saskatchewan (Human Rights Commission) v Whatcott* 2013 SCC 11, at paragraphs 121-124 ("*Whatcott*") to the effect that targeting LGB conduct as distinct from targeting persons of LGB orientation is an ineffective distinction for purposes of surviving a discrimination analysis. Specifically, the Court in *Whatcott* adopted the remarks of L'Heureux-Dubé J in the *BC Teachers* case at para 69: "I am dismayed that at various points in the history of this case the argument has been made that one can separate condemnation of the "sexual sin" of "homosexual behaviour" from intolerance of those with homosexual or bisexual orientations. This position alleges that one can love the sinner, but condemn the sin [...]. The status/conduct or identity/practice distinction for homosexuals and bisexuals should be soundly rejected."
[21] Affidavit of Darrel Pink, Paragraph 28.

Society's consciousness of the dangers stemming from under-representation of minorities which was particularly underlined in the work of the Marshall Commission.[22]

30. This misconception also leads the Applicants and the Intervenors to ignore a fundamental distinction between this case and *BC Teachers*. The *BC Teachers* case was argued largely on the basis that teachers trained at TWU would not be qualified to teach in the public school system because of the risks of discriminatory conduct flowing from their belief that same-sex sexual acts are "sinful", "an abomination", and "contrary to nature".[23]

31. This is not the basis for the Society's refusal to recognize TWU's law degree. The Society's refusal is based on its need to act in the public interest by promoting diversity in the profession.

B. The Regulation and Resolution do not prevent TWU graduates from practising law in Nova Scotia

32. A "law degree" recognized by the Regulation is a qualification that applies to persons seeking to article in Nova Scotia, but is subject to a waiver which may be granted by the Executive Director under Regulation 3.2. Articling in this province is one way of being able to practise here. Another way is by means of transfer from another province to which a TWU graduate has been admitted. Nothing in the Resolution or the Regulation precludes that from happening.

33. The Executive Director's discretion to waive any of the qualifications would potentially allow for case-by-case admissions after students have graduated from TWU. Presumably, if a graduate applied for a waiver and was denied one, the graduate could apply for judicial review of that decision, including upon *Charter* grounds. Until this case and possibly other cases touching on similar issues in British Columbia and Ontario are decided, and until the Society is faced with an actual TWU graduate, it will not be possible to predict how the Executive Director would respond to a request for a waiver of the law degree requirement based on *Charter* or *Human Rights Act* grounds. It should be presumed that the Executive Director would respond lawfully.

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[22] Affidavit of Darrel Pink, Paragraphs 4ff.
[23] Affidavit of Dr. Jeffrey P. Greenman, Paragraphs 159-168.

34. The Regulation and the Resolution have the effect of ensuring that TWU is not permitted to limit the sexual-orientation diversity of the pool of Nova Scotia Bar admissions' applicants without consequence. Students wishing to consider a career in Nova Scotia are being given advance warning that they will have to use an alternate practice entry method if they cannot persuade their prospective law school to adopt a policy that does not limit the diversity of the pool of potential admittees to the Nova Scotia Bar.

C. TWU's Covenant is Not Voluntary

35. There are repeated references to the "voluntary" nature of the TWU Covenant in the briefs of the Applicants and Intervenors and the Covenant actually refers to "voluntarily abstain[ing] from" [...] sexual intimacy that violates the sacredness of marriage between a man and a woman.[24] Saying the Covenant is voluntary, does not make it so.

36. Agreeing to the Covenant is <u>not</u> voluntary, but rather, mandatory, for TWU students to enrol and to continue attending TWU. Prospective students are required to commit to the Covenant[25] even though they are not required to commit to the Statement of Faith,[26] and even though TWU accepts students from various religious and non-religious backgrounds.[27]

37. The Applicants and Intervenors repeatedly state that they welcome LGB students to attend TWU.[28] Evangelical doctrine first declares that same-sex sexual activity is contrary to nature and can under no circumstances be approved, but goes on to direct that LGB people be treated with respect, compassion and sensitivity and also that discrimination or harassment will not be tolerated.[29] In other words, they say "it's ok to be gay, just don't act gay".[30]

38. This principle of "love the sinner, condemn the sin", has been soundly rejected as contrary to Canadian law and the public interest.[31]

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[24] Covenant, Tab A at pp. 2-3.
[25] Affidavit of Dr. W. Robert Wood, Paragraph 96, 125.
[26] Affidavit of Dr. W. Robert Wood, Paragraph 62-63.
[27] Affidavit of Dr. W. Robert Wood, Paragraph 92. See also *Trinity Western Act*, discussed below.
[28] Applicants' Brief, Paragraph 163.
[29] Affidavit of Jeffrey P. Greenman, Paragraphs 144-169.
[30] In *Hall (Litigation guardian of) v. Powers,* (2002) 59 OR (3d) 423 (S.C.J.) a high school student who was refused permission to attend the prom at a Catholic high school pointed out, and the court notes, the inconsistency of accepting people as LGB people and, at the same time, suppressing all activity connected to their identities.
[31] *Saskatchewan (Human Rights Commission) v. Whatcott* 2013 SCC 11, at paragraph 123.

39. Further, even if attendance at TWU and adherence to the Covenant can be said to be voluntary, that voluntariness may be mitigated by the small number of places available at Canadian common law schools relative to the demand.[32] As TWU noted in its proposal to the Approvals Committee:

> [...] Canada has the lowest number of law schools per capita of any Commonwealth country.
>
> Competition to get into existing law schools is now fierce, with many arguably qualified candidates unable to access a legal education. [...] Many qualified candidates have been forced to look for international options for a legal education.[33]

40. For some people on the cusp of being accepted to a law school, TWU may be the school to which they have the best or most practical chance of admission.[34] To have all of its law school admissions reserved for heterosexuals or LGB people willing to deny their orientation is discriminatory. It gives preference to those of a majoritarian sexual orientation.

D. TWU's Law School is Not a Church

41. While TWU is affiliated with the Evangelical Free Church of Canada, its proposed law school is not a religious institution. It will confer a Canadian common law legal education on its students and TWU proposes to offer all core courses offered at secular law schools.[35] Judging by the efforts taken by TWU to have its prospective law degrees recognized by Canadian law societies, it is not training lawyers solely to become ecclesiastical law scholars or in-house church lawyers, but to seek their admittance to a regulated profession by the designated regulatory authority in each Province, and presumably to go forth into the public domain to practice law.[36]

42. Legal education is not at, or even close to, the heart of religion, religious practice or religious rites. It is squarely in the secular, non-religious domain. Offering a law degree,

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[32] Affidavit of Darrel Pink, Paragraph 33.
[33] TWU's Proposal to the Approvals Committee, Record, NSBS001387 at p. 50.
[34] This may arise because of TWU being the newest law school, or because it is geographically proximate and more manageable for prospective students with family or other local commitments in the area, or possibly because of parental directions from evangelical Christian parents.
[35] See TWU's Proposal to the Approval Committee, Record, NSBS001387 at pp. 56-68 for a list of proposed courses and course descriptions. Detailed course descriptions are contained in Appendix 8 of the Proposal at pp. 118ff. It is noteworthy that NONE of the course descriptions contain any Evangelical component.
[36] See brief of the Intervenor, Justice Centre for Constitutional Freedoms at paragraph 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".

even one that integrates a Christian perspective, is not a religious rite or function. This is in marked contrast to the performance by Church officials of church marriage ceremonies discussed by the Supreme Court of Canada in the *Reference re Same Sex Marriage* 2004 SCC 79 ("*Marriage Reference*") at paragraph 57 in which the Court noted that "[t]he performance of **religious rites** is a fundamental aspect of religious practice." [emphasis added]

43. Many of the Intervenors and affiants of TWU proclaim the mission of evangelical Christians to take their religious beliefs and values into their everyday life, beyond the sphere of traditional religious worship, into the "public square". This is not objectionable in itself, but discrimination and other harmful conduct does not attract the protection of "freedom of religion" when approvals are being sought from a statutory authority regulating secular activities, such as the practice of law.

E. TWU's Covenant is not a Religious Requirement

44. The evidence submitted by the Applicants makes it clear that those serving in Evangelical Free Church of Canada ("EFCC") ministries must agree to an EFCC covenant which has a similar blanket proscription against same-sex sexual conduct that appears in TWU's Covenant.[37] There is no evidence, however, that pledging to abide by such a covenant is required of members of this Church. In other words, abstention from same-sex sexual conduct is not made a condition of membership in the Church or attendance at services – at the least, there is no evidence of it before the Court.[38]

45. The TWU covenant precluding same-sex sexual conduct does so irrespective of whether the prospective student is married and living off-campus and irrespective of the student's faith or non-faith. There is nothing in the Covenant to prevent a student from praying to a non-Christian God or wearing clothing, jewellery or symbols of other faiths. The stated concern in the briefs of the Applicants and their supporting Intervenors for the freedom to associate with individuals of like faith is difficult to reconcile with the singularity of the focus on proscribed sexual conduct at TWU rather than adherence to all elements of the faith. It is inconsistent as well with s. 3(2) of TWU's enabling statute, which expressly

[37] Affidavit of William (Bill) Taylor, paragraphs 78-81, and Exhibit D.

[38] There is passing reference in Prof Reimer's Affidavit to Evangelical Christians having "behavioural expectations" that include sexual moral purity (paragraph 54-55), but nothing indicating that the members of Evangelical churches, let alone the EFCC, are required to pledge or sign a Covenant or code of conduct. Dr Taylor, who is the Executive Director of the EFCC is careful to limit his comments on the use of a code of conduct or covenant to those serving as ministers: paragraphs 78-79 and 107-108.

mandates it to provide an education to "young people of any race, colour or **creed** [emphasis added]".[39]

46. The Society does not challenge the sincerity or the religious nature of the belief of Evangelical Christians that sexual activity is restricted to marriage between a man and a woman. The Society does, however, challenge that it is a religious requirement to impose it on all law students, including students of other faiths and orientations. The Society also challenges that it is a religious requirement only to allow LGB law students to associate with Evangelical Christians if they agree not to be sexually active.

47. There is nothing in the evidence that indicates that the imposition of a mandatory covenant is a matter of religious belief, religious policy or dogma or that it is necessary to meaningfully exercise the Applicants' *Charter* rights. The evidence from Professor Reimer on behalf of TWU suggests, rather, that moral codes of conduct that are "distinctive", "have greater restrictions", and which create "tension with other relevant outgroups" generate a branding or marketing advantage for particular "religious subcultures".[40] If the Covenant is not a requirement found at the base of the religion itself – the member in the Church - and if other religious beliefs, dogma and rites of the Evangelical Free Church of Canada are not made mandatory at TWU, and if non-Christians are welcome to attend TWU, how can it fairly be said to be a religious requirement or rite that all students pledge to abide by the Covenant?

F. Evangelical Christians are Not a Historically Disadvantaged Minority

48. There is no evidence in the Record or Affidavits that would support a finding that Evangelical Christians are a historically disadvantaged minority. Evangelical Christians may well be, as suggested by Professor Reimer, a distinct "religious subculture", but they are a subgroup of a historically dominant Christian religion. There is no evidence before the Court that Evangelical Christians have been persecuted or discriminated against over time. In fact, the Canadian Council of Christian Charities' submission is replete with discussion of "special treatment" that Christian religious communities have

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[39] *Trinity Junior College Act*, SBC 1969, c 44, as amended by the *Trinity Western College Amendment Act, 1979*, SBC 1979, c. 37, and the *Trinity Western College Amendment Act, 1985*, SBC 1985, c. 63 ("*TWU Act*"). A consolidated version of the *TWU* Act is provided in the Affidavit of Dr W. Robert Wood as Exhibit "E".

[40] Affidavit of Dr Samuel H. Reimer, paragraphs 67-91. Dr Reimer does not explicitly refer to the effect as a branding or marketing advantage, but this is a fair conclusion from his analysis. He refers to the effect as one of strengthening the subculture: paragraph 72.

historically received in Canada.[41] The fact that the EFCC is associated with a university project to establish a law school exemplifies the absence of disadvantage. There are notably no aboriginal law schools, LGB law schools, African Canadian law schools, women's law schools, nor even any Jewish or Muslim law schools in Canada.

49. This historical Christian dominance does not mean that the religious freedoms of Evangelical Christians are not fully protected under the *Charter*. Nor does it mean that EFCC believers enjoy no equality rights. What it does mean, however, is that the Court should not lose sight of which group, as between LGB people and Evangelical Christians, is the group that needs positive steps to be taken by governmental and public authorities to ensure diversity and inclusion in the legal profession. The invisibility of Evangelical Christians in the Society's annual self-identification survey – complained of by the Applicants[42] – simply reflects the reality that there is no evidence of a long-standing discrimination problem directly having an adverse impact on members of the evangelical community, the way there has been for centuries against LGB people.

G. By seeking regulatory approval to confer a law degree recognized by the Society TWU has left the purely private sphere and entered the domain of public sector, *Charter*-compliant organizations

50. If TWU were offering a legal education for persons not seeking admission to the articling program in Nova Scotia, it could legitimately claim to be beyond the purview of regulatory authorities. However, its students need to know before they make the decision to enrol, that the recognition of their future law degree in Nova Scotia is in jeopardy unless they persuade their legal education provider to open its admissions policies to persons who are not required to sign a discriminatory Covenant.

51. There is no evidence that any law school reserves places for LGB students. TWU effectively proposes to reserve places at one law school entirely for heterosexual people. By joining the select group of institutions offering a much sought-after Canadian common law legal education, TWU is affecting the balance between heterosexual and LGB law students in a way that aggravates the pre-existing patterns of discrimination.[43]

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[41] See paragraph 19. See also the Chenier Affidavit where the dominance of Christian beliefs is the historical norm in Canada.

[42] Applicants' Brief, paragraphs 185-190. In this passage, the Applicants also say that the Society took active steps to exclude Benjamin Shearer from the Nova Scotia Bar. This is false. His Affidavit confirms that he was eligible and welcome but that he unilaterally declined to be admitted. It may be inferred that this was in response to the Society's condemnation of discrimination by TWU against LGB persons.

[43] Affidavit of Prof Mary Bryson, paragraph 19.

This effect may be small in its own right, but it is significant, even if only a few LGB students suffer from it. If the Society were to condone TWU's admissions' policy it would be sending a clear message to LGB people that the Society is prepared to passively acquiesce to an unlevel playing field and to perpetuate discriminatory practices. This would not be consistent with the considerable efforts of the Society in recent years to communicate welcome to this historically disadvantaged and persecuted minority. It would also in itself contribute to the minority stress identified by Professor Bryson.[44]

H. The *BC Teachers* Case is Not Determinative

52. The Society's position is that the issues in the *BC Teachers* case are different than those in the present case. The factual foundation, the applicable standard of review and the constitutional issues raised in *BC Teachers* mandated a particular analysis by the Supreme Court of Canada. The factual foundation, applicable standard of review and constitutional issues raised by the Resolution and the Regulation mandate a different focus, a different analysis and ultimately, a different result.

53. In *BC Teachers*, the British Columbia College of Teachers (the "College") rejected TWU's application for certification of a teacher-training program. The case was primarily decided by the Supreme Court of Canada on the grounds asserted by the College that the graduates from TWU would not be qualified to teach in the public school system because of the institutional environment in which they received their degree. The majority judgment described the College's position as follows at paragraph 11:

> The BCCT argues that teaching programs must be offered in an environment that reflects human rights values and that those values can be used as a guide in the assessment of the impact of discriminatory practices on pedagogy. Although the BCCT did not take into account the existence of special institutions such as TWU in designing its bylaws and policies, it claims that all institutions who wish to train teachers for entry into the public education system **must satisfy the BCCT that they will provide an institutional setting that appropriately prepares future teachers for the public school environment, and in particular for the diversity of public school students.** [emphasis added]

54. The majority set out the issues that it considered at paragraph 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**

[44] Ibid, pages 12-14.

> **sufficient to justify that graduates of TWU should not be admitted to teach in the public schools**? [emphasis added]

55. The majority concluded that there was no evidence to support a belief that graduates of TWU would discriminate in the classroom when they became qualified as teachers:

> 36 Instead, the proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them. Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected. The BCCT, rightfully, does not require public universities with teacher education programs to screen out applicants who hold sexist, racist or homophobic beliefs. For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society.

56. In contrast, the Society does not take the position that TWU law graduates will be predisposed to discriminate against LGB people when they become lawyers and the Society does not take issue with the quality of legal education proposed by TWU.[45] Instead, the Society has determined that it cannot accept a degree from a law school that discriminates and, in effect, excludes LGB students from admission or continued enrolment at the school. This is a very different issue than that considered in *BC Teachers.*

57. This is a case about who TWU is willing to admit as a student to its law school. It is not about any perceived or actual discriminatory tendencies of TWU's graduates. The Society does not claim that TWU graduates will discriminate against LGB people in their professional lives, whether as lawyers, law professors or judges. Rather, the Society has determined that the Covenant itself discriminates against LGB persons by effectively excluding them from the law school.

58. In *BC Teachers*, the majority of the Supreme Court of Canada did not address the validity of the Covenant, nor did it address the effect of an acceptance of the Covenant by the College on LGB people. The parties simply did not call evidence of such effects, nor did they focus their submissions on those effects. Further, in *BC Teachers*, the Court properly considered the *Human Rights Code* of British Columbia while in the present case, as more fully argued below, the Nova Scotia *Human Rights Act* is the relevant statute for the Society to consider.

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[45] Subject to the provisions set out by the Federation.

59. In this case, there is evidence that the Covenant effectively excludes LGB people from attending the law school, that the Covenant is harmful to LGB students who do attend TWU and that, if the Society were to sanction the Covenant, there would be harmful effects to LGB members of the legal profession and their broader communities.[46]

60. In the alternative, to the extent that the issues in the present case can be said to be similar, the decision in *BC Teachers* is not binding on this Court. The arguments made in *BC Teachers* are different than those in the present case, the law relating to equality protection for sexual orientation has evolved significantly since 2001, the standard of review is different, and the evidentiary record is much richer in this case than in *BC Teachers*.

61. The law relating to freedom of religion and sexual orientation has also evolved considerably since 2001. In the *Marriage Reference*, decided in 2004, the Court held that the recognition of equality rights for same-sex couples does not interfere with freedom of religion. In *S.L. v. Commission Scolaire des Chênes*, 2012 SCC 7, the Court held that freedom of religion does not serve to insulate people from others' beliefs and practices. In *Saskatchewan (Human Rights Commission) v. Whatcott* 2013 SCC 11, the Court adopted the analysis of the dissenting Justice in *BC Teachers* in rejecting the distinction between discriminating against same-sex sexual conduct and discriminating against persons of same-sex sexual orientation. The *Whatcott* case is a critical development in the law as it makes it clear that prohibiting same-sex sexual conduct is the same as discrimination against an individual on the basis of sexual orientation.

62. Section 52 of the *Constitution Act, 1982* provides:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

63. The Supreme Court of Canada was clear in *Canada (Attorney General) v. Bedford*, 2013 SCC 72 (*"Prostitution Reference"*) that the common law principle of *stare decisis* is subordinate to the Constitution as set out in section 52 and lower courts cannot be limited to acting as "mere scribes" by creating a record without conducting any legal analysis.[47] When society and the law have evolved and when cases are focussed on

[46] Affidavits of Dr. Chenier and Dr. Bryson.
[47] Paragraphs 43-44.

new legal issues, it is open to the lower courts to consider the question anew. It is not open to this Court to simply accept that *BC Teachers* is binding without a thorough review of the evidence and of the evolution of equality law as it relates to sexual orientation.

64. In the *Prostitution Reference*, the application judge determined that the law and society had evolved over the twenty-year period between the original prostitution reference and the one before her. Further, in the original reference, the advocates had not focussed on section 7 of the *Charter*, the law of which had also evolved over that twenty-year period. The Supreme Court of Canada upheld this approach and explained:

> 40 In this case, the precedent in question is the Supreme Court of Canada's 1990 advisory opinion in the Prostitution Reference, which upheld the constitutionality of the prohibitions on bawdy-houses and communicating -- two of the three provisions challenged in this case. The questions in that case were whether the laws infringed s. 7 or s. 2(b) of the Charter, and, if so, whether the limit was justified under s. 1. The Court concluded that neither of the impugned laws were inconsistent with s. 7, and that although the communicating law infringed s. 2(b), it was a justifiable limit under s. 1 of the Charter. While reference opinions may not be legally binding, in practice they have been followed. [citation omitted]
>
> 41 The application judge in this case held that she could revisit those conclusions because: the legal issues under s. 7 were different, in light of the evolution of the law in that area; the evidentiary record was richer and provided research not available in 1990; the social, political and economic assumptions underlying the *Prostitution Reference* no longer applied; and the type of expression at issue in that case (commercial expression) differed from the expression at issue in this case (expression promoting safety). The Court of Appeal disagreed with respect to the s. 2(b) issue, holding that a trial judge asked to depart from a precedent on the basis of new evidence, or new social, political or economic assumptions, may make findings of fact for consideration by the higher courts, but cannot apply them to arrive at a different conclusion from the previous precedent (at para. 76).
>
> 42 **In my view, a trial judge can consider and decide arguments based on Charter provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.** [emphasis added]

65. The same approach was applied by the trial judge in *Carter v. Canada* 2012 BCSC 886 *("Assisted Suicide")*. In *Rodriguez v. Canada,* [1993] 3 SCR 519, the Supreme Court of Canada had upheld section 241 of the *Criminal Code*, which prohibits assisted suicide. Sue Rodriguez, a British Columbian woman suffering from ALS, had challenged the provision as contrary to *Charter* sections 7, 12, and 15.

66. In the *Assisted Suicide* case, Madam Justice Smith determined that at the time of the hearing "a different set of legislative and social facts" existed from those that existed in 1993.[48] She also held that there had been a sufficient change in the applicable legal principles to free her from having to follow *Rodriguez*.[49] In her view, the *Rodriguez* majority had not considered the right to life under section 7, nor had it considered two principles of fundamental justice that have been significantly developed since 1993: over breadth and gross disproportionality.[50] Smith J. also determined that the Supreme Court of Canada had not fully considered whether the impugned provision violated section 15, having instead merely assumed a violation in order to illustrate why the prohibition would survive under section 1.[51]

67. This Court must decide in the present case on the basis of the facts (including legislative and social facts) in the evidentiary record, the applicable legal principles and the legal issues raised by the parties; all of which are significantly and materially different from those in *BC Teachers*. *BC Teachers* is therefore neither binding on this Court nor determinative of this case.

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[48] Paragraph 998.
[49] Paragraph 998.
[50] Paragraphs 924 and 985.
[51] See paragraphs 986-988. While the majority of the BCCA disagreed with Smith J., the matter was heard and reserved by the Supreme Court of Canada in October, 2014.

PART II - BACKGROUND

A. The History and Mandate of the Society[52]

68. The Society was formed in 1789 and since that time, has had the authority to regulate the practice of law in the Nova Scotia. The Society has the mandate and the duty to act in the public interest by ensuring diversity in the legal profession and by promoting membership in the bar and the judiciary to all equity seeking groups.

69. This public interest mandate came to the forefront following the release of the report from the Royal Commission on the Donald Marshall Jr. Prosecution in 1989 (the "Marshall Report"), which recognized that Donald Marshall would not likely have received the same treatment and been wrongfully convicted if he were "white". One of the key recommendations in the Marshall Report directs as follows:

> We recommend that the Dalhousie Law School, the Nova Scotia Barristers' Society and the Judicial Councils support courses and programs dealing with legal issues facing visible minorities, and encourage sensitivity to minority concerns for law students, lawyers and judges.

70. In the immediate aftermath of receipt of the Marshall Commission Report, the Society focused on its primary responsibility with regard to lawyers' behaviour by addressing matters of lawyer conduct and possible discipline arising from consideration by the Commission of the roles that individual lawyers played in Mr. Marshall's wrongful conviction and subsequent events. At the same time and over many months, with the assistance of the Race Relations Committee, it also began to look at the various recommendations made by the Commission relating to the legal profession as a whole and the administration of justice in the Province.

71. Flowing from the recommendations of the Marshall Commission, the Society made the Race Relations Committee a standing committee of the Society and it established the Gender Equality Committee (GEC) in 1991-92.

72. In 1993 the GEC released a report, *Gender Equality in the Legal Profession: A Survey of Members of the Nova Scotia Legal Profession.*[53] The Nova Scotia Report documented the existence of widespread gender discrimination, reporting that most of the respondents "indicated that they [were] tired of being deterred in their endeavours by a

[52] See the Affidavit of Darrel Pink.
[53] Affidavit of Darrell Pink, Exhibit 2.

lack of respect, by discriminatory attitudes, by sexist jokes, by sexual harassment, by banging their heads against the glass ceiling, by the undermining of their status as professionals, and by facing barriers which prevent them from carrying out their obligations as parents and pursuing successful careers."

73. The goal of these initiatives by the Society was to assist the legal profession in examining and achieving equity for all groups in the legal profession and to create a more comprehensive equity program.

74. In 1996 Council of the Society ("Council") approved the establishment of the Society's Equity Office and the hiring of an Equity Officer, to work under the direction of the Executive Director. Since its inception, the Equity Office has actively addressed ways to make the profession more diverse and reflective of the diverse communities in the Province, with an emphasis on equity seeking or historically disadvantaged communities. The Equity Office is responsible for a range of programs designed to increase lawyers' and law firms' understanding of issues related to human rights and all forms of harassment and discrimination across the diversity spectrum. The Equity Officer and the two equity committees have developed numerous policies to assist lawyers and law firms relating to issues such as hiring practices, accommodation, maternal and parental leaves, harassment and more recently, the development of greater cultural competence within the legal profession.

75. In addition to initiatives on employment equity, cultural competence, disability and mental health, access to justice, gender equity initiatives and racial equity community initiatives, the Equity Office has engaged directly with the lesbian, gay, bisexual and transgendered ("LGBT") legal community. In March 2010, the Equity Office, in collaboration with the CBA Sexual Orientation Gender Identity section, introduced a mentorship program for LGBT law students and lawyers. The purpose of the mentorship program is to provide a community of support for LGBT law students and new lawyers entering the profession.

76. In 2013, the Society revised the Mandate of the Equity Office to provide, in part:

> The Equity Office assists in fulfilling the Society's regulatory functions of maintaining public confidence in the regulation of the profession, upholding the public interest in the practice of law and seeking to improve the administration of justice in relation to equity and diversity.

77. In 1993, the Society underwent the first of what became a series of program reviews. The *Barristers and Solicitors Act*, the predecessor legislation to the current *LPA*, did not contain an 'Objects Clause' or any language prescribing the role or purpose of the Society. In 1997 Council approved Regulation 1A which set out the public interest role of Society as follows:

> 1A It is the object and duty of the Society to regulate the practice of law within Nova Scotia by:
>
> Upholding and protecting the public interest through:
>
> Preserving and protecting the rights of all persons in the fair and impartial administration of justice;
>
> Ensuring the independence, integrity and honour of the legal profession and its members; and
>
> Establishing, monitoring and enforcing standards for the education, professional responsibility and competence of its members.

78. In 1996, the Society, as another part of its response to the Marshall Report, implemented Chapter 24 of the *Legal Ethics Handbook* which provided, in part:

> 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.

79. The *Legal Profession Act*, S.N.S. 2004, c. 28 came into force in 2004. Subsection 4(1) of the Act articulated the Society's purpose:

> 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

> establish standards for the qualifications of those seeking the privilege of membership in the Society;
>
> establish standards for the professional responsibility and competence of members in the Society; and
>
> regulate the practice of law in the Province.

80. The new *LPA* caused the Society to address through regulations and policy how it would carry out its purpose. Several initiatives were undertaken to create clear policy directions for the Society's work. First, Council adopted a set of policies about how it would do its work. Included in these Council Policies was a statement of 'Values' that would drive all Society activity. These values, first adopted in 2008, are:

> Commitment to Excellence
>
> We strive for excellence in all aspects of our work. We adopt appropriate and best policies, procedures and practices and we promote excellence in the profession.
>
> Fairness
>
> We operate fairly and impartially apply our policies, procedures and practices.
>
> Respect
>
> We treat all persons with dignity regardless of their circumstances. We listen, consider and seek to understand other points of view.
>
> Integrity
>
> We approach our work in an ethical, honest and principled fashion.
>
> Visionary Leadership
>
> We actively seek out and assess what is happening provincially, nationally and globally that affects the regulation of the legal profession. We anticipate and respond to a rapidly changing environment and have the courage to initiate change.
>
> Diversity
>
> We promote equality and encourage the profession to embrace the value of diversity. We are inclusive and supportive of women and men from diverse backgrounds, cultures, practice environments and life experiences.
>
> Accountability
>
> We are open, transparent and objective in our independent governance and regulation of the profession. We know that with independence comes responsibility; we demonstrate to those who are affected by what we do that we act in accordance with our mandate.

81. A second way in which the new *LPA* directly impacted the Society's activities was that it caused Council to establish a Strategic Plan that, in part, addressed how the Society would uphold and protect the public interest in the practice of law. Each Strategic Plan has been accompanied by a detailed Activity Plan where Council specifies the activities and initiatives that will advance the Strategic Plan. The Society's commitment to and its activities to advance equity in the legal profession have been incorporated in all of its Strategic and Annual Activity Plans.

82. In 2010, the *LPA* was further amended to provide:

> 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
>
> establish standards for the qualifications of those seeking the privilege of membership in the Society;
>
> establish standards for the professional responsibility and competence of members in the Society;
>
> regulate the practice of law in the Province; and
>
> seek to improve the administration of justice in the Province by
>
> (i) regularly consulting with organizations and communities in the Province having an interest in the Society's purpose, including, but not limited to, organizations and communities reflecting the economic, ethnic, racial, sexual and linguistic diversity of the Province, and
>
> (ii) engaging in such other relevant activities as approved by the Council.

83. Between November 2011 and April 2012, the Society amended its Council Policies to address its duty to improve the administration of justice in Nova Scotia. In particular, Council developed Policies 2.4.10, 2.5 and 18.27 which set out the responsibilities of both Council and the Executive Director.

> 2.4 To fulfill its role and its governance responsibilities, Council shall:
>
> [...]
>
> 2.4.10 be fully informed, through regular briefings and ongoing dialogue with diversity-seeking groups, of the trends affecting the administration of justice and the legal profession and the risks facing the Society, and Council will use that information to develop initiatives and partnerships that have as an objective the improvement of the administration of justice where the Society can effectively use its resources to respond to identified issues and needs;

> 2.5 To seek to improve the administration of justice, Council shall:
>
> 2.5.1 identify and then seek to eliminate barriers to entry to the legal profession from members of historically disadvantaged communities;
>
> 2.5.2 encourage and facilitate retention of lawyers from historically disadvantaged communities; and
>
> 2.5.3 encourage and facilitate access to leadership roles of the profession and the Society from members of historically disadvantaged communities; and
>
> 18.27 The Executive Director shall ensure that Society regulations are regularly reviewed to identify any that impact access to legal services, and that Council is informed of the result of each such review, with options as appropriate to address any identified regulation or gap in regulation.

84. In 2011, the Society replaced the *Legal Ethics Handbook* with the *Code of Professional Conduct*. Section 6.3, Equality, Harassment and Discrimination, was approved to continue to carry out the principles underlying the previous Chapter 24.

B. The History of the Treatment of LGB People and the Effects of Exclusion

85. While the Supreme Court of Canada now firmly recognizes historical discrimination against LGB people in Canada and has read sexual orientation into section 15(1) of the *Charter* since 1995, the history of the exclusion of and discrimination against LGB Canadians is startling and the complicity of the state in that discrimination cannot be ignored. In *Egan v. Canada*, [1995] 2 S.C.R. 513 at pp. 600-601, the Supreme Court of Canada stated:

> The historic disadvantage suffered by homosexual persons has been widely recognized and documented. Public harassment and verbal abuse of homosexual individuals is not uncommon. Homosexual women and men have been the victims of crimes of violence directed at them specifically because of their sexual orientation [...]. They have been discriminated against in their employment and their access to services. They have been excluded from some aspects of public life solely because of their sexual orientation [...]. The stigmatization of homosexual persons and the hatred which some members of the public have expressed towards them has forced many homosexuals to conceal their orientation. This imposes its own associated costs in the work place, the community and in private life." [references omitted]

86. Until recently, it has been legally, socially and medically acceptable to discriminate against and exclude LGB people from institutions in Canada. It was only in 1969 that same-sex sexual activity was removed as an offence under the *Criminal Code.*[54] Prior to that, in 1967, the Supreme Court of Canada approved a "dangerous offender"

[54] *Criminal Law Amendment Act, 1968-69* (S.C. 1968-69, c. 38). Prior to the amendments, "buggery" was subject to 14 years imprisonment and "gross indecency" included same-sex consensual activity.

designation for a man who admitted to consensual sexual activity with other men.[55] Homosexuality was only removed from the Diagnostic and Statistical Manual of Mental Disorders ("DSM") as a mental disorder in 1974.[56] Those suspected of same-sex sexual activity were often sent for psychiatric treatment so that they may be cured of the disease.[57]

87. Dr. Chenier, an expert historian, provides numerous examples of official policies that have historically excluded LGB people and other minority groups from participating in government and educational institutions, many of which were based on honestly held religious belief. She explains that from the moment of European colonization, sexual and other minorities have been formally and informally excluded from virtually every type of institution with a governmental aspect. The goal was to have a homogenous, white, heterosexual population. These values and practices were based on Christian theological teachings buttressed by scientific racisms and sexology.[58] This resulted in segregation of and discrimination against blacks,[59] restrictions on Chinese immigration,[60] and caps on the number of Jewish students at certain universities[61].

88. LGB people, especially gay men, were perceived to be a threat to children because it was believed that their desire for sexual contact with the same sex was uncontrollable, insatiable and indiscriminate. This perception was created by mental health experts, used by the police and popularized in the news media as a way to explain an apparent rise of sexual assaults against children.[62]

89. During WWII, recruits were actively screened for signs of being LGB and internal campaigns were undertaken to expose and eliminate anyone believed to be LGB. Those in service found to be LGB were dismissed, cast out of their communities as immoral sinners and excluded from the benefits of a normal family and social life.[63]

90. In 1952, Canada amended the *Immigration Act* to include homosexuality as a reason for denying entry. Thousands of lesbians and gays were dismissed from the civil service

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[55] *Klippert v. The Queen*, [1967] SCR 822
[56] Chenier Affidavit at paragraph 66.
[57] Chenier Affidavit at paragraph 76.
[58] Chenier Affidavit at paragraph 12.
[59] Chenier Affidavit at paragraphs 24-29.
[60] Chenier Affidavit at paragraph 19.
[61] Chenier Affidavit at paragraph 23.
[62] Chenier Affidavit at paragraph 51.
[63] Chenier Affidavit at paragraph 52.

and some left on their own volition for fear of being discovered and rendered unemployable. By the early 1970s, the Canadian government had amassed over 9,000 files on suspected LGB people, many of whom had no direct relationship to the military or civil service.[64]

91. LGB people were also excluded from the education system. The notion that they were undesirable led to official and unofficial policies barring people suspected to be lesbian or gay being put in place, and these policies remained in place until they were successfully challenged in the 1980s and 1990s.[65]

92. The military, the civil service and schools were not the only institutions that barred LGB people from employment, membership and participation. Anyone in the public and private sector could dismiss a person with impunity on the grounds that they were LGB.[66] As Dr. Chenier explains, laws that once seemed normal and natural, and were sanctioned by the Christian bible, are now seen as unethical and dangerous.

93. The effects of this type of exclusion on LGB people was to require them to live in fear of exposure and the prevalence of drug and alcohol addiction and suicidal ideation (presently termed "minority stress") is evident from the oral histories collected from LGB people.[67]

94. Polices that prohibit people who engage in same-sex activity from membership, employment or participation have two principal effects on LGB people – they will either be deterred from participating or they will try to hide their sexual orientation. In both instances, the person is harmed: in the first instance by exclusion and loss of opportunity and in the second by being forced to hide a part of oneself, and to live in a state of fear and anxiety that one's sexual orientation will be discovered.[68] LGB individuals must constantly monitor their behaviours, limit their friends, interests and their expression.

95. History has shown that the state has perpetuated discrimination and prejudice but that it can also combat it. The additional harm caused by the state sanctioning of

[64] Chenier Affidavit at paragraph 58.
[65] Chenier Affidavit at paragraph 59.
[66] Chenier Affidavit at paragraph 61.
[67] Chenier Affidavit at paragraph 53.
[68] Chenier Affidavit at paragraph 68.

discriminatory policies is that it legitimizes these policies. By legitimizing acts of discrimination, the state sends a clear signal to citizens that discrimination is acceptable and justifiable.[69]

96. Dr. Bryson explains that research on the health impacts of living in states that have enacted laws barring same-sex marriage provides compelling evidence that state sanctioning of discrimination against LGB people has wide-ranging effects on LGB people. In a study cited by Dr. Bryson, researchers found consistent increases in rates of psychiatric disorders and co-morbidity among LGB individuals living in states that banned same-sex marriage while that same increase was not observed in states that did not do so.[70] Similarly, research on the effects of institutionalized discrimination on LGB people in regulated professions such as education and medicine, demonstrate that discrimination against or failure to enforce anti-discrimination policies has serious detrimental consequences for the LGB person's psychological well-being, professional development and sense of safety at work.

97. The opinions and research provided by Dr. Bryson and Dr. Chenier regarding the effect of the state sanctioning discrimination or the effect of the state failing to prohibit discrimination are clearly supported by the Supreme Court of Canada's reasoning in *Vriend v. Alberta*, [1998] 1 S.C.R. 493 where the Court considered Alberta's failure to include sexual orientation as a ground of discrimination in its human rights legislation. Mr. Vriend was employed at Kings College in Alberta. When asked by the president of the college whether he was a gay, he confirmed that he was. He was subsequently fired for not complying with the college's policy against homosexuality. Cory J. and Iacobucci J. explained that the effect of Alberta's failure to include sexual orientation as a ground for discrimination in its human rights statute was to perpetuate, encourage and legitimize discrimination against LGB people:

> 99 Apart from the immediate effect of the denial of recourse in cases of discrimination, there are other effects which, while perhaps less obvious, are at least as harmful. In Haig, the Ontario Court of Appeal based its finding of discrimination on both the "failure to provide an avenue for redress for prejudicial treatment of homosexual members of society" and "the possible inference from the omission that such treatment is acceptable" (p. 503). It can be reasonably inferred that the absence of any legal recourse for discrimination on the ground of sexual orientation perpetuates and even encourages that kind of discrimination. The respondents contend that it cannot be assumed that the

[69] Chenier Affidavit at paragraph 84.
[70] Bryson Affidavit at paragraph 21.

> "silence" of the IRPA reinforces or perpetuates discrimination, since governments "cannot legislate attitudes". However, this argument seems disingenuous in light of the stated purpose of the IRPA, to prevent discrimination. It cannot be claimed that human rights legislation will help to protect individuals from discrimination, and at the same time contend that an exclusion from the legislation will have no effect.
>
> 100 However, let us assume, contrary to all reasonable inferences, that exclusion from the IRPA's protection does not actually contribute to a greater incidence of discrimination on the excluded ground. **Nonetheless that exclusion, deliberately chosen in the face of clear findings that discrimination on the ground of sexual orientation does exist in society, sends a strong and sinister message. The very fact that sexual orientation is excluded from the IRPA, which is the Government's primary statement of policy against discrimination, certainly suggests that discrimination on the ground of sexual orientation is not as serious or as deserving of condemnation as other forms of discrimination. It could well be said that it is tantamount to condoning or even encouraging discrimination against lesbians and gay men.** Thus this exclusion clearly gives rise to an effect which constitutes discrimination.
>
> 101 **The exclusion sends a message to all Albertans that it is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation.** The effect of that message on gays and lesbians is one whose significance cannot be underestimated. As a practical matter, it tells them that they have no protection from discrimination on the basis of their sexual orientation. Deprived of any legal redress they must accept and live in constant fear of discrimination. These are burdens which are not imposed on heterosexuals.
>
> 102 Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetrates the view that gays and lesbians are less worthy of protection as individuals in Canada's society. **The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination.** [emphasis added]

98. Since the Supreme Court of Canada's recognition that sexual orientation is a prohibited ground of discrimination under the *Charter*, it has repeatedly reaffirmed that exclusionary laws and policies affecting LGB persons are unacceptable in Canadian law and to discriminate on that basis is contrary to public policy, the *Charter*, human rights legislation and fundamental Canadian values.

99. Despite these recent advancements, LGB people, like many other disadvantaged minorities, remain under-represented in the Canadian legal system and in the legal profession in Nova Scotia.[71]

C. Trinity Western University

100. TWU is a university formed in 1962 in Langley, British Columbia which is affiliated with the Evangelical Free Church of Canada. The core beliefs of the EFCC are reflected in TWU's Statement of Faith, a document that staff and faculty, but not students except those in a leadership position, must agree to adhere to annually.[72]

101. TWU is required to admit students of all denominations and cannot limit enrolment only to those who identify as Evangelical Christian. Section 3(2) of the TWU Act states that the university's objective is to:

> Provide for young people of **any race, colour or creed**, university education in the arts and sciences with an underlying philosophy and viewpoint that is Christian. [emphasis added][73]

102. Evangelical Christianity condemns same-sex intimacy and interprets marriage as being a union between a man and a woman. Same-sex marriage is considered sinful and the religion calls on people who engage in same-sex activity to "confess their sin, repent of their chosen ways and amend their lives to uphold the biblical standard of conduct."[74]

103. Dr. Greenman states that Evangelical Christians believe and profess that same-sex intimacy is "contrary to biblical teaching and therefore morally unacceptable", "sinful", "morally accountable to God", an "abomination", "contrary to nature", "a serious sin" and "comparable morally to murder".[75]

104. Dr. Greenman then goes on to explain that "evangelical Christianity teaches that those who self-identify as gay, lesbian, bisexual or transgendered should be treated by Christians as those whom God loves, and as neighbours whom they are called by God to treat with kindness, respect, compassion and love".[76]

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[71] Bryson Affidavit at paragraph 19.
[72] Statement of Faith, Wood Affidavit, Exhibit "B".
[73] *Consolidated Trinity Western University Act*, s. 3(2): Affidavit of Dr. W. Robert Wood, Exhibit "E".
[74] Greenman Affidavit at paragraph 184.
[75] Greenman Affidavit at paragraph 82, 105, 107, 109, 159, 168
[76] Greenman Affidavit at paragraph 191.

(1) **The Community Covenant**

105. TWU requires its faculty, staff and students to read, understand and pledge to the terms of its Covenant. It is a mandatory part of the admissions policy, regardless of religious belief and/or sexual orientation and continuing adherence to the Covenant is required to remain at the University. The Covenant requires students to adopt and practice a lifestyle that is consistent with the Evangelical Church of Canada's view of the Bible, and accept the Bible as divinely inspired and as a "guide for personal and community life". The Covenant goes on to specifically prohibit "sexual intimacy that violates the sacredness of marriage between a man and a woman".[77]

106. TWU describes the Covenant as a "solemn pledge", "contractual agreement," and a "relational bond" with "reciprocal benefits and responsibilities" and encourages its members to take action to bring others in compliance with the Covenant and to report violations of the Covenant. A failure to report another student's violation of the Covenant is, in itself, considered inappropriate behaviour. TWU's Student Accountability Policy provides, in part:

> "Admission to the University is limited to those who agree to comply with these behavioural expectations which apply to every student whether a resident or commuter both on and off campus".
>
> "The University does not view a student's agreement to comply with these standards and guidelines as a mere formality. Therefore students who find themselves unable to maintain the integrity of their commitment should seek a living-learning situation more acceptable to them."
>
> "the integrity of TWU community....may at times involve taking steps to hold one another accountable to the mutual commitments outlined in this covenant" and "all members share this responsibility".
>
> "At a grass roots level, it is expected and encouraged that students, staff and faculty will hold each other accountable to the commitments each has made to the University and community. Disregard for community responsibility and accountability is considered inappropriate behaviour [...]".[78]

107. The Student Accountability Policy provides examples of likely consequences for failing to adhere to the Covenant. A first offence of "sexual misconduct", which presumably

[77] Covenant at Tab 1.
[78] Affidavit of Dr. W. Robert Wood, Exhibit "N".

includes same-sex sexual activity, will have a "likely consequence" of a "Suspension"[79] and the "likely consequence" of a repeated offence is "Expulsion".[80]

108. TWU repeatedly states that it fully welcomes students of all faiths and fully welcomes LGB students, presumably even married ones.[81] In doing so, however, the mandatory price of admission for LGB law students is to leave a large part of their identity at the door and to deny who they are for the duration of their time at TWU.

109. While the Covenant is mandatory for students, faculty and staff of TWU regardless of their beliefs and/or sexual orientation, there is no evidence to suggest that entering into the Covenant, or a similar "contractual agreement", is a necessary part of membership in the Evangelical Church. The EFCC does **not** require members, parishioners or attendees to sign a covenant or contract in order to participate in religious rituals and services.[82]

110. Neither TWU's Statement of Faith nor the Affidavit evidence outlining the beliefs of the EFCC say anything to suggest that it is a component of Evangelical Christianity to control and prohibit the beliefs and practices of other people or to isolate themselves from those who conduct themselves in a manner that they view as sinful. There is simply no evidence that isolation from and exclusion of LGB people from a law school is a component of the Evangelical Christian faith.

(2) **TWU's Proposal for a Law School**

111. TWU proposes to operate a law school and to grant common law degrees, the objectives and substance of which can only be defined as secular. It proposes to offer a comprehensive common law program substantially similar to programs offered by other Canadian common law schools with a focus on the development of core competencies required for the practice of law. TWU also proposes to make it mandatory that all law

[79] "*Suspension*" is described in the Policy as "an involuntary separation of the student from the University for a specified length of time. Suspension impacts financial aid, participation on athletic and drama teams, in music groups and in student leadership positions. Parents of students under 21 years of age are notified and a temporary record is kept with the student's transcript. For the duration of the suspension students are not allowed on campus without express permission, and are not permitted to attend class or TWU events, either on or off campus."

[80] "*Expulsion*" is described in the Policy as "a permanent separation of the student from the University with a permanent notation on the student's transcript. Parents of students under 21 are notified. Students are not allowed on campus without express permission, and are not permitted to attend TWU events, either on or off campus without express permission."

[81] Applicants' Brief, paragraph 163.

[82] The Bill Taylor Affidavit states that the EFCC requires its "pastors and missionaries" to sign a covenant, however, there is no evidence that the EFCC requires its parishioners or attendees to do so.

students agree to and adhere to the Covenant if they want to graduate with a law degree, even if they are non-Evangelical and even if they are members of the LGB community. In doing so, TWU is effectively asking the provincial law societies, including the Nova Scotia Barristers' Society to endorse the requirements of the Covenant.

112. TWU proposes to offer 19 mandatory courses, none of which have religion as the focus of the curriculum.[83] Aside from a general reference to TWU's overall mission to teach from a Christian viewpoint, the proposed law school is not religious in any respect. The mandatory course requirements and the descriptions for all of the courses TWU proposes to offer could be those from any Canadian common law school.

113. The Approval Committee provided a thorough review of the proposed curriculum and came to the conclusion, with which the Society agrees, that TWU's proposed curriculum provisionally satisfies the requirements of offering a comprehensive common law legal education that can meet the standards of admission to law societies in Canada. If a student successfully completed the course requirements at TWU, he or she would be considered by the Society to be competent to practice law in Nova Scotia.

D. The Resolution and The Regulation

114. Council is responsible for the governance and regulation of the legal profession in the public interest, under the *LPA*. Council includes 21 members, including three Officers, 13 elected lawyers, three Public Representatives, a representative of the Attorney General of Nova Scotia and the Dean of the Schulich School of Law.[84]

115. In April, 2013, Council was aware that the TWU had made an application to the government of British Columbia for permission to open a law school and to the Federation for approval of the common law degree to be granted by TWU.[85] At that time, Council decided to defer any discussion of whether it would approve a law degree from the proposed law school at TWU as a qualification for the practice of law in Nova Scotia until after the Federation had issued a report.[86] The matter was also reviewed by a Special Advisory Committee resulting in continuing preliminary approval.[87]

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[83] Report of the Federation of Law Society's, Record NSBS001387 at pp. 4-7, pp. 56-68 and pp. 117ff.
[84] Ibid, s. 7.
[85] Memorandum to Council, April 10, 2013, Record NSBS001110.
[86] Council Minutes, April 19, 2013 Record, NSBS001113.
[87] Report of the Special Advisory Committee, Record, NSBS 001341.

116. On December 13, 2013, the FLSC issued a report granting preliminary approval to a proposed new law school program at TWU.[88]

117. On January 24, 2014, Council assigned to the Executive Committee the tasks of receiving submissions and identifying options with regard to whether or not to approve a degree from the proposed law school at TWU.[89] The Executive Committee held public meetings on February 13, 2014 and March 4, 2014. The Committee also received approximately 170 written submissions and heard from the President of TWU.[90]

118. On April 25, 2014, Council voted in favour of a Resolution which provides:[91]

> 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:
>
> exempts law students from signing the Community Covenant; or
>
> 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.

119. On July 23, 2014, the Society amended the Regulation to implement the Resolution, which Regulation has been effective law from that date (the "Regulation").[92] The Regulation provides:

> In this Part
>
> (a) "**Committee**" means the Credentials Committee;
>
> (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

[88] FLSC Canadian Common Law Program Approval Committee Report, Record, NSBS001387.
[89] Council Minutes, January 24, 2014, Record, NSBS001142.
[90] Transcript, February 13, 2014, Record, NSBS000699; Transcript, March 4, 2014, Record, NSBS000936; Review of Submissions, April 16, 2014, Record, NSBS001082.
[91] Council Minutes, supra note 9; Memo to Council, April 16, 2014, Record, NSBS001064.
[92] Council Minutes, July 18, 2014 continued July 23, 2014, Record, NSBS001864; Memorandum to Council, July 21, 2014, Record, NSBS001870; Regulations amended to September 19, 2014, Record, NSBS001875.

> 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**;
>
> ii) a degree in civil law, if the holder of the degree has passed a comprehensive examination in common law or has successfully completed a common law conversion course approved by the Credentials Committee 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;
>
> iii) a Certificate of Qualification issued by the National Committee on Accreditation of the Federation of Law Societies of Canada;

120. The Applicants challenge both the Resolution and the amended Regulation. While the Applicants filed their Application for Judicial Review prior to the implementation of the Regulation, this Court has agreed to consider both the validity of the Resolution and the Regulation. The Resolution and the Regulation are necessarily inter-twined and the Society's submissions relating to the Resolution and the Regulation will undoubtedly overlap. The practical effect of the Society's Regulation is that it has determined that it will not recognize law degrees from universities that discriminate in their admissions or enrolment policies on grounds prohibited by the Charter or the Nova Scotia *Human Rights Act*. These non-discrimination benchmarks are the same ones that would apply if the Society were itself providing the legal education instead of allowing that to be provided by law schools. The Resolution reflects the fact that the mandatory imposition of the Covenant is discriminatory on the basis of sexual orientation.

PART III - ADMINISTRATIVE LAW ISSUES

121. TWU challenges the Resolution and the Regulation on various administrative law grounds. The ultimate question for determination for this Court is whether the Society acted reasonably within its jurisdiction when it passed the Regulation and adopted the Resolution.

A. The Standard of Review

122. The Applicants argue that the standard of review to be applied to both the Resolution and the Regulation is correctness on the basis that the issues they raise go to jurisdiction. The Society disagrees. There are few, if any, true jurisdictional questions that remain in administrative law that will attract a standard of correctness. Instead, the courts have recognized that deference should be accorded to administrative decision-makers except in the rarest of circumstances, and that as long as an administrative decision-maker acts reasonably within its jurisdiction and its decision reflects one in the range of reasonable outcomes, the courts will not interfere.

123. The Applicants' main submission on the standard of review can be summarized as - the Society did not have the jurisdiction to approve a law school and as such passing a Regulation that defined "law school"[93] was *ultra vires.* The Applicants argue that because the Society was enacting the Regulation pursuant to its delegated statutory authority, the determination of whether the Society's enabling legislation authorized it to pass the Regulation is a jurisdictional one and subject to a standard of review of correctness.

124. The Applicants go on to argue that the Society's jurisdiction is limited to establishing standards for individual members of the Nova Scotia Bar and regulating the practice of law in the province and because it is so limited, the Society acted outside of jurisdiction by taking into account irrelevant considerations, such as religious belief, and the Nova Scotia *HRA* when it passed the Resolution and the Regulation.

125. The Applicants' characterization of the issues before the Society as ones that attract a standard of review of correctness fails to take into account the considerable changes that have taken place in administrative law since *Dunsmuir v. New Brunswick*, 2008 SCC 9 ("*Dunsmuir*") and reflects the now-abandoned, formalistic approach that led to

[93] The Society did not in fact define a "law school" in the Regulation. It amended the definition of a "law degree".

endless analysis as to what was a true jurisdictional question, just a jurisdictional question or a question of law. As Binnie J. pointed out in *Dunsmuir*: "Our objective should be to get the parties away from arguing about standard of review to arguing about the substance of the case".[94]

126. In *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 ("*Alberta Teachers*"), the majority found that true questions of jurisdiction are so rare as to lack a clear definition (para. 42), and as such the correctness standard really only applies to "decisions of tribunals interpreting their home statute where the issue is a constitutional question, a question of law that is of central importance to the legal system as a whole and that is outside the adjudicator's expertise, or a question regarding the jurisdictional lines between competing specialized tribunals" (para. 43).

127. Rothstein, J. went on in *Alberta Teachers* to reiterate "Dickson J.'s oft-cited warning in *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corp.* [1979] 2 SCR 227 that courts should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so". Rothstein, J. then continued:

> [34] The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance **when the tribunal is interpreting its own statute**. In one sense, anything a tribunal does that involves an interpretation of its home statute involves the determination of whether it has the jurisdiction to do what is being challenged on judicial review. However, since Dunsmuir, this court has departed from that definition of jurisdiction. Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. .....it is sufficient in these reasons to say that, **unless the situation is exceptional, and we have not seen such a situation since Dunsmuir, the interpretation by a tribunal 'of its own statute or statutes closely connected to its function with which it will have familiarity' should be presumed to be a question of statutory interpretation subject to deference on judicial review.** [emphasis added]

(1) **Standard of Review to be applied to the Regulation**

128. The Applicants argue that whether the Society has the delegated authority to approve law degrees by regulation is a question of *vires* and as such must be correct. The Applicants cite Brown & Evans for this proposition. The Applicants chose not to refer, however, to the other portion of the Brown & Evans text that provides: "courts have indicated that they may review Regulation-making only for unreasonableness," for

[94] As quoted in *Alberta Teachers* at para 38.

example, "where a Regulation was made by a self-governing professional body pursuant to a statutory power" (15:3222). The authors then state the following:

> More recently, the Supreme Court of Canada in *Chamberlain v. Surrey School District No. 36* [[2002] 4 SCR 710, 2002 SCC 86] has reviewed a resolution passed by an elected school board denying approval for certain reading materials for unreasonableness. And while the majority in *Chamberlain* said that a school board does not possess the same degree of autonomy as a legislature or municipal council, the decision suggests that reasonableness as a standard of review may well apply to review of the exercise of delegated legislative powers, as it does to other non-adjudicative administrative action. Moreover, it would be incongruous to permit review of the enactment of a municipal bylaw by a standard of reasonableness, but not other forms of delegated legislation, and, since the Supreme Court's decisions in *Dunsmuir* and *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association* [2011] 3 SCR 654, 2011 SCC 61], reasonableness would now appear to be accepted as the appropriate standard to apply.

129. The recent case of *Canadian National Railway Co. v Canada (Attorney General),* 2014 SCC 40 ("*Cdn. National Railway*") confirms the move away from a correctness approach. While *Cdn. National Railway* does not address the validity of subordinate legislation, it squarely addresses the question of true jurisdiction. At issue was whether the Governor in Council had authority under its subordinate legislation to vary or rescind orders of the Canadian Transportation Agency when the matter involved a question of law concerning whether a specific party to a contract could bring a complaint under the statutory regime. The legislation in question gave authority to vary or rescind orders, but did not address whether that could be done for errors of law. The Court stated:

> [61] **To the extent that questions of true jurisdiction or *vires* have any currency**, the Governor in Council's determination of whether a party to a confidential contract can bring a complaint...does not fall within that category. This is not an issue in which the Governor in Council was required to explicitly determine whether its own statutory grant of power gave it the authority to decide the matter... **Rather, it is simply a question of statutory interpretation involving the issue of whether the...complaint mechanism is available to certain parties.** This could not be a true question of jurisdiction or *vires* of the Governor in Council. (emphasis added)

130. Similarly, the issue in *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2014 BCSC 1414[95] *("Sobeys West")* was the validity of a bylaw passed under the legislation governing pharmacists and pharmacy operations in BC. Under the legislation, the College of Pharmacists of BC had a duty to "serve and protect the public and to exercise its powers and discharge its responsibilities under all enactments in the

[95] On appeal to the BCCA.

public interest." The College was given general bylaw making authority consistent with the duties and objects of the College (akin to regulation making authority under the *LPA*) over standards, limits or conditions for practice, and other matters.

131. Under such authority, the College passed a bylaw prohibiting incentives such as customer loyalty schemes that were offered by some pharmacies. Certain drug stores, including those operated by Sobeys West, sought to have the bylaw quashed for lack of jurisdiction. In considering the applicable standard of review, the Court stated:

> [11] The respondent is not a publicly elected body. It receives its authority pursuant to the *HPA*, and its powers are limited to those granted to it by its enabling statute. Those powers include the power to regulate the conduct of pharmacies and pharmacists in the public interest. The respondent correctly argued that the standard of review on jurisdictional matters is one of correctness; however, I did not understand the petitioners to challenge the respondent's jurisdiction to pass bylaws intended to promote and not harm public interests.
>
> [12] The parties are otherwise agreed that the standard of review to be applied to the respondent's decisions respecting the passage of bylaws is that of reasonableness, pursuant to *Dunsmuir*.
>
> [13] In my view, the onus of establishing the Impugned Bylaws are unreasonable rests upon the petitioners.

132. The *Sobeys West* case, when read together with *Dunsmuir, Alberta Teachers* and *Cdn. National Railway*, stands for the proposition that true questions of jurisdiction only arise in determining the broad existence of statutory authority, not in its exercise. The former is subject to correctness; the latter to a standard of review of reasonableness.

133. In the current case, the purpose of the Society is to uphold and protect the public interest in the practice of law, to establish standards for qualifications for those seeking the privilege of membership, to establish standards of competence and to regulate the practice of law in Nova Scotia. The Society, by deciding to pass the Regulation, interpreted its mandate as necessarily including the authority to define what qualifies as a "law degree" in Nova Scotia. This is not a "true jurisdictional" question, but rather an interpretation of the Society's own enabling statute leading to a finding that regulating the practice of law in Nova Scotia includes defining a "law degree". Deference must be accorded to the Society's determination of what regulations are necessary in order to properly regulate the legal profession in the public interest.

134. In *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, (*Pearlman*) the Court emphasized the deference that should be accorded to regulators of the legal profession:

> It is appropriate at this juncture to mention the legislative rationale behind making a profession self-governing. The Ministry of the Attorney General of Ontario produced a study paper entitled The Report of the Professional Organizations Committee (1980) which, I believe, provides a helpful analysis of this rationale. The following extract from p. 25 is apposite:
>
> > In the government of the professions, both public and professional authorities have important roles to play. When the legislature decrees, by statute, that only licensed practitioners may carry on certain functions, it creates valuable rights. As the ultimate source of those rights, the legislature must remain ultimately responsible for the way in which they are conferred and exercised. Furthermore, the very decision to restrict the right to practise in a professional area implies that such a restriction is necessary to protect affected clients or third parties. The regulation of professional practice through the creation and the operation of a licensing system, then, **is a matter of public policy: it emanates from the legislature; it involves the creation of valuable rights; and it is directed towards the protection of vulnerable interests.**
> >
> > On the other hand, where the legislature sees fit to delegate some of its authority in these matters of public policy to professional bodies themselves, it must respect the self-governing status of those bodies. **Government ought not to prescribe in detail the structures, processes, and policies of professional bodies. The initiative in such matters must rest with the professions themselves, recognizing their particular expertise and sensitivity to the conditions of practice.** In brief, professional self-governing bodies must be ultimately accountable to the legislature; but they must have the authority to make, in the first place, the decisions for which they are to be accountable. [Emphasis added by SCC]
>
> The authors noted the **particular importance of an autonomous legal profession to a free and democratic society**. They said at p. 26:
>
> > Stress was rightly laid on the high value that free societies have placed historically on an independent judiciary, free of political interference and influence on its decisions, and an independent bar, free to represent citizens without fear or favour in the protection of individual rights and civil liberties against incursions from any source, including the state.
> >
> > On this view, the self-governing status of the professions, and of the legal profession in particular, was created in the public interest.
> >
> > ...

> **In the case at bar, the Manitoba Legislature has spoken, and spoken clearly. The Law Society Act manifestly intends to leave the governance of the legal profession to lawyers and, unless judicial intervention is clearly warranted, this expression of the legislative will ought to be respected.** (Emphasis added)

135. *Pearlman* implicitly endorses that decisions respecting the regulatory functions of a Law Society are within the expertise of the Society. Who is in a better position to determine what regulations are necessary to regulate the practice of law in the public interest than the Society itself? The Society was given full authority to do so by the legislature and it has the expertise to determine how the profession should be regulated. That determination must be accorded deference through a standard of review of reasonableness.

136. The Applicants raise three other reasons why the Regulation should be reviewed for correctness.

137. First, the Applicants argue that the Regulation raises cross-jurisdictional issues because the BC Minister of Education has the authority to approve degrees in the province of British Columbia and this creates a situation where there are competing tribunals attempting to make the same decision. The Society disagrees. "A question regarding the jurisdictional lines between competing specialized tribunals" as described in *Alberta Teachers*, is a question regarding which competing tribunal has the ultimate authority to make a determination of an issue before them that is squarely the same.

138. There are no cross jurisdictional lines of competing tribunals as between the Society, other law societies or the BC Minister of Advanced Education.[96] The functions of each are entirely discrete and serve different purposes. The BC Minister approves schools in BC for specified purposes under the *Degree Authorization Act*, SBC 2002, c. 24. These purposes do not focus on the functions of the public interest regulator of the legal profession in Nova Scotia, or even in B.C. They are not "competing tribunals".

139. Further, the fact that different Law Societies may consider the approval of law degrees from TWU or other universities (and may come to different conclusions) does not cross jurisdictional lines among competing tribunals. The issue is not one of true jurisdiction, as previously discussed. It is the exercise of individual regulators interpreting their home statutes, as they are authorized to do. These individual regulators are not in competition

[96] Suggested at Applicants' Brief, para 31

with each other. They each can legitimately set the admissions criteria they determine are most appropriate within their respective statutory mandates and purposes.

140. Law societies could require all of the legal training and education for admission to be carried out by the law societies themselves, rather than accepting legal training and education from law schools. If law societies were carrying out the training themselves, there is no question that the training would have to be offered in a manner consistent with the *Charter* and the applicable human rights legislation of the societies' respective home provinces. The Society's Regulation in Nova Scotia simply requires the same standard of human rights compliance to be carried out by law schools seeking recognition for their graduates in the admissions process in Nova Scotia, that would have to have been carried out if the Society were itself providing the legal education of its prospective admittees. The Society does not purport to impose that requirement for purposes of admission to the Bar in other Canadian jurisdictions.

141. Second, the Applicants say that the question of whether TWU is entitled to teach its religious values and require those at their school to abide by a Covenant, is of general importance to the legal system as a whole and therefore is subject to a correctness standard. Again, the Society disagrees.

142. The restrictions in the Resolution relating to the Covenant are not of general importance to the legal system as a whole – they are of interest to TWU in the context of its own student admission policies, and not elsewhere.

143. Finally, the Applicants argue that *BC Teachers* is determinative on the standard of review. The various distinguishing features of *BC Teachers* from the present case have already been reviewed. With specific respect to issues of standard of review, the Applicants note that in *BC Teachers*, the Court found that correctness was the standard both for determining that the BCCT had jurisdiction to consider discriminatory practices in dealing with the TWU application, and for determining the ultimate validity of the BCCT's decision.

144. *BC Teachers* was decided prior to the sea change in law concerning standard of review that commenced with *Dunsmuir*. Just one year after *BC Teachers*, the Court found in *Chamberlain v. Surrey School District No. 36,* [2002] 4 SCR 710, 2002 SCC 86 ("*Chamberlain*") that the reasonableness standard of review applied to a resolution of a

school board not to approve books depicting same-sex parented families for use as educational resources. As is noted above in Brown & Evans, reasonableness "as a standard of review of non-adjudicative administrative action is now firmly established in relation to the exercise of discretion, apart altogether from a review for bad faith or arbitrariness" (15:2431;).

145. When the above is taken into account, the Society says the presumption of deference has not been rebutted. The Regulation is subject to the reasonableness standard.

146. In the alternative, if it is determined that the Regulation raises true questions of jurisdiction where it defines a law degree in a manner calling for consideration of discriminatory practices, the Society says that the Regulation was within the jurisdiction of the Society. The test for determining *vires* in this event is that articulated in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care),* 2013 SCC 64 (*Katz*):

> [24] A successful challenge to the *vires* of regulations requires that they be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate (Guy Régimbald, *Canadian Administrative Law* (2008), at p. 132). This was succinctly explained by Lysyk J.:
>
> > In determining whether impugned subordinate legislation has been enacted in conformity with the terms of the parent statutory provision, it is essential to ascertain the scope of the mandate conferred by Parliament, having regard to the purpose(s) or objects(s) of the enactment as a whole. The test of conformity with the Act is not satisfied merely by showing that the delegate stayed within the literal (and often broad) terminology of the enabling provision when making subordinate legislation. The power-conferring language must be taken to be qualified by the overriding requirement that the subordinate legislation accord with the purposes and objects of the parent enactment read as a whole.
>
> [...]
>
> [25] Regulations benefit from a presumption of validity [...]. This presumption has two aspects: it places the burden on challengers to demonstrate the invalidity of regulations, rather than on regulatory bodies to justify them [...] and it favours an interpretative approach that reconciles the regulation with its enabling statute so that, *where possible*, the regulation is construed in a manner which renders it *intra vires* [...].
>
> [26] Both the challenged regulation and the enabling statute should be interpreted using a "broad and purposive approach ... consistent with this Court's approach to statutory interpretation generally" [...]
>
> [27] This inquiry does not involve assessing the policy merits of the regulations to determine whether they are "necessary, wise, or effective in

> practice" [...] *Hunters v. Ontario (Ministry of Natural Resources)* (2002), 2002 CanLII 41606 (ON CA), 211 D.L.R. (4th) 741 (Ont. C.A.):
>
> > ... the judicial review of regulations, as opposed to administrative decisions, is usually restricted to the grounds that they are inconsistent with the purpose of the statute or that some condition precedent in the statute has not been observed. The motives for their promulgation are irrelevant. [para. 41]
> >
> > [28] It is not an inquiry into the underlying "political, economic, social or partisan considerations" [...]. Nor does the *vires* of regulations hinge on whether, in the court's view, they will actually succeed at achieving the statutory objectives [...]. They must be irrelevant", "extraneous" or "completely unrelated" to the statutory purpose to be found to be *ultra vires* on the basis of inconsistency with statutory purpose [...]. In effect, although it is possible to strike down regulations as *ultra vires* on this basis, as Dickson J. observed, "it would take an egregious case to warrant such action" [...]. [references omitted]

147. Based on the above, it is the Society's position that the reasonableness standard applies with respect to the entirety of this Court's review of the Regulation. Alternatively, to the extent the Regulation raises true jurisdictional issues by defining a law degree it is reviewable on a standard of correctness. Regardless of the test, the Society says that its Regulation withstands judicial review.

(2) **Standard of review to be Applied to the Resolution**

148. The Regulation is the objective statement of the criteria that must exist for a law degree to be approved by the Society. It was formulated in the present case through the policy discussion and decision arising from a consideration of TWU's proposed law school. The specific finding that TWU's Covenant was discriminatory arose from Council's passage of the Resolution.

149. The Applicants say that the Resolution was made without reasons and without evidence, and was therefore unreasonable. To this point, the Society says that these are matters of procedural fairness, and not subject to traditional standard of review analysis. They will be addressed separately, *infra,* to determine their impact on the validity of the Resolution.

150. The Applicants say that there are three issues of "true jurisdiction" arising from the Resolution, that are subject to review on a standard of correctness which are substantially similar to the issues raised regarding the Regulation: 1) The Society was not given the authority to approve a law school (rather than determine whether a student was qualified to practice law in Nova Scotia); 2) The Legislature did not give the Society

authority to consider the religious beliefs of a student (or the religious foundations of a school); and 3) The Legislature did not give the Society the authority to impose a standard on some students and not others.

151. Finally, the Applicants say that to the extent the Society was disapproving a school in another province and applying the Nova Scotia *Human Rights Act* to that school, it was determining a constitutional question, which is subject to review on a correctness standard.

152. The Society says that when reviewing these issues which are improperly characterized by the Applicants as ones of "jurisdiction", the standard of review is reasonableness, based on the same line of cases previously outlined that create a presumption of deference that has not been rebutted in these circumstances.

153. The fact that Council considered the *Charter* and the *HRA* does not change the standard of review analysis. Administrative decision makers are required to take into account fundamental Canadian values, including those in the *Charter*, when exercising their discretion. [97] In *Doré v. Barreau du Québec,* 2012 SCC 12 ("*Doré*") the Court held that administrative decision makers should consider the nature of their statutory objectives and consider how the relevant *Charter* values can best be protected in view of those statutory objectives. This requires the decision maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. A court will review the tribunal's exercise of that balancing on a standard of reasonableness. The court commented:

> [47]... An administrative decision-maker exercising a discretionary power under his or her home statute, has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing Charter values. As the court explained in *Douglas / Kwantlen Faculty Assn. v. Douglas College* [1990] 3 S.C.R. 570, adopting the observations of Professor Danielle Pinard:
>
> > ... Administrative tribunals have the skills, expertise and knowledge in a particular area which can with advantage be used to ensure the primacy of the Constitution. Their privileged situation as regards the appreciation of the relevant facts enables them to develop a functional approach to rights and freedoms as well as to general constitutional precepts.

[97] *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817, as quoted in *Doré* v *Barreau du Québec*, 2012 SCC 12 *at para 28.*

154. Accordingly, Council's consideration and application of *Charter* values when making the Resolution, calls for a reasonableness analysis.

155. With respect to the application of the *HRA*, it must be noted that human rights legislation is fundamental, quasi-constitutional law and the Society is required to take it into account. As set out in *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14 ("*Tranchemontagne*"), in considering the Ontario Social Benefits Tribunal's conclusion that it did not have jurisdiction to apply the relevant Human Rights Code:

> 13 The Code is fundamental law. The Ontario legislature affirmed the primacy of the Code in the law itself, as applicable both to private citizens and public bodies. Further, the adjudication of Code issues is no longer confined to the exclusive domain of the intervener the Ontario Human Rights Commission ("OHRC"): s. 34 of the Code The legislature has thus contemplated that this fundamental law could be applied by other administrative bodies and has amended the Code accordingly.

156. While Nova Scotia still confers the responsibility for administration of *HRA* issues upon the Human Right Commission, that does not mean that the Act cannot be applied by other decision-makers in this province, especially when it is raised as ancillary or closely connected to some other function of the administrative decision-maker in question.

157. In light of the above statements and consistent with the application of similar principles in *Doré*, consideration of human rights legislation in the exercise of statutory discretion should attract a standard of review of reasonableness. Such a conclusion was reached in *Flinn v. Halifax Regional School Board*, 2014 NSCA 64 ("*Flinn*"), where the reasonableness standard of review was found to apply in the review of a labour tribunal's decision where the tribunal took human rights laws into consideration. While not addressing this issue at length, the court approved the reasoning of the lower court (*"AA" v. Halifax Regional School Board*, 2013 NSSC 228), which found:

> [41] The law is less clear than it might be on the question of whether deference is due to a labour tribunal's interpretation of human rights law, but I would suggest that the tribunal is entitled to deference when it is required to interpret and apply a statute that is closely connected to its mandate and which it encounters frequently. This would include provincial human rights legislation. That being said, some authorities suggest less deference on issues of pure human rights law. It may be that a pure question of law – such as the formulation of a legal test – would be subject to a correctness standard. However, where the tribunal correctly formulates the legal test in the course of determining an issue directly within its area of expertise and jurisdiction – such as justification for

> dismissal – the authorities support a degree of deference to the decision on the ultimate issue, which is whether termination was justified.

158. In further considering *Dunsmuir* contextual factors, the nature of the question at issue here is not a question usually attracting the correctness standard of review. Rather, it concerns elements of public policy, as well as mixed fact and law. Finally, the Society says that Council had the expertise to make a determination under the *HRA*, considering that Council is principally composed of lawyers who have expertise in legal matters. Like any duly constituted Human Rights Board of Inquiry (which is usually made up of practicing members of the Nova Scotia bar), Council had the necessary expertise to not only make determinations under the *HRA*, but also to generally apply its norms and principles. As earlier referenced in cases like *Pearlman*, the Supreme Court of Canada has recognized the fundamental importance of leaving the governance of the legal profession to lawyers, and has recognized the expertise of lawyers to govern their own profession.

159. These factors collectively weigh in favour of applying the reasonableness standard to a review of Council's Resolution, which took into account values and principles espoused in the *HRA*.

B. The Application of the Standard of Review

160. The Applicants raise seven main issues in challenging the Regulation and the Resolution. In doing so, they frame the questions as requiring an inquiry by the Court of whether or not the Society's actions were correct. It is the Society's position that the Court should review these issues to determine whether or not the Society's actions were reasonable, not correct. The Society will respond to the challenges from the Applicants as follows:[98]

1) Was it within the Society's authority and reasonable to pass a Regulation and Resolution that considered a law school's admissions and enrolment policies, instead of the qualifications of individual applicants?

2) Does the Regulation unreasonably define a "law degree" by leaving decisions regarding the discriminatory nature of admission and enrolment policies to Council?

3) Are the Regulation and Resolution unreasonable because they take into account irrelevant considerations such as religious precepts?

[98] Note that some of the issues have been reframed.

4) Does the Regulation make unauthorized distinctions that are discriminatory, rendering it unreasonable?

5) Was it reasonable for Council to consider the Nova Scotia *Human Rights Act*?

6) Was Council's Resolution unreasonable because Council acted without evidence and gave no reasons?

7) Was Council's Resolution unreasonable because Council found that the Covenant was discriminatory?

161. As stated in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 ("*Catalyst Paper*"), if the applicable standard of review is correctness, the reviewing court requires that the Council be correct in its decision to pass the Regulation and the Resolution and the word "reasonable" used above can be substituted with the word "correct".

162. If the applicable standard of review is reasonableness, the reviewing court requires that the decision be reasonable, having regard to the processes followed and whether the outcome falls within a reasonable range of alternatives in light of the legislative scheme and contextual factors relevant to the exercise of the power. As our Court of Appeal recently explained in *Egg Films Inc. v. Nova Scotia (Labour Board)*, 2014 NSCA 33 ("*Egg Films*"), where it stated:

> [26] Reasonableness is neither the mechanical acclamation of the tribunal's conclusion nor a euphemism for the reviewing court to impose its own view. The court respects the Legislature's choice of the decision maker by analysing that tribunal's reasons to determine whether the result, factually and legally, occupies the range of reasonable outcomes. The question for the court isn't – What does the judge think is correct or preferable? The question is – Was the tribunal's conclusion reasonable? If there are several reasonably permissible outcomes the tribunal, not the court, chooses among them. If there is only one and the tribunal's conclusion isn't it, the decision is set aside. The use of reasonableness, instead of correctness, generally has bite when the governing statute is ambiguous, authorizes the tribunal to exercise discretion, or invites the tribunal to weigh policy. [references omitted]

163. With respect to the application of the reasonableness standard to *Charter* issues, the decision in *Doré* provides the most recent instruction. On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* rights and values at play. The Court must give a "margin of appreciation", or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives.

164. Finally, with respect to the application of the reasonableness standard to *HRA* issues, recent guidance has been provided by our Court of Appeal in *Izaak Walton Killam Health Centre v Nova Scotia (Human Rights Commission)*, 2014 NSCA 18 (*IWK*), where the court held:

> [22] How this Court should approach a "reasonableness" review of a tribunal's interpretation of human rights legislation is described by the Supreme Court of Canada in *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53:
>
> [33] The question is one of statutory interpretation and the object is to seek the intent of Parliament by reading the words of the provision in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of Parliament.....In approaching this task in relation to human rights legislation, one must be mindful that it expresses fundamental values and pursues fundamental goals. It must therefore be interpreted liberally and purposively so that the rights enunciated are given their full recognition and effect....However, what is required is nonetheless an interpretation of the text of the statute which respects the words chosen by Parliament.

C. Interpretative Framework for Administrative Law issues

165. As outlined in the Standard of Review section, the Society asserts that all issues under review should be considered on a reasonableness standard and accorded deference. Alternatively, if issues of true jurisdiction are found to exist in considering the Society's authority to pass the Regulation, clear guidance can be gleaned from *Katz* by applying the principles set out therein. These principles create a presumption of validity for regulations that places the burden on the Applicants to demonstrate their invalidity and favours an interpretative approach that reconciles the Regulation with its enabling statute. A broad and purposive approach must be used consistent with the Court's approach to statutory interpretation generally. Only where a regulation is irrelevant, extraneous or completely unrelated to the statutory purpose, will it be set aside.

166. All of these factors from *Katz* are founded in the general statement that "**A successful challenge to the *vires* of regulations requires that they be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate**"[99].

[99] *Katz* at para 24

167. If, as the Society contends, there are no true jurisdictional issues here, then the approach to determining the validity of the Regulation is that set out in *Catalyst Paper*,[100] where the Court approached the validity of the bylaws in question from the perspective of whether the bylaws were a reasonable interpretation of the home statute. The Court concluded:

> [25] Reasonableness limits municipal councils in the sense that the substance of their bylaws must **conform to the rationale of the statutory regime set up by the legislature**. The range of reasonable outcomes is thus circumscribed by the purview of the legislative scheme that empowers a municipality to pass a bylaw. [emphasis added]

168. In *Cdn National Railway*, the Supreme Court of Canada questioned whether the distinction between issues of true jurisdiction and issues of interpretation of home statutes continued to exist,[101] and then went on to apply the basic principles of statutory interpretation:

> The words of an Act are to be read in their entire context, in their grammatical and ordinary sense **harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament**: R. Sullivan, Sulivan on the Construction of Statutes (5th ed. 2008) at p 1, citing E.A. Driedger, The Construction of Statutes (1974), at p. 67). [emphasis added]

169. The focus, regardless of whether the question is framed as jurisdictional or otherwise , is whether the resulting subordinate legislation and decisions arising from it are consistent with the **purpose and scope of the enabling statute** and can be read harmoniously with the scheme of the Act, when read in a broad and purposive manner.

(1) **The scope and mandate of the Society reflected in the *LPA***

170. These are set out in detail earlier in this Brief.[102] The relevant portions of the *LPA* are the purpose provisions (section 4), the regulation making provisions (section 5), and the general Council authority provisions (section 6). Collectively these provisions require and enable the Society to:

- uphold and protect the public interest in the practice of law;
- establish standards for the qualifications of those seeking the privilege of membership in the Society;

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[100] *Catalyst*, supra at pp. ...
[101] *Cdn National Railway* at para 61
[102] See Tab D for *LPA*.

- seek to improve the administration of justice in the Province by, among other things, consulting with communities reflecting the sexual diversity of the Province;

- make regulations establishing requirements to be met by members, including educational, good character and other requirements;

- and take any action consistent with the Act that Council considers necessary for the promotion, protection, interest or welfare of the Society, including the making of regulations that assist in carrying out the Society's purpose.

171. The above language of the *LPA* emphasizes the public interest mandate of the Society, where the interests of the administration of justice must be served.

172. In addition, there is broad authority given to Council as follows:

> 6(2) The Council shall govern the Society and manage its affairs, and may take action consistent with this Act that it considers necessary for the promotion, protection, interest or welfare of the Society.
>
> (3) Council may take any action consistent with this Act by resolution.
>
> ...
>
> (5) In addition to any specific power or requirement to make regulations under this Act, the Council may make regulations to manage the Society's affairs, pursue its purpose and carry out its duties.

173. The courts have also provided assistance in understanding the public interest mandate of the Society and the importance played by those who regulate professions, particularly the legal profession, given its independent and key function in the administration of justice.

(2) **The role of a Law Society**

174. In *Pearlman, supra* the Court underscored the independence of Law Societies and the fact that such independence should not be constrained unless clearly warranted. In particular the Court emphasized the importance of an autonomous legal profession to a free and democratic society.

175. In *Federation of Law Societies of Canada v. Canada (Attorney General)* 2013 BCCA 147,[103] the Court noted:

[103] On appeal to SCC at paras 109 -111.

> The independence of the Bar is also an integral part of Canadian society as a whole. In *Omineca Enterprises Ltd. v. British Columbia (Minister of Forests)* (1993), 1993 CanLII 1366 (BC CA), 85 B.C.L.R. (2d) 85 at para. 53 (B.C.C.A.), McEachern C.J.B.C., (dissenting in part for unrelated reasons), wrote:
>
> > One of the great and often unrecognized strengths of Canadian society is the existence of an independent bar. Because of that independence, lawyers are available to represent popular and unpopular interests, and to stand fearlessly between the state and its citizens.
>
> This view was echoed in *Finney v. Barreau du Québec*, 2004 SCC 36 (CanLII), [2004] 2 S.C.R. 17 at 21, where LeBel J. commented that "[a]n independent bar composed of lawyers who are free of influence by public authorities is an important component of the fundamental legal framework of Canadian society."
>
> The independence of the Bar has also been asserted as an element of the rule of law which is essential to the constitution of a modern democracy, as expressed by Lord Bingham in his book *The Rule of Law* (London: Allen Lane, 2010) at pp. 92–93:
>
> > Scarcely less important than an independent judiciary is an independent legal profession, fearless in its representation of those who cannot represent themselves, however unpopular or distasteful their case may be.

176. In *LaBelle v. Law Society of Upper Canada* (2001), 52 O.R. (3d) 398, aff'd (2001) 151 O.A.C. 284, leave to appeal ref'd [2002] S.C.C. No. 137 ("*LaBelle*") the court stated:

> [31] The legal profession is a fundamental component of our historical system of government and pre-dates Magna Carta. Self-government was assumed by the English Inns of Court since the fourteenth century. The independence of the bar is a conventional constitutional requirement designed to maintain a free society.[104]

177. These cases support the Society's position that the Legislature in crafting the *LPA* manifestly intended to leave the governance of the legal profession to lawyers. A clear expression of this can be found in the realization that regulations under the *LPA*, with small exceptions,[105] do not require approval of the Governor in Council. There has been a true delegation of governance and decision making to Council, within the statutory confines of the *LPA*. The independence of the legal profession, including its authority to pass regulations without Cabinet oversight, supports a generous, rather than a narrow interpretation of the Society's mandate.

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[104] See also at para 34 of *LaBelle* the article titled *"Self-Government of the legal profession – can it continue?"* (1985), 4 Advocates' Soc. J. No. 1, 11-16, G.D. Finlayson, Q.C. (later Mr. Justice Finlayson of the Court of Appeal for Ontario)

[105] *LPA*, as 16(4)(l) and (m) and s. 71.

(3) **Interpretative guidance from the Court respecting regulated professions**

178. The broad and purposive approach to legislation of professions was given emphasis in *Binet v. Pharmascience Inc.* 2006 SCC 48, ("*Binet*") where the Court held that a narrow interpretation of the governing body's powers, preventing it access to documentation held by third parties would undermine the body's capacity to protect the public interest. Justice LeBel, writing for the majority, held that:

> 35 According to the principles of interpretation, in the event of ambiguity, the interpretation most favourable to the purpose of the statute must prevail. ...
>
> 36 This Court has on many occasions noted the crucial role that professional orders play in protecting the public interest. As McLachlin J. stated in *Rocket v. Royal College of Dental Surgeons of Ontario*, 1990 CanLII 121 (SCC), [1990] 2 S.C.R. 232, "[i]t is difficult to overstate the importance in our society of the proper regulation of our learned professions" (p. 249). The importance of monitoring competence and supervising the conduct of professionals stems from the extent to which the public places trust in them. Also, it should not be forgotten that in the client-professional relationship, the client is often in a vulnerable position.... (Emphasis added)

179. *Binet* has been relied on in several cases to suggest that the privilege of self regulation places the individuals responsible for it under an onerous obligation.[106] The regulatory body should have the tools to carry out its responsibility. Narrow interpretations of legislative power should be rejected in favour of interpretations that provide the regulator with authority to carry out its responsibilities.

180. Such a purposive and expansive approach to interpretation was favoured in *Churko v. Law Society of Saskatchewan* 2011 SKQB 327 ("*Churko*"), a case involving admission to the profession where the Court considered the authority of the Society to consider broad issues of suitability of principals for articling students. The Applicant argued that the Executive Director had acted unreasonably by taking into account the firm environment where the principal was located. The Applicant argued this was not a factor the Executive Director could consider, as his authority was restricted to a review of only the enumerated factors, and these did not accord authority to review the factors under consideration. The Society argued that such an interpretation would undermine the purposes of the Act. The Court accepted the Society's view, stating:

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[106] See, for example *Wise v. Law Society of Upper Canada* 2010 ONSC 1937 (Div. Ct.) *Rassouli-Rashti v. College of Physicians and Surgeons of Ontario* 2009), 256 OAC 186 (Div. Ct.), *Celgene Corp v Canada(Attorney General) 2011 SCC 1, Gore v College of Physicians and Surgeons of Ontario, 2009 ONCA 546),*.

> [20] In determining the interpretation to be placed on Rule 152(2), the court's task, as encapsulated in *Rizzo v. Rizzo Shoes, supra*, is to consider its provisions in their entire context and in their grammatical and ordinary sense harmoniously with the object of the Act and the intention of the Legislature.
>
> [21] Rule 152 was promulgated by the Benchers in the exercise of their duty to protect the public by assuring the integrity, knowledge, skill, proficiency and competence of members of the Law Society, including students-at-law. This is set forth in s. 3.1(c) of the Act.
>
> ...
>
> [26] Thus, a restrictive interpretation of the word "involvement" would confine its meaning under Rule 152(2) to "direct, personal involvement", which is the interpretation propounded by the applicant. A more expansive interpretation would allow the Executive Director to consider a member's indirect involvement with the Society as an associate of his or her law firm.
>
> [27] For the purposes of this application, I conclude that the purpose and intent of the Act will best be served by adopting the latter, more liberal and expansive, interpretation.

181. These authorities collectively underscore the application of the broad, purposive approach to statutory interpretation, requiring it to be done in a manner that is consistent with its public interest mandate. If the authority if not specifically granted, it can be implied. As stated by James Casey:

> Professional regulatory organizations, like all administrative bodies, obtain jurisdiction from one of two sources: by an express grant of jurisdiction by legislation or by application of the doctrine of jurisdiction by necessary implication to provide powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature.[107]

182. In addition to reviewing the Society's governing legislation and the guidance of the Courts, further assistance in applying a broad and purposive approach to an analysis of the Regulation and Resolution comes from the Society's governance documents, born from its history.

(4) **The importance of considering historically disadvantaged communities permeates the Society's work**

183. Even before the courts required the Society to consider *Charter* values and Human Rights legislation in all exercises of their statutory authority, the Society had decided to

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[107] James Casey, *The Regulation of Profession in Canada at 5-1*, Carswell Looseleaf (Under this principle, authority to regulate the practice of dentistry was found to be broad enough to authorize a regulation impacting on business arrangements by prohibiting a dentist from practising under the control of a non-dentist in *Brown v. Dental Association of Alberta* 2002 ABCA 24).

take very deliberate steps to address issues of discrimination that impacted the administration of justice.

184. As previously referenced, the Society developed a focused interest in diversity and inclusion following the report of the Marshall Commission. This point was before the Society for consideration in advance of the Resolution and the Regulation being passed. Benjamin Perryman in his written submission to the Society referred to the "historical failures of the legal system in Nova Scotia" and went on to state[108]:

> The Marshall case teaches us an important lesson about legal regulation: A failure to adopt a broad, liberal and purposive approach, beyond concern for the lawyer-client relationship, has the potential to cause significant harm to the public interest, especially for vulnerable populations.
>
> [...]
>
> The Royal Commission report was a clarion call for the Society to focus more acutely on equality. The Society responded by accepting the Royal Commission's recommendations and establishing the Equity Office. In creating the Equity Office, the Society accepted that it has a public interest role in promoting equality.

185. As already described, the Society created an Equity Office in 1996 with a mandate to assist the Society to fulfill its regulatory functions of maintaining public confidence in the regulation of the profession, upholding the public interest in the practice of law and seeking to improve the administration of justice in relation to equity and diversity.

186. Further insight into the Society's focus on matters relevant to equity and diversity is found in the 2013-16 Strategic Framework[109] as well as its Governance Policies[110]. Collectively, these documents require the Society, among other things, to identify and then seek to eliminate barriers to entry to the legal profession from members of historically disadvantaged communities and to encourage and facilitate retention of lawyers from historically disadvantaged communities.

187. Infused throughout all of the Society's work is its Statement of Values, requiring Council to, among other things promote equality and encourage the profession to embrace the value of diversity.

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[108] Record: NSBS000406/2, Submission of Benjamin Perryman.
[109] Record: NSBS001863 Strategic Framework.
[110] Record: NSBS001804, Council Governance Policies.

188. When considering guidance from the courts and from the Society's governing documents with respect to both the Regulation and the Resolution:

> (1) The grammatical and ordinary meaning of the language of the *LPA*, read in its entire context can be determinative in and of itself in understanding the Society's authority. When the grammatical and ordinary meaning is not sufficiently clear, the language must be interpreted harmoniously with the scheme of the Act, the object of the Act, and the intention of the Legislature;
>
> (2) They should be interpreted using a broad and purposive approach, rather than an approach of narrow construction;
>
> (3) If their substance conforms with the rationale of the statutory regime, they will be reasonable;

189. In addition, with respect to the Regulation:

> (4) It benefits from a presumption of validity. This:
>
> > (a) places the burden on the Applicants to demonstrate invalidity; and
> >
> > (b) favours an interpretive approach that reconciles the Regulation with its enabling statute so that, where possible, the Regulation is construed in a manner that renders it *intra vires*;
>
> (3) This inquiry does not involve assessing the policy merits of the Regulation to determine if they are necessary, wise or effective in practice, and does not involve an inquiry into the underlying political, economic, social or partisan considerations;
>
> (4) To be found *ultra vires* on the basis of inconsistency with statutory purpose, the Regulation must be irrelevant, extraneous or completely unrelated to the statutory purpose.

D. Challenges from the Applicants

(1) Was it within the Society's authority and reasonable to pass a Regulation and Resolution that considered a law school's admissions and enrolment policies, instead of the qualifications of individual applicants?

190. The Applicants say that the Society 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, and are made without jurisdiction.[111]

[111] Applicants' Brief, p. 10, para. 1.

(i) The Regulation

191. While the Society asserts the Regulation should be reviewed with deference, it will nonetheless address the jurisdictional issue raised by the Applicants. When analyzed from a jurisdictional perspective the Regulation benefits from the presumption of validity and the Applicants cannot meet the burden to demonstrate invalidity. The Regulation is directed at the law degree held by the applicant for membership, which is granted, of course, by a law school. The Regulation does not provide the definition of a "law school"; it provides a definition of a "law degree".

192. Applying the ordinary and grammatical meaning of the intersection of Section 4 (the duty to uphold the public interest in the practice of law by, among other things, establishing standards for the qualifications of those seeking membership) together with the regulation making authority in subclause 5(8)(b) (the ability to make regulations setting out the educational and other requirements to be met for membership), results in a jurisdictional framework within which the Society plainly had the authority to define a law degree for membership purposes.

193. To the extent the Regulation defines a law degree to include considerations of admission and enrolment policies beyond academic criteria, the presumption of validity requires the Regulation to be interpreted in a way that reconciles it with the *LPA,* so that, where possible, the Regulation is construed in a manner that renders it *intra vires.*

194. Using a broad and purposive approach to this analysis, and considering the breadth of the enabling language in the *LPA*, the consideration of discriminatory admissions and enrolment processes is consistent with the Society's broadly stated public interest purpose; it is a natural application of the guidance and direction outlined in its governance documents to address issues of discrimination as they relate to the administration of justice.

195. The Regulation governs who can be admitted as an articling clerk in Nova Scotia, and eventually become a lawyer and potentially a judge. It is relevant to the administration of justice. It addresses issues of equity for the historically disadvantaged. It is a regulation that deals with a requirement for members; it is a regulation that assists in carrying out the Society's purpose. It ensures that the pool of admittees into the Nova Scotia Bar is

not constrained by discriminatory enrolment criteria in the feeder system of law schools that currently perform the first block of legal education and training, which the Society, in its regulatory discretion, has allowed to be delegated to professional educators. The Society could choose a more intrusive role in legal education if it wished, either because of concerns about substantive educational criteria, or because of concerns about the diversity consequences of allowing third parties to control entry into the system. Instead it has delegated legal training to others, but now it does so only upon conditions designed to assist equal access to Society membership on the part of historically disadvantaged communities.

196. To be found *ultra vires* on the basis of inconsistency with statutory purpose, the Regulation must be "irrelevant', "extraneous" or "completely unrelated" to the statutory purpose. How can the Regulation be so when the statutory purpose broadly relates to upholding the public interest in the practice of law? How can this be so when the public interest in the practice of law requires that only those who meet the requirements for membership should be enrolled as articling clerks? How can this be so in a profession where the Legislature, as upheld by many court decisions, has underscored the importance of leaving the governance of the legal profession, including the setting of membership qualifications, to the profession itself? How can it be that a Regulation with an objective of eliminating discriminatory practices in the admissions and enrolment policies of law schools is irrelevant or extraneous to the Society, whose purpose, Strategic Framework, and policy direction are aimed at the elimination of discrimination for historically disadvantaged communities? Finally, how can a Regulation that requires consideration of the values in the *Charter* and the Nova Scotia *Human Rights Act* be invalid when the courts have clearly directed that statutory decision makers must take such values into account when exercising their discretion and their statutory authority?

197. The Applicants have not rebutted the presumption of the validity of the Regulation. The Regulation neutrally establishes a requirement for non-discrimination. It does not apply it. This creation of a non-discrimination criterion, when read in the entire context of the *LPA*, in its grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the legislature, reflects both a correctly enacted regulation and a reasonable one.

(ii) The Resolution

198. The starting point in determining whether Council had the authority to pass the Resolution is the grammatical and ordinary meaning of the *LPA* as it applies to the Resolution.

199. It is perhaps useful here to distinguish between the language of the Resolution and the language of the Regulation, and the effect of the distinction in the language used.

200. The Society recognizes that the language of the Resolution does not reference a law degree. It references the fact that the "TWU program" meets the National Requirement and states that Council "**does not approve the proposed law school at Trinity Western University**" unless students are either exempted from the Community Covenant or the Covenant is amended. The Applicants make much of this and say that by so doing, Council was taking on the authority to approve or reject law schools, an authority it did not have. They say that through the Resolution the Society was NOT establishing a standard for members as set out in its purpose clause– it was attempting to regulate a law school, which was beyond its jurisdiction to do. Much of this argument has been addressed with respect to the Regulation and relies on the most narrow, and thereby inappropriate, interpretation of the language of the *LPA*. Because the language of the Resolution uses the terminology of "approve the proposed law school", it deserves supplementary comment.

201. The Society acknowledges it has no authority to "approve" law schools in the sense contemplated by the *Degree Granting Act.* Indeed, this underscores the point that there are different types of approvals for different components of the educational and other requirements and regulations contemplated by the *LPA*, that fulfill the Society's mandate as set out in the Society's purpose clause.

202. If a new law school were being proposed for Nova Scotia, that school would need approval by the Nova Scotia Minister of Education and the Governor in Council as contemplated in the *Degree Granting Act,* for the purposes set out in that statute. In addition, the Society retains its own concurrent jurisdiction over educational and other requirements leading to membership in the legal profession. As earlier outlined respecting the Regulation, the Society would still have to determine whether it would

accept a degree from such new law school as part of its authority. It cannot delegate that authority to some other entity. The Society's necessary focus is on whether the law degree adequately satisfies the criteria under its own broad statutory mandate to uphold and protect the public interest in the practice of law.

203. The Resolution must be read in that broad and purposive context. The language in which the Resolution was couched is, in retrospect, imprecise. The reference to "approval" of the law school has created uncertainty for the Applicants as to the focus of Council's debate and decisions.

204. However, no such uncertainty existed at the Council level; the intention was clearly to make a determination about what, if any, criteria could impact the recognition of law degrees in Nova Scotia and the admission of law school graduates to membership in the Society.

205. In its Memorandum to Council preceding the passage of the Resolution, the Executive Committee says the following:

> A Special Committee of the FLSC has determined that there is no public interest reason to **exclude future graduates of the program from law society bar admission programs** as long as the program meets the National Requirement, and has noted that each Law Society must make its own decision about **the admission of law school graduates**. (emphasis added)[112]

206. When considering the option it eventually adopted, while also using the language of school "approval", the Executive Committee stated "... the consequence of TWU preserving the Covenant in its present form is that **its law school graduates should not be enrolled in the articling program in Nova Scotia"**. (emphasis added)[113] The actions of the Society in receiving submissions and considering volumes of material prior to passage of the Resolution were directed clearly at defining the components of an acceptable law degree that would qualify a candidate for membership. Given this context, it cannot be the case that the Society, in using the word "approve" in the Resolution, intended it to bear the meaning of "approval" by a body with authority over TWU. The ordinary meaning, in the context of the purpose of the statute was to say that graduates with a law degree from TWU (the TWU program) meet the National Requirement, but otherwise will not be eligible for membership unless the requested

[112] Executive Committee Memo to Council, Review of Submissions, Record, NSBS0010882, p. 1.
[113] *Supra*, p. 18.

exemptions from or amendments to the Covenant are put in place. In other words, TWU was not approved as an automatic source of admittees to the profession in Nova Scotia, unless it remedied a discriminatory rule that affected the neutrality of the law school feeder system on sexual orientation issues.

207. An amendment to existing regulations was expressly contemplated when the Resolution was passed. The language of the Regulation does not speak of "approving" TWU as a law school. Rather, the Regulation simply provides a definition of a law degree and does not assert authority over a law school.

208. The language of the Resolution ties in directly with the language of the Regulation. Both have their genesis in the language, purpose and history of the *LPA*. This language permits Council, as part of the Society's public interest mandate, to set the standards for the qualifications of those seeking the privilege of membership in the Society in a manner that does not discriminate against the historically disadvantaged, and in a manner that promotes inclusion of the LGB community as members of the legal profession in Nova Scotia. By referencing TWU's discriminatory policies in its Resolution, the Society was not wrongly or unreasonably asserting jurisdiction over TWU as a law school. Rather, it was reasonably, and alternatively correctly, interpreting its statutory mandate in a manner that allowed it to fulfil the Society's broad public interest purpose. As a result, the Resolution was properly made within the Society's authority and is reasonable.

(2) **Does the Regulation unreasonably define a "law degree" by leaving decisions regarding the discriminatory nature of admission and enrolment policies to Council?**

209. Under this heading the Society will respond to two related arguments advanced by the Applicants. The Applicants argue in Ground II of their Brief that the Regulation is flawed because it leaves the question of whether a university unlawfully discriminates within the discretion of Council. It says that by so doing Council has not acted within its statutory authority as it has not set a standard as required by the *LPA*.[114]

210. The Applicants further argue in Ground VII that the Regulation is contrary to the rule of law as it purports to give Council the ability on an *ad hominem* basis to decide whether

[114] Applicants' Brief at pages 23-24.

to admit a particular student or not, without an objective standard.[115] Given the relationship between these arguments, the Society will address them together.

211. The starting point is to acknowledge the presumption of validity of the Regulation and to require the Applicants to rebut this presumption of validity. This presumption is difficult to rebut as the court must favour an interpretive approach that reconciles the Regulation with its enabling statute so that, where possible, the Regulation is construed in a manner that renders it *intra vires*.

212. The *LPA* gives authority to Council to set educational and other requirements for membership. It does so in the broad context of regulating an independent legal profession in the public interest, within a focused framework of the promotion of equity and the non-countenance of discrimination. Within such framework, the Regulation states that for purposes of defining a law degree, the student admissions and enrolment policies of the university must be examined by Council, and it is Council that is given the discretion to determine whether the university unlawfully discriminates in these policies on grounds prohibited by either or both the *Charter* or the Nova Scotia *Human Rights Act*.

213. The grammatical and ordinary meaning of the language of the *LPA*, read in its entire context, and interpreted harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature, supports the authority to create the Regulation. The Regulation recognizes that determinations of unlawful discrimination require contextual decision making, based on the specific admissions and enrolment policies in issue. It is not feasible, practical or attainable to set out in a regulation the variety of factors that may be considered in making such a determination. This does not make the Regulation *ultra vires* or unreasonable.

214. To include discretion in the Regulation is a necessary aspect of it and one that is found throughout the regulations. A review of the criteria for enrolment of an articled clerk is illustrative.

215. Regulation 3.3.1 sets out a variety of criteria, one of which is that the applicant must have a law degree. Other criteria include, among others, that the applicant must be "of good character"; and a "fit and proper person". There is no guidance in the regulations

[115] Applicants' Brief at pages 37-40.

respecting the factors or "standard" to be applied when making decisions as to whether such discretionary criteria have been met. Such criteria necessarily require the application of discretion, and do not need to be legislatively circumscribed through setting a "standard" or objective criteria.

216. The fact that *measurement* of the standard falls to be determined by Council does not alter the fact that Council has set the criteria for determining when a law degree will be considered a law degree for purposes of admission to membership. The criteria include the approval of the Federation of Law Societies as well as Council's determination that the university granting the degree does not engage in unlawful discrimination in its admissions or enrolment policies, on prohibited *Charter* or *HRA* grounds. This is far more than "a blanket statement that a law degree is a law degree if Council determines", as argued by the Applicants.

217. It is not tenable to suggest that Council will arbitrarily make decisions under the Regulation. In the *LPA*, Council is given the broad authority to: "take any action consistent with this Act that it considers necessary for the promotion, protection, interest or welfare of the Society".[116] These in fact <u>are</u> the criteria against which its decisions on unlawful discrimination will be made, after considering the admissions and enrolment policies and the *Charter* and the HRA. The standard, in effect, has been set. This is not arbitrary, *ad hominem* discretion.

218. As will be discussed in more detail when considering *Charter* issues below, the SCC in *R. v. Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606 at paragraphs 66 to 69 acknowledged that the state, in attempting to realize important social objectives, sometimes must frame an enactment in relatively general terms. The SCC explained at paragraph 68:

> [...] The modern State intervenes today in fields where some generality in the enactments is inevitable. The substance of these enactments remains nonetheless intelligible. **One must be wary of using the doctrine of vagueness to prevent or impede State action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject-matter does not lend itself....** [emphasis added]

[116] *LPA*, subsection 6(2).

219. The Regulation is entirely consistent with the statutory framework of the *LPA*, which grants considerable discretion to Council within the broadly stated public interest purpose of the statute.

(3) **Is the Resolution unreasonable because it takes into account irrelevant considerations such as religious precepts?**

220. The religious precepts of TWU are given effect in the Community Covenant. It was not only appropriate, but necessary, for Council to consider the Covenant prior to passing the Resolution. The Applicants suggest (at para. 70 of their Brief) that the Society 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)." The Applicants say that whether a student has attended a school that has a religious nature or whether the student signed the Covenant are "irrelevant considerations", and that by so doing the Society erred in its decision making.

221. As earlier noted, the Society believes the Applicants have misconstrued its review of the Covenant and the religious precepts of TWU. Council reviewed the Covenant and the religious precepts of TWU not to keep Evangelical Christians out of the legal profession, but to consider whether the Covenant would present a barrier and disadvantage to LGB persons from entering the legal profession. Such an inquiry was supported and indeed required to reflect Society's Policy 2.5.1: to "identify and then seek to eliminate barriers to entry to the legal profession from members of historically disadvantaged communities"[117], a policy reflective of the broad public interest mandate of the Society, shaped by its history.

222. The Applicants refer at paragraph 67 of their brief to the statement in *BC Teachers* where the court stated: "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".

223. In this case the Society's concern is not with the beliefs of its members, but with the diversity of the profession and the equality of opportunity. The diversity of the profession is linked to the public interest in the due administration of justice. As already noted, the Society is particularly alive to the dangers stemming from under-representation of

[117] Affidavit of Darrel Pink at paragraph 28.

minorities, given how the work and findings of the Marshall Commission have influenced the Society to emphasize the importance of equity initiatives.[118]

224. The discrimination against LGB people is founded in the Covenant. Rather than this being an irrelevant consideration in the Society making its decision, it was a key component of its decision making. The mandatory nature of the Covenant is the very issue that gives rise to the finding of discrimination.

225. Based on the analysis in *Catalyst Paper*, it was reasonable for the Society to take into account the effect of the Covenant on issues of equality and discrimination, when passing its Resolution. Unlike questions of *vires* in subordinate legislation, *Catalyst* instructs that in the context of determining reasonableness it is appropriate to consider "broader social, economic and political issues".

(4) Does the Regulation make unauthorized distinctions that are discriminatory, rendering it unreasonable?

226. The Society disagrees with the Applicants' position that the Regulation should be invalidated because it allegedly "discriminates" in the following ways that TWU says are not authorized by the *LPA:*

a. Draws a distinction based on non-academic criteria including religious views and views of traditional marriage;

b. Distinguishes among students based on the university they attended rather than their individual qualifications;

c. Distinguishes between applicants based on admission policies rather than educational qualifications; and

d. Distinguishes based on the *Human Rights Act* in a manner not authorized by the *LPA*.

227. The word "discriminates" as used by TWU in this context refers to the making of a distinction in the application of the Regulation to different persons or classes of persons.[119]

228. The Applicants rely on *Montreal v Arcade Amusements,* [1985] 1 SCR 368 and the authorities following it, under which it has been held that express authority is required for

[118] Affidavit of Darrel Pink at paragraphs 4ff.
[119] Applicants' Brief, at pages 24-27.

a regulator to enact rules or regulations which discriminate, unless the discrimination is a necessary incident to the exercise of the power delegated to the regulator.

229. As the Applicants point out at paragraph 75 of their brief, the principle of non-discrimination in regulation-making was developed in the context of municipalities but the principle applies equally to regulations such as those made by the Society. From that municipal context, the Society says the recent case of *Catalyst Paper* offers more current instruction.

230. The Society says that its Regulation does not discriminate or make distinctions in the manner suggested by the Applicants. The Regulation simply states that a law degree from a school that unlawfully discriminates will not qualify as a "law degree" for the purposes of Regulation 3.1. The Regulation is neutral in that it applies to every law degree-conferring institution and prospective articling student in the same way.

231. If there are any distinctions contained in the Regulations as suggested by the Applicants, the Society is explicitly, and alternatively implicitly, authorized by the statutory regime to make a Regulation containing those distinctions and it was reasonable for it to do so. Through its broad statutory purpose, and explicit and implicit regulation making authority as previously described, the Council had authority to pass the Regulation.

232. Just as the municipality was entitled in *Catalyst Paper* (at paragraph 32) to consider not only objective considerations but also broader social, economic and political issues in formulating its taxation by-law,[120] so too was the Society entitled to have regard to the broader issues of non-discrimination, equality and inclusion raised by its public interest mandate in formulating its Regulation. Indeed, the Society was required to exercise its regulation-making authority in accordance with the *Charter* and the *Nova Scotia Human Rights Act*. As a result, any distinctions made by the Society in the Regulation were necessarily incidental to its exercise of the powers delegated to it by the legislature under the *LPA*.

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[120] The municipality's taxation by-law set the ratio between residential property and major industrial property at 1:20.3. The taxation by-law was the municipality's response to a demographic shift that caused skyrocketing residential property values while the value of Catalyst's major industrial property remained relatively stable. The municipality was concerned that taxing residential property at the rate that reflected its actual value relative to the value of other classes of property would result in an unacceptable tax increase to the residents, especially to long-term fixed-income residents. The by-law was upheld as being reasonable and within the scope of the legislative scheme, despite the application of different tax rates to different classes of property. See paragraphs 3, 34-36.

233. The Regulation does not draw a distinction among students based on religious views or traditional views of marriage. The Regulation defines a law degree in a manner that does not preclude a person of any religion or belief from seeking membership as an articling clerk in Nova Scotia. To the contrary, if a law degree was from an institution that unlawfully discriminated in its enrolment or admissions policies against a student because of their religion, a degree from that institution would not meet the criteria for a law degree established by the Regulation.

234. The Regulation promotes equality of opportunity for all persons to become members of the Society. It is not a regulation of exclusion of individuals based on their beliefs. Indeed, the door is left open to an individual graduate of a university that engages in unlawful discrimination to apply for membership in the Society. Through the authority in article 3.3.2 of the Society's regulations, the Executive Director retains authority to always consider an individual's circumstances.

235. The argument that the Society has wrongly made a distinction based on a university rather than an individual's qualifications must be rejected. This argument is a re-statement of the earlier jurisdictional argument advanced by the Applicants in saying that the Society has no jurisdiction to pass a regulation relating to a law school. The Society's response is to repeat that its decisions in this matter do not result in the Society exercising jurisdiction over TWU; the jurisdiction is only with respect to the law degree, a matter within its statutory authority.

236. The Applicants say that while it is proper to establish standards and educational requirements which qualify a student to practice law, this does not authorize Council to distinguish based on a university's enrolment or admission policies. This issue was analyzed previously in the context of the jurisdiction of the Society to pass the Regulation referencing the admission and enrolment policies of a university.

237. The definition of a "law degree" in the Regulation requires that a university granting the degree must not discriminate in its law student admissions or enrolment policies or requirements on grounds prohibited by the Nova Scotia *Human Rights Act ("HRA")*.

238. The Applicants say that the Society is not given jurisdiction to distinguish between applicants for articles based on its application of the *Human Rights Act,* as the administration of the *HRA* has properly been assigned to the Human Rights Commission

under their statute. Moreover, the Applicants say that the *HRA* sets out specific procedures for making determinations regarding discrimination complaints, and requires that determinations of this nature be made by independent adjudicators. The Society cannot usurp the role of the Commission.[121]

239. The Society says that it not only has the authority to take this province's human rights laws and values into consideration in approving law degrees, it in fact has a positive obligation to do so. The Applicant's argument understates the very broad mandate of the Society in regulating the legal profession in this province and simultaneously overstates the impact of the Society's decision to pay proper respect to the protections afforded by our human rights legislation.

240. As previously referenced, the *BC Teachers* case rejected TWU's arguments that regulators should not be addressing human rights issues, and that their public interest role was limited to standards of teacher training, competence and good character. The Court in rejecting these arguments stated:

> 13 ... The power to establish standards provided for in s. 4 of the Act must be interpreted in light of the general purpose of the statute and in particular, the need to ensure that "the fulfilment of public functions is undertaken in a manner that does not undermine public trust and confidence" (Ross, supra, at para. 84). Schools are meant to develop civic virtue and responsible citizenship, to educate in an environment free of bias, prejudice and intolerance. It would not be correct, in this context, to limit the scope of s. 4 to a determination of skills and knowledge.
>
> 14 We are therefore of the view that the BCCT had jurisdiction to consider discriminatory practices in dealing with the TWU application.

241. While the Society has asserted that the *BC Teachers* case can and should be distinguished on other grounds for a variety of reasons discussed earlier in this Brief, this aspect of the case remains good law. The findings of the Court have been echoed repeatedly in subsequent cases. As noted in *Dalhousie University v. Aylward*, 2001 NSSC 51 ("*Aylward*"), "the public at large has a vested interest in making sure that individual rights are protected"[122] Indeed, as earlier noted in *Tranchemontagne,* human

[121] Applicants' Brief paragraphs 87-89.
[122] At para 21.

rights laws are "fundamental, quasi-constitutional laws," and must be recognized as "being the law of the people".[123]

242. The public importance of the *HRA* in this province is exemplified by the fact that the Nova Scotia legislature has bound itself and all its agents through the *HRA*[124] while also giving primacy to the protections afforded under the *HRA* against regulations made pursuant to any other enactment that violates those protections.[125]

243. The fact that the government expressly sought to bind itself and its agents to the *HRA* demonstrates its importance. As a professional body seeking to uphold the public interest, it was entirely reasonable for the Society to apply the *HRA* to itself and its degree approval process in the manner it did.

244. Moreover, although regulations under the *LPA* do not require Governor in Council approval, they are regulations passed pursuant to the *LPA*, and thus qualify as a "regulation made pursuant to an enactment" under s. 10(1) of the *HRA*. It is the Society's position that the prior definition of "law degree," had it remained unchanged, would have indirectly approved of the discriminatory actions of TWU, and thus allowed for the restriction of "the rights or privileges of an individual or a class of individuals," namely LGB individuals. Given the potential violation of s. 10(1) of the *HRA*, and the risk that the prior regulation may have been rendered null and void, it was entirely reasonable for the Society to make the amendment in question. In any event, it is clear from the provisions of the HRA and cases such as *Alyward* and *Tranchemontagne* that entities like the Society have a positive duty to ensure that the decisions they make are consistent with the *HRA*.

245. The question facing the Society in this instance was whether it was in the public interest to approve, and thereby indirectly endorse a law degree from an institution that provides a legal education while systematically excluding and discriminating against LGB individuals in clear violation of the norms and principles espoused in the *HRA*. This consideration was both reasonable and highly relevant.

246. The Applicants implicitly acknowledge that the Society can rightly take such factors into consideration when regulating its members. As noted in paragraph 9 of the Applicants'

[123] At para 33.
[124] At section 21.
[125] At subsection 10(1).

Brief, the Society has imposed the obligation for all practitioners to respect the rights protected under the *HRA*, and further provides that lawyers have "a duty to respect the human dignity and worth of all persons and to treat all persons with equality and without discrimination." We would note in addition, as earlier referenced that all lawyers in Nova Scotia have pursuant to the *Code of Professional Conduct* a "duty to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations and institutions", as well as a "**special responsibility to respect the requirements of human rights laws** in force in Canada, its provinces and territories, and specifically, to honour the obligations enumerated in human rights laws"[126] (emphasis added)

247. Presumably, TWU makes this point to demonstrate that there are other mechanisms by which the Society can and has ensured that all legal practitioners in Nova Scotia abide by the minimum standards set out in our human rights legislation. However, it also demonstrates that the Society traditionally has had a duty in ensuring that the rights protected under our human rights legislation are respected and upheld by members of the profession. Including such considerations in the degree approval process is entirely in keeping with that obligation.

248. On a more practical level, it is clear that the Society, by redefining "law degree" in the manner it has, is not in any way attempting to usurp the role of either the Human Rights Commission or any properly constituted Board of Inquiry. By its Regulation, the Society does not purport to investigate discrimination complaints in the manner of the Commission; nor does it purport to make findings and pass orders in the manner of a Board of Inquiry. Rather, any considerations given to whether a degree-granting institution's policies and practices are discriminatory or violate the norms espoused in the *HRA* are limited entirely to the Society's own process for approving a law degree. There is therefore no basis upon which to claim that the Society has by its Regulation unlawfully granted to itself the authority to administer the *HRA* in the manner suggested by the Applicants.

249. Finally, while the Commission certainly has a significant role to play in protecting basic human rights, it does not have exclusive jurisdiction to do so (see, for instance, *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003

[126] Article 6.3

SCC 42 ("*Parry Sound*"), where the Supreme Court of Canada affirmed that grievance arbitrators have not only the power but also the responsibility to implement and enforce the substantive rights and obligations of human rights and other employment-related statutes; (see also *Tranchemontagne*).

250. In sum, the Society was operating well within its mandate in deciding that the province's non-discrimination standards were relevant for purposes of approving a law degree. By taking into account standards of non-discrimination in Nova Scotia in order to ensure that the public interest in the practice of law in this province is upheld, the Society was not making a wrongful distinction among applicants for articles based on its application of the *HRA*. Rather, it was reasonably incorporating a requirement into the degree approval process to ensure conformity with the *HRA*, a requirement that will be equally applied to all applicants.

(5) **Was it reasonable for Council to consider the Nova Scotia *Human Rights Act*?**

251. In addition to arguing that the Covenant does not discriminate against LGB persons, the Applicants say that this form of discrimination would be lawful in accordance with the requirements of British Columbia's *Human Rights Code*, RSBC 32, 1996, c. 210 (the "*HRC*") and the SCC decision in *BC Teachers*.

252. The Society does not intend to dispute the purported lawfulness of the Covenant under BC law. It is the Society's position that the lawfulness of the Covenant in British Columbia, and perhaps in other jurisdictions, is irrelevant to the Society's determination that the Covenant does not meet the standards of non-discrimination required in this Province.

253. The Applicants advance the position that the Society has erred by imposing the *HRA* on events and actions occurring in British Columbia. They say that there can be no finding that TWU has violated the *HRA*, because the *HRA* does not apply extra-territorially. The Applicants rely solely upon the decision of *Unifund v. ICBC*, [2003] S.C.J. No. 39 ("*Unifund*"), which dealt with a dispute over whether Ontario motor vehicle accident insurance laws applied to an accident that occurred in British Columbia but involved an Ontario driver. The question was whether Ontario could rightly impose obligations

pursuant to its own provincial laws on an insurer in British Columbia. The Court found that Ontario did not have jurisdiction, since the accident occurred in British Columbia.

254. *Unifund*, and the principles it espouses, is distinguishable from the Society's circumstances involving TWU.

255. First, it appears that much of the Applicants' argument on the applicability of the *HRA* fundamentally misunderstands the purpose and effect of the Society's decision. Specifically, the Applicants claim the Society is unreasonably attempting to "regulate civil rights arising out of a university enrolment or admission in British Columbia"[127] and "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*"[128].

256. That is not at all what the Society's Resolution has done. As is addressed above, the Society is not attempting to usurp the role of the Commission or Board of Inquiry; nor is it formally applying a regulatory regime in competition with British Columbia's regime. Rather, in this instance the Society is setting its own requirements for a law degree as a pre-requisite for the practice of law in this Province. The Society is ensuring that requirements take proper account of this Province's human rights legislation and the values it protects and espouses.

257. Unlike *Unifund*, this case does not involve "competing exercises" of regulatory regimes. The equivalent scenario to *Unifund* in this instance would arise if the Human Rights Commission attempted to pursue a discrimination complaint against TWU before a Nova Scotia Board of Inquiry for discriminatory acts and policies occurring in British Columbia that only affected residents in British Columbia. Such an attempt may be thwarted by the principle of extra-territoriality as it is set down in *Unifund*. No improper institutional competition arises here simply because the Society has regulated its degree approval process within this province differently than British Columbia or other provinces.

258. Second, while authorities may suggest that provinces cannot legislate extra-territorially when it comes to competing regulatory regimes, the Court in *Unifund* also noted that a provincial law will not offend the principle of extraterritoriality unless it "'attempt[s] to

[127] Applicants' Brief at para 96.
[128] Applicants' Brief at para 97.

extend the reach of provincial legislation outside its borders'".[129] That is clearly not what the Society has done. Rather, the Society's actions are in accordance with its very broad statutory mandate, where it has defined a law degree in a manner consistent with the public interest, for purposes of approving degrees in this Province. As the Applicants put it, the "legislature of Nova Scotia (and consequently NSBS) has authority only over matters occurring within Nova Scotia".[130] The Society agrees, and says that determinations regarding the Society's law degree requirements are on their face matters of a local nature concerning civil rights in this Province under section 92(13) of the *Constitution Act, 1867*, and only have an impact within the borders of this Province.

259. Third, even if *Unifund* were applicable in this regard, it does not stand for the sole proposition that provinces have "no legislative competence to legislate extraterritorially".[131] Rather, the Court in *Unifund* noted that territorial limits only prevent the application of a province's laws to "matters not **sufficiently connected** to it" (emphasis added).[132] The Court noted that what constitutes a "sufficient connection" ultimately "depends on the relationship among the enacting jurisdiction, the subject matter of the legislation and the individual or entity sought to be regulated by it." More recently, the Court noted that "the real and substantial connection test ... suggests that the connection between a state and a dispute cannot be weak or hypothetical. A weak or hypothetical connection would cast doubt upon the legitimacy of the exercise of state power over the persons affected by the dispute".[133] Finally, the applicability of provincial legislation to "out-of-province defendants is conditioned by the requirements of order and fairness" which are applied "flexibly according to the subject matter of the legislation" (para. 56).[134]

260. In this case, if it can be said that the Society has attempted to extend the reach of the *HRA* outside provincial borders, then there is a sufficient connection between the province of Nova Scotia and the degrees granted by TWU, since the degree itself will be relied upon by graduates of TWU in order to practice law in this Province. Clearly the connection between the Society, TWU and the Province of Nova Scotia is neither weak

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[129] para. 85; see also *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 SCR 494, 2000 SCC 21 at paras. 37 - 38).
[130] Applicants' Brief at para 48.
[131] *Unifund*, at para 50.
[132] *Unifund*, at para 56.
[133] *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 32.
[134] *Unifund* at para 56.

nor hypothetical. This case is therefore completely distinguishable from *Unifund* which involved an out-of-province defendant who had no connection whatsoever to the Province of Ontario. The Regulation applies to persons seeking admission to the Nova Scotia articling program.

261. Such was the case in *Ayangma v Infoway*, 2009 PESC 24 ("*Ayangma*"), where a complainant based in Prince Edward Island alleged that he had been discriminated against in a job application process for a position that would have been located in either Halifax, Toronto or Montreal. The respondent was based in Quebec. The complainant had taken part in two interviews that proceeded by teleconference and videoconference, respectively. While the Human Rights Commission of PEI had declined to accept jurisdiction due to the location of the employer, the Supreme Court of PEI decided otherwise, noting that there was a substantial connection between the complainant and the province of PEI, even though the respondent and the job itself were located outside of the province. According to the Court, "[c]ases may be substantially connected to two or more jurisdictions, and in such cases, all of those jurisdictions have jurisdiction" (at para. 22), subject only to considerations of *forum non conveniens*. Here, there is no question that there is a substantial connection between the Society, its law degree approval process, persons seeking admittance to the bar, and the province of Nova Scotia. It was therefore reasonable for the Society to find that the *HRA* would apply to the approval of TWU law degrees, even though the discriminatory conduct of TWU is arguably occurring in British Columbia.

262. Given the above, the Society says that it did not unreasonably or incorrectly consider the provisions of the *HRA* when passing the Resolution. After applying the *HRA*, it was reasonable for the Society to conclude that it was not in the public interest of the practice of law in this province to approve a law degree from an institution that intentionally and systematically excludes and discriminates against sexual minorities under this Province's governing human rights legislation.

(6) **Was the Resolution unreasonable because Council acted without evidence and gave no reasons?**

263. The Applicants argue that "if the 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", the decision should be set aside due to the failure to give reasons and the absence of evidence of student conduct. [135]

264. The premise of the Applicants' argument is inaccurate as the Society did not "refuse to approve a law school in British Columbia because TWU has a traditional Christian view of marriage its students uphold". As has been emphasized throughout, the Society did not refuse to "approve a law school", and did not base its decision regarding conditional approval on the beliefs of TWU or its students.

(i) Reasons

265. The Applicants go on to say that without reasons for its Resolution, the Society has not demonstrated that it has given due regard to the importance of the rights at issue. They rely on *Doré* where Justice Abella said:

> 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.

266. The particular context of the decision under review determines whether reasons are required, and their extent. Adjudicative decisions impacting individual rights require more reasons than other types of decisions. Once the duty of procedural fairness has been found to exist, the particular legislative and administrative context is crucial to determining its content.[136]

267. The Resolution is a decision made by Council respecting the approval of a law degree from TWU. It did not involve an adjudicative process similar to those in *Doré* and *Falkenham.* The present case is not a disciplinary decision. The Applicants also reference the case of *C.R. Falkenham Backhoe v Nova Scotia*, 2008 NSCA 38 ("*Falkenham*"). This was a decision of our Court of Appeal reviewing an award of damages. Each of these cases involved an adjudicative process with impact on individual rights.

268. In *R. v. Sheppard*, 2002 SCC 26, Justice Binnie made this point as follows:

> 15 Reasons for **judgment** are the primary mechanism by which judges account to the **parties** and to the public for the decisions they render. The courts

[135] Applicants' Brief at para 102-104
[136] *Canada (Attorney General) v. Mavi*, 2011 SCC 30, at para 41

> frequently say that justice must not only be done but must be seen to be done, but critics respond that it is difficult to see how justice can be seen to be done if judges fail to articulate the reasons for their actions. Trial courts, where the essential findings of facts and drawing of inferences are done, can only be held properly to account if the reasons for their **adjudication** are transparent and accessible to the public and to the appellate courts.
>
> ...
>
> 18 In Canadian administrative law, this Court held in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 43, that:
>
> ... it is now appropriate to recognize that, **in certain circumstances, the duty of procedural fairness** will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this **where the decision has important significance for the individual, when there is a statutory right of appeal**, or in other circumstances, some form of reasons should be required.
>
> 19 There are, of course, significant differences between the criminal courts and administrative tribunals. **Each adjudicative setting drives its own requirements. If the context is different, the rules may not necessarily be the same.** These reasons are directed to the criminal justice context. (emphasis added)

269. In the context of the making of regulations, no reasons are required. As set out in *Thorne's Hardware Limited v. The Queen*, [1983] 1 S.C.R. 106:

> [...] It is neither our duty nor our right to investigate the motives which impelled the federal Cabinet to pass the Order in Council.
>
> [...]
>
> [...] Governments do not publish reasons for their decisions; governments may be moved by any number of political, economic, social or partisan considerations. (at pp. 112-13)

270. The same principles apply where the regulation making power has been delegated to statutory bodies such as municipalities, and by extension to regulatory bodies. Under this authority no reasons were required for the making of the Regulation.

271. In *Catalyst Paper* the Court emphasized that any process requirements for subordinate legislation would the Court turn on the circumstances and the governing legislation. As to reasons, she stated:

> **29** It is important to remember that requirements of process, like the range of reasonable outcomes, vary with the context and nature of the decision-making process at issue. **Formal reasons may be required for decisions that involve quasi-judicial adjudication by a municipality. But that does not apply to the process of passing municipal bylaws. To demand that councillors who have just emerged from a heated debate on the merits of a bylaw get together to produce a coherent set of reasons is to misconceive the nature of the democratic process that prevails in the Council Chamber. The reasons for a municipal bylaw are traditionally deduced from the debate, deliberations and the statements of policy that give rise to the bylaw.** (emphasis added)

272. It is recognized that the Resolution is a decision specifically impacting the recognition of law degrees from TWU. However, the comments in *Catalyst Paper* nonetheless offer guidance. In the present case, the Council considered 168 written submissions and dozens of oral submissions from a variety of individuals and organizations. Together, these submissions brought diverse, scholarly and well developed arguments to Council for its consideration. The proceedings of Council are not hearings however.

273. As in *Catalyst Paper*, to demand that the 23 members of Council who have just emerged from a heated debate on the merits of the Resolution get together to produce a coherent set of reasons is to misconceive the nature of the process that prevails in Council decisions.

274. Finally, reference is made to *Alberta Teachers,* where the Court reviewed requirements for reasons in the context of an adjudicative decision of an administrative decision maker who implicitly determined that a limitation period did not apply by rendering a decision on the merits. No explicit decision was made to extend the time, and no reasons on the point were provided. Rothstein, J. quoted the following passage from *Dunsmuir*:

> 48 ... We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a **respectful attention to the reasons offered or which could be offered** in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279 at 286.[137] (emphasis added)

275. After noting that deference under the reasonableness standard is best given effect when reasons are provided, Rothstein J. stated:

> [54]...Nonetheless, this is subject to a duty to provide reasons in the first place. When there is no duty to give reasons (eg, Canada (Attorney General) v Mavi, [2011] 2 S.C.R. 504) **or when only limited reasons are required, it is entirely**

[137] *Alberta Teachers*, para 52.

> **appropriate for courts to consider the reasons that could be offered for the decision when conducting a reasonableness review**. (emphasis added)

276. Council was engaged in a policy-making decision about what, if anything, to do about the discriminatory Covenant. The decision of whether the Covenant was discriminatory was a simple one, not requiring reasons, as the Covenant on its face is discriminatory by applying different standards to married LGB people than to married heterosexuals. The controversy and discussion was about the policy issue, the decision upon which ultimately found expression in the Regulation. For the reasons given above, regulation-making does not require reasons. Council is a body made up of many members, all of whom could be expected to hold views and opinions of their own. This is reflected in the vote ultimately choosing Option C. It would be impractical in this context to require reasons for decision which would, by necessity, require a majority set of reasons, various dissenting reasons and various concurring reasons.

277. In any event, this Court does not have to travel far to consider the reasons that could be offered. The Executive Committee's Report to Council that preceded the decision leading to the Resolution identified three options for Council's consideration and provided explanations of each. By adopting Option C –Conditional Approval for TWU's School, the majority of Council likely shares the reasoning advanced by the Executive Committee when it set out the rationale for this option.[138]

278. To conclude, to the extent that reasons are required in the context of Council decision making, sufficient reasons are contained within the Executive Committee's explanations to Council of the legal and factual considerations that led to the adoption of the decision that was eventually reached in the form of the Resolution. This explanation provides the type of "justification, transparency and intelligibility" within the decision making process required by *Dunsmuir,* that satisfies any procedural fairness requirements.

(ii) Evidence

279. The Applicants also say that there was no evidence before the Society that a student at TWU had engaged in discriminatory conduct and that the Society found as a substitute

[138] Record: NSBS001255, Executive Committee Report to Council, Option C.

for evidence of student conduct that TWU's practices were discriminatory. That is not sufficient.[139]

280. The Applicants' argument is centered on the analysis in *BC Teachers* where the Court focused on the lack of evidence of future discriminatory conduct by TWU students.

281. As repeatedly noted throughout these arguments, the Resolution was not premised on any suggestion of anticipated discriminatory conduct by TWU students.

282. The Resolution is based on its need to act in the public interest by promoting diversity in the profession. The Society has determined that it cannot accept a degree from a law school that discriminates and, in effect, excludes LGB students from admission or continued enrolment at the school. This is a very different issue than that considered in *BC Teachers*.

283. Simply put, no evidence was needed of purported discriminatory conduct of future TWU law graduates in the practice of law because the Society does not allege such conduct will occur. Evidence of discrimination within the Covenant was before Council, which is all that is required in connection with the Resolution specifically affecting TWU's rights. No other evidence is necessary as the policy-making role of Council, embodied in the Regulation, is not required to be carried out with an evidentiary foundation.

(7) Was it reasonable for Council to conclude that the Covenant is discriminatory?

284. The Resolution states that "Council resolves that the Community Covenant is discriminatory...".

285. Section 5 of the *HRA* prohibits discrimination in respect of the provision or access to services on account of sexual orientation, gender identity, gender expression and family status. Section 4 of the Act defines discrimination as follows:

> 4. For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society. 1991, c. 12, s. 1.

[139] Applicants' Brief, page 35

286. The Covenant requires students to "abstain from ... sexual intimacy that violates the sacredness of marriage between a man and a woman" and provides that TWU may "discipline, dismiss or refuse a student's re-admission to the University" for failure to comply with the Covenant. These requirements clearly impose burdens on LGB individuals not imposed on married, heterosexual individuals by prohibiting conduct which is inseparable from the identity of LGB persons. The Covenant is discriminatory.

287. The Applicants suggest that requiring students to adhere to the Covenant does not discriminate against individuals on grounds set out in the *HRA*. In particular, "it does not inquire about sexual orientation on admission or enrolment"[140] and "[a]ll students, regardless of religion or belief or sexual orientation, are free to seek admission and enrol at TWU". [141] This argument has already been rejected in *BC Teachers*, where the Court noted that "a homosexual student would not be tempted to apply for admission [to TWU], and could only sign the so-called student contract at considerable personal cost".[142]

288. While the Applicants may claim that TWU's requirement to adhere to the Community Covenant does not exclude or denigrate LGB individuals but only excludes and denigrates sexual intimacy between them, it is now clear from *Whatcott* that such a requirement constitutes discrimination.[143] The Covenant clearly imposes a burden on LGB individuals that is not imposed on others. It is *prima facie* discriminatory under the provisions of the *HRA* set out above.

289. There are no exceptions under the *HRA* for TWU, such as those potentially available under the BC *Human Rights Code* for religious institutions. Clause 6 (ii) of the HRA provides some limited exceptions, but does not extend to provide an exception for a university program.

E. Conclusion on Administrative Law issues

[140] Applicants' Brief at para 12
[141] Applicants' Brief at para 90
[142] *BC Teachers* at para 25
[143] See discussion on *Whatcott* at para ___.

(1) **Did the Society act reasonably, within its jurisdiction when it passed the Regulation?**

290. The Regulation is presumptively valid in accordance with the test set out in *Katz*. It is a neutral rule that simply prohibits discrimination in student admission or enrolment policies of universities seeking to have law degrees approved by the Society.

291. Such a rule is made within the Society's jurisdiction. The specific regulation making provisions of the LPA authorize it to make regulations to pursue its purpose. The Society's broadly stated purpose to uphold the public interest in the practice of law, influenced by its history, requires it to act in a manner that promotes diversity and inclusion within the legal profession, and requires it not to countenance discrimination.

292. While the ordinary and grammatical meaning of the language in the *LPA* itself may give authority for the Regulation, when read in the context of the statute as a whole and when read harmoniously with the scheme of the *LPA* and its purposes, the required broad and purposive approach definitively leads to the conclusion that the Regulation was both reasonable and within the authority of the Society. The narrow approach to statutory interpretation advanced by the Applicants is not supportable in law.

293. *Catalyst Paper* describes the test for reasonableness of subordinate legislation. Only if the Regulation is one no reasonable body could have taken (informed by the factors Council may legitimately consider), will it be set aside. Such factors must take into account broader social, economic and political issues. By passing the Regulation, Council appropriately recognized the need to consider the broad societal issues of discrimination, diversity, inclusion, and the values and rights implicated by the Charter and Human Rights legislation, when determining the acceptability of law degrees. The Regulation is one that a reasonable body, empowered and required to act in the public interest, could make.

(2) **Did the Society act reasonably, within its jurisdiction when it passed the Resolution?**

294. The same principles of statutory interpretation that make the Regulation reasonable, also render the Resolution reasonable. The test for reasonableness requires the Resolution to fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

295. In passing the Resolution Council reasonably and correctly concluded that the Covenant constituted discrimination under the provisions of the *HRA*. As will be set out in detail in the provisions of this Brief addressing the Charter, Council was also required to take into account Charter values, and did so. Under *Doré* it was required to balance these Charter values with the Society's statutory objectives. The broadly stated purpose of the Society, emphasizing not only the usual roles of a regulator, but the larger issues of equity, diversity and inclusion as they impact the administration of justice, created an obligation on Council to ensure its decision reflected these factors.

296. The decision to provide conditional approval to a law degree from TWU was within the range of reasonable outcomes open to the Society and reflected an appropriate balancing of all interests. The Society could have approved the law degree unconditionally; rejected it unconditionally; or as it did, approve it on conditions that properly balanced the religious precepts of TWU students with the equality objectives of the Society[144].

297. In *Administrative Law in Canada*, 5th ed., Sara Blake states:

> Courts review neither the wisdom nor the merits of discretionary decisions made by tribunals pursuant to statutory authority. Nor do they review whether government policy accomplishes its intended purpose. A court should not substitute its own decision for that of the tribunal just because it would have exercised the discretion differently had it been charged with the responsibility. A discretionary decision of a tribunal made in good faith, within the scope of its statutory authority and pursuant to fair procedure will be permitted to stand.

298. The Resolution meets this test.

[144] See discussion *infra* re balancing of Charter values, and *Oakes* analysis

PART IV - CHARTER ISSUES

A. Overview

299. The Province of Nova Scotia has delegated the authority to regulate all aspects of the legal profession in the Province to the Society. Regulations made by the Society are subject to the *Charter.* Equally, any decisions made and standards set by the Society are subject to the *Charter* and must conform with *Charter* values. As the Supreme Court of Canada explained in *Multani v. Commission Scolaire Marguerite-Bourgeoys,* 2006 SCC 6 at paragraph 22:

> The council is a creature of statute and derives all its powers from statute. Since the legislature cannot pass a statute that infringes the Canadian Charter, it cannot, through enabling legislation, do the same thing by delegating a power to act to an administrative decision maker: see Slaight Communications, at pp. 1077-78. As was explained in *Eldridge v. British Columbia (Attorney General)*, [197] 3 S.C.R. 624, at para. 20, the Canadian Charter can apply in two ways:
>
> First, legislation may be found to be unconstitutional on its face because it violates a Charter right and is not saved by s. 1. In such cases, the legislation will be invalid and the Court compelled to declare it of no force or effect pursuant to s. 52(1) of the Constitution Act, 1982. Secondly, the Charter may be infringed, not by the legislation itself, but by the actions of a delegated decision-maker in applying it. In such cases, the legislation remains valid, but a remedy for the un-constitutional action may be sought pursuant to s. 24(1) of the Charter.

300. The Applicants and their supporting Intervenors argue that both the Regulation and the Resolution violate the rights of TWU under section 2(a), 2(b) and 2(d) of the *Charter.* In addition, the individual Applicant and the Intervenor, the Association for Reformed Political Act (ARPA) Canada ("ARPA") take the position that the Regulation and the Resolution infringe the equality rights of prospective future TWU graduates who want to enter the articling program in Nova Scotia.

301. It is the Society's position that neither the Regulation nor the Resolution infringes anyone's rights to freedom of religion, freedom of expression, freedom of association or equality. Instead, the Regulation and the Resolution are aimed at and do protect the equality rights of LGB people who want to receive a law school education in Canada. The failure to protect and promote the equal access to legal education of LGB people would itself be an infringement of their equality rights under section 15(1).

302. In considering the *Charter* rights that have been raised by the Applicants and the Intervenors, the Society asks the Court to focus on the nature of and actual effect of the

Regulation and the Resolution on TWU and its potential students, both Evangelical Christians and all others seeking a law degree. Under the Regulation, TWU and all other common law schools in Canada seeking approval by the Society must refrain from discrimination in their admissions and enrolment policies. This is a neutral Regulation and does not target any particular religion, race or sexual orientation. Through the Resolution, the Society has found that TWU's Covenant is discriminatory and accordingly, unless TWU removes the mandatory requirement for the Covenant for law students or amend the Covenant in a way that ceases to discriminate, it does not grant approved "law degree" under the Regulation.

303. TWU asserts that it must be able to bind all law students to the Covenant and control their sexual behaviour in order to create an Evangelical Christian law school.

304. As noted above, there is no evidence before the Court that operating a law school is a "religious rite" or "practice". It is an entirely secular activity and TWU's proposed curriculum reflects the secular nature of the school. Graduates of TWU are being prepared to practice law in a secularly regulated profession and the Society accepts that future TWU graduates will do so in a competent and non-discriminatory manner. There is also no evidence before the Court that Evangelical Christians are required to commit to the Covenant, or something similar, to be a member of the EFCC. How then can it be said that removing the mandatory nature of the Covenant for law students engages or interferes with the rights of Evangelical Christians to believe, express and associate to express their religious beliefs?

305. TWU welcomes students of all faiths, creeds and sexual orientations and therefore is not seeking to associate only with other Evangelical Christians at their university. What TWU seeks to do is to regulate the conduct of and discriminate against those who cannot, without a self-denial that is not demanded of heterosexuals, conform to TWU's rules and practices. The Covenant requires LGB students to renounce their constitutionally-protected sexual orientation in exchange for a law degree.

306. If the mandatory nature of the Covenant is removed, Evangelical Christians both at TWU and beyond can continue to believe, express, conduct themselves and associate with others to express their belief that same-sex activity is prohibited by the Bible. The removal of the mandatory nature of the Covenant and the acceptance of law students

who may (or may not) engage in private sexual activity not condoned by Evangelical Christians does not interfere in any way with Evangelical beliefs or the personal conduct of Evangelical students. Neither TWU nor Evangelical law students are being asked to alter their beliefs or their conduct in any way that infringes on the strength of their faith. Instead, the Society has made the decision that it cannot condone the practice of prohibiting law students from obtaining a degree on discriminatory grounds. Freedom of religion does not include the right to discriminate against others in what is inherently, a secular activity. While TWU is entitled to discriminate against LGB people, the Society, given its mandate and *Charter* obligations, cannot condone that discrimination by allowing scarce law school spaces to be effectively reserved for heterosexual students or those willing to deny, suppress and cover up their true LGB nature.

307. In the alternative, to the extent that the Applicants' *Charter* rights can be said to be engaged by the Regulation or the Resolution, any interference with those rights has been properly balanced against the equality rights of LGB people. Further, any limit that can be said to have been put on the Applicants' rights is reasonable and justified under section 1 of the *Charter*.

B. Neither the Regulation nor the Resolution Infringe Section 2(a), 2(b) or 2(d) of the *Charter*

308. Section 2 of the *Charter* provides:

> Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> (c) freedom of peaceful assembly; and
> (d) freedom of association.

309. The Applicants and their supporting Intervenors argue that the Resolution and The Regulation breach their rights under sections 2(a), 2(b) and 2(d) of the *Charter*.[145]

[145] Applicants' Brief at paragraphs 135-162 [addressing freedom of religion, association and expression]; Justice Centre for Constitutional Freedoms' Brief [addressing freedom of association]; Evangelical Christian Fellowship of Canada and Christian Higher Education Canada's Brief [addressing freedom of religion and freedom of expression]; Catholic Civil Rights League and Faith and Freedom Alliance Brief [addressing freedom of religion]; Christian Legal Fellowship's Brief [addressing freedom of religion, freedom of expression and freedom of association]; and Canadian Council of Christian Charities' Brief [addressing freedom of religion].

(1) **Freedom of Religion**

310. Freedom of religion protects a person's[146] right to "hold and to manifest whatever beliefs and opinions his or her conscience dictates" free from "coercion or restraint."[147]

311. In *Syndicat Northcrest v. Amselem,* 2004 SCC 47, the Supreme Court summarized the principles underlying section 2(a) of the *Charter* and the test to be applied when considering whether the right to freedom of religion has been infringed. The majority's discussion of the content of section 2(a) of the *Charter* bears repeating:

> 39 In order to define religious freedom, we must first ask ourselves what we mean by "religion". While it is perhaps not possible to define religion precisely, some outer definition is useful since only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected by the guarantee of freedom of religion. Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. **In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.**
>
> 40 What then is the definition and content of an individual's protected right to religious freedom under the Quebec (or the Canadian) *Charter*? This Court has long articulated an expansive definition of freedom of religion, which revolves around the notion of **personal choice and individual autonomy and freedom**. In Big M, supra, Dickson J. (as he then was) first defined what was meant by freedom of religion under s. 2(a) of the Canadian *Charter*, at pp. 336-37 and 351:
>
> A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the [page 577] 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.
>
> ... Freedom means that ... no one is to be forced to act in a way contrary to his beliefs or his conscience.

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[146] TWU's Brief suggests that it is not only the individual Applicant but also TWU that claims a right to freedom of religion. To date, the Supreme Court of Canada has not concluded that corporations can claim the right to freedom of religion. This issue is squarely before the Court in a case heard and reserved in March, 2014, *Loyola High School, et al. v. Attorney General of Quebec*, S.C.C. File No. 35201. Because there is an individual Applicant in this case, it is not necessary for the Court to decide whether section 2(a) of the *Charter* protects the rights of TWU as a corporation.

[147] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at pp. 336-337.

...

... With the *Charter*, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be. .

41 Dickson J. articulated the purpose of freedom of religion in *Big M*, *supra*, at p. 346:

Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided inter alia only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.

42 Similarly, in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 759, Dickson C.J. stated that the purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices.

[...]

56 Thus, at the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief. Only then will freedom of religion be triggered. [emphasis added]

312. More recently in *Whatcott*, the Court set out the test to be applied to alleged breaches of section 2(a) as follows:

155 An infringement of s. 2(a) of the Charter will be established where: (1) the claimant sincerely holds a belief or practice that has a nexus with religion; and (2) the provision at issue interferes with the claimant's ability to act in accordance with his or her religious beliefs: *Hutterian Brethren of Wilson Colony*, at para. 32; *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at paras. 46 and 56-59; and *Multani*, at para. 34. The interference must be more than trivial or insubstantial, so that it threatens actual religious beliefs or conduct.

313. A number of principles can be derived from these decisions:

First, religious beliefs are profoundly personal and what is protected is the right to hold those beliefs, express those beliefs and conduct oneself in accordance with those beliefs;

Second, what is sought to be protected must be a religious activity;

> Third, what is sought to be protected must be grounded in a sincerely held belief with a nexus to religion;
>
> Fourth, not all alleged interferences with freedom of religion attract *Charter* protection. It is only those non-trivial or non-insubstantial interferences with the exercise of the implicated right so as to constitute an infringement of freedom of religion under the *Charter*; and
>
> Fifth, even if the claimant successfully demonstrates non-trivial interference, religious conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected. The ultimate protection of any particular *Charter* right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises.

314. When these principles are applied to the present case, it is evident that the Regulation prohibiting discriminatory admissions and enrolment policies at law schools and the Resolution approving TWU as a "law school" subject to its removal of the mandatory nature of the Covenant for law students (or amending the Covenant in a way that ceases to discriminate) does not affect a "religious activity", does not interfere with sincerely held beliefs of Evangelical Christians and does not interfere with the manner in which Evangelical Christians choose to conduct themselves.

315. The Supreme Court of Canada in the *Marriage Reference* explained at paragraph 57 that "the performance of religious rites is a fundamental aspect of religious practice". Operating a law school is not a religious activity, a religious rite or a religious practice. TWU has not provided any evidence that faith or religious practice requires the study of law. Further, TWU has not provided any evidence that the study of law must be done in isolation from those who do not share their Evangelical beliefs or their views of sexual conduct. There is also no evidence to suggest that it is a tenet of the Evangelical faith that they not study law with individuals who may engage in private conduct of which they do not approve.

316. In contrast, the evidence put forward by TWU is that it welcomes all faiths, sexual orientations and non-believers. There is no evidence that requiring those of other faiths, other sexual orientations and non-believers to adhere to the Covenant in any way affects the learning environment of Evangelical Christians who choose to obtain a law degree.

317. The Society does not question the sincerity of the Evangelical belief that the only permissible sexual activity is that between a man and a woman who are married to each other. What the Society does question, however, is whether the mandatory Covenant, which requires <u>all</u> law students to conduct themselves as though they share those

beliefs is a manifestation of the faith. Religious beliefs are profoundly personal and what is protected is the right to hold those beliefs, express those beliefs and conduct oneself in accordance with those beliefs, not to impose them on others. If anyone's freedom of religion is jeopardized in the context of this case, it is the freedom of persons of other creeds who are mandated by the *TWU Act* to be welcomed at the University, and yet subjected to discriminatory sexual conduct rules which may not be endorsed by their own faith.

318. To the extent the Society's recognition of a law degree from TWU is conditional on TWU removing the mandatory nature of the Covenant, any interference that condition could have with Evangelical Christian belief would be trivial and non-substantial. In *R. v. Jones*, [1986] 2 S.C.R. 284 ("*Jones*"), Wilson J. stated, albeit in dissent, that:

> Section 2(a) does not require the Legislature to refrain from imposing any burdens on the practice of religion. Legislative or administrative action whose effect on religion is trivial or insubstantial is not, in my view, a breach of freedom of religion. I believe that this conclusion necessarily follows from the adoption of an effects-based approach to the Charter. The U.S. courts in determining constitutionality sometimes deny the relevance of effect.

319. This view was explicitly endorsed by Dickson J., as he then was, in *R. v. Edwards Books & Art Ltd.*, [1986] 2 S.C.R. 713 where he stated at paragraph 97:

> [...] The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs in turn govern one's conduct and practices. **The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened.** For a state-imposed cost or burden to be proscribed by s. 2(a) it must be capable of interfering with religious belief or practice. In short, legislative or administrative action which increases the cost of practising or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial: see, on this point, R. v. Jones, [1986] 2 S.C.R. 284, per Wilson J. at p. 314. [emphasis added]

320. It cannot be said that the condition of removing the mandatory requirement for the Covenant (or amending the Covenant in a way that ceases to discriminate) is anything more than trivial or insubstantial as it does not threaten "actual religious beliefs or conduct".[148] While signing and adhering to the Covenant may be a religious practice or expression of faith by Evangelical Christians who choose to do so, removing the mandatory nature of the Covenant in order to seek recognition from the Society does not

[148] *Whatcott* at paragraph 155.

interfere with the belief in the tenets of the Covenant or with an individual's decision to conduct themselves in accordance with the Covenant.

321. The condition imposed by the Society in the Resolution is an affirmation that law schools must have an "all welcome" policy for minorities if they want to have their degrees recognized in the Province. In the *Marriage Reference*, the Supreme Court of Canada rejected the argument that the state's affirmation of sexual-orientation equality, and more particularly its recognition of same sex marriage, "will have the effect of imposing a dominant social ethos and thus limit the freedom to hold religious beliefs to the contrary". The Court held that "the mere conferral of rights upon one group" does not "constitute a violation of the rights of another group".

(2) **Freedom of Expression**

322. Neither the Regulation nor the Resolution infringe or even engage the right to freedom of expression under Section 2(b) of the *Charter*. All members of TWU and all Evangelical Christians are free to express their belief that sexual activity is reserved for marriage between a man and a woman and to express that belief by voluntarily signing and abiding by all terms of the Covenant both on and off-campus.

323. Requiring that LGB law students agree to abide by the Covenant cannot be characterized as an expression of belief but rather, the suppression of others' beliefs. The content of section 2(b) was recently summarized by the Supreme Court of Canada in *Baier v. Alberta*, 2007 SCC 31:

> 19 In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, a two-part analysis was established for determining whether a violation of freedom of expression has occurred. The first step asks whether the activity is within the protected sphere of free expression. **If the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee.** Once it is established that the activity is protected, **the second step asks if the impugned legislation infringes that protection, either in purpose or effect.** This analysis has been used in many subsequent cases (e.g. *R. v. Zundel*, [1992] 2 S.C.R. 731, *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569; *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083).
>
> 20 While the Irwin Toy test defined the scope of freedom of expression broadly, in subsequent cases this Court has clarified that **s. 2(b) protection is not without limits and that governments should not be required to justify every exclusion or regulation of expression under s. 1** *(Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141, 2005 SCC 62, at para. 79). In *City of Montréal*, McLachlin C.J. and Deschamps J., for the majority, found that the

> method or location of expression may remove it from s. 2(b) protection (paras. 56 and 60). For example, with respect to the method of expression, s. 2(b) does not protect violent expression (*Irwin Toy*, at pp. 969-70), and with respect to location, expression on public property may in some circumstances remain outside the protected sphere of s. 2(b) (*City of Montréal*, at para. 79). In addition, **the Court has held that s. 2 generally imposes a negative obligation on government rather than a positive obligation of protection or assistance** (*Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1035; *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, at para. 26).

324. In *R. v. Keegstra*, [1990] 3 S.C.R. 697 at pp. 762-63, Dickson C.J. identified the fundamental or "core" values sought to be protected under section 2(b). These include the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process.

325. The Applicants argue that the Covenant is a private, voluntary, expression of an agreement not to engage in sexual intimacy outside of opposite marriage. The Applicants go on to argue that the Covenant does not require students to share the religious beliefs upon which the Covenant is based and for those students that makes the Covenant purely a matter of freedom of expression, rather than freedom of religion.[149]

326. These submissions are again based on the mischaracterization of the Covenant as voluntary. The Covenant is not a voluntary expression of belief meant to convey any meaning. It is a mandatory requirement for all law students regardless of whether they share those beliefs or choose to express them.

327. The Society accepts that an individual who chooses to agree to the Covenant and to live by its tenets is expressing his or her belief in the Evangelical faith. Nothing in the Regulation or the Resolution interferes with that expression.

(3) **Freedom of Association**

328. Section 2(d) of the *Charter* protects the right to associate to achieve collective goals and it is only laws that substantially interfere with the ability to achieve those goals through collective action that will be subject to the *Charter*.

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[149] Applicants' Brief at paragraph 158.

329. Freedom of association under the *Charter* has traditionally been considered by the Courts in the context of labour and political associations. The Society acknowledges that freedom of religion may be reinforced by freedom of association in that individuals who share common religious beliefs can declare and practice them collectively. The Society does not agree, however, that the right to associate freely has been infringed by the Resolution or the Regulation.

330. The Supreme Court of Canada recently provided a comprehensive review of the principles underlying freedom of association in *Ontario v. Fraser,* 2011 SCC 20.[150] At paragraph 33, the majority of the Court set out the following principles:

> Section 2(d), interpreted purposively, guarantees freedom of associational activity in the pursuit of individual and common goals.
>
> [...]
>
> The effect of a process that renders impossible the meaningful pursuit of collective goals is to substantially interfere with the exercise of the right to free association, **in that it negates the very purpose of the association and renders it effectively useless**. This constitutes a limit under s. 2(d) which is unconstitutional unless justified by the state under s. 1 of the Charter. (This is an application of the settled rule that a law or government act that in purpose or effect constrains exercise of a right constitutes a limitation for purposes of s. 1: see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.) [emphasis added]

331. The first question to consider is what is the "common goal" sought to be pursued by TWU and Evangelical Christians by prohibiting law students from engaging in sexual activity outside of heterosexual marriage? The JCCF at paragraph 26 of its Brief describes the goal of the university as follows:

> 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 a Christian worldview and the practice and adherence to Christian beliefs [...].

332. The Applicants themselves do not articulate the collective goal sought to be pursued through the enforcement of the Covenant with the exception of arguing that, as a private institution, it is entitled to have conditions of membership and that students can exercise

[150] While there is considerable debate between members of the Court about whether freedom of association imposes a positive duty on the state to provide a legislative framework in which to associate, that debate is not relevant to the issues in the present case.

their freedom to associate by voluntarily attending TWU and signing the Covenant.[151] The Applicants instead argue that, just as the Conservative Party of Canada can exclude those who belong to another party, so too can TWU exclude individuals who do not conform to their Evangelical beliefs.[152] While this may be true, the right to associate freely does not include the right to have discriminatory policies recognized and accepted by the Society through approval of a TWU law degree for admission to the Nova Scotia Bar. The main goal of TWU is to offer a common law degree that will enable students to practice law in Canada. To achieve that goal, TWU must conform to the requirements set by the Society which include the prohibition against discrimination.

333. Section 2 of the *Charter* entitles individuals to declare and manifest religious beliefs and practices, and to do so collectively. Section 2 does not, however, entitle individuals of any belief system to discriminate against or exclude others while it is operating a law school for which it seeks recognition from the state.

C. Equality Rights under Section 15 of the *Charter*

(1) The Applicant's Equality Rights

334. The individual Applicant argues that the Resolution and the Regulation violate his equality rights under section 15(1) of the *Charter*.[153] The Intervenor, Association for Reformed Political Action ("ARPA") focuses its submissions entirely on section 15(1) of the *Charter*. The other Intervenors do not address section 15(1) directly.

335. It is not entirely clear whether the Applicants and ARPA challenge only the Regulation as being a law that violates their section 15(1) equality rights or whether they challenge the Resolution, which found TWU's Covenant to be discriminatory.

336. The Regulation above cannot be said to violate equality rights. Standing alone, the Regulation simply states that a law school that unlawfully discriminates will cannot grant a "law degree" for the purposes of The Regulation. The Regulation is neutral. It must therefore, be the Resolution, namely that TWU has a discriminatory enrolment policy that the Applicants are challenging. Regardless of whether it is the Regulation itself or its effect on any individual in the circumstances that are being challenged, there has not been a violation of section 15(1) of the *Charter*. The Regulation is constitutional on its

[151] Applicants' Brief at p. 44.
[152] Applicants' Brief at paragraph 137.
[153] See Applicants' Brief at paragraphs 163-161 [sic].

face and the decision that TWU discriminates can withstand both a standard of review of reasonableness and one of correctness.

337. Section 15 of the *Charter* provides:

> 15. (1) Every individual[154] 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.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

338. The most recent articulation of the analysis to be applied under section 15(1) is contained in *Quebec (Attorney General) v. A* 2013 SCC 5.[155] Abella J. reviewed the section 15 jurisprudence beginning with *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 and explained that regardless of the way in which it has been articulated since *Andrews*, the analysis under section 15(1) has remained constant. The real question is "does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?" Abella J. explained:

> 323 In sum, the claimant's burden under the Andrews test is to show that the government has made a distinction based on an enumerated or analogous ground and that the distinction's impact on the individual or group perpetuates disadvantage. If this has been demonstrated, the burden shifts to the government to justify the reasonableness of the distinction under s. 1. As McIntyre J. explained, "any justification, any consideration of the reasonableness of the enactment; indeed, any consideration of factors which could justify the discrimination and support the constitutionality of the impugned enactment would take place under s. 1" (p. 182).
>
> 324 Kapp, and later Withler v. Canada (Attorney General), [2011] 1 S.C.R. 396, restated these principles as follows: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? (Kapp, at para. 17; Withler, at para. 30). As the Court stated in Withler:
>
> The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. [para. 39]

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[154] There does not appear to be an argument that section 15(1) is available to TWU and if it were made, it would have to be rejected. Section 15 applies only to "individuals" which does not include a corporation or organization.

[155] The majority reasons on section 15(1) were delivered by Abella J. (reasons at paragraphs 283-381) and concurred with by McLachlin C.J. (reasons at paragraphs 410-450) and **Deschamps**, Cromwell and Karakatsanis JJ. (reasons at paragraphs 382-409).

> 325 In referring to prejudice and stereotyping in the second step of the Kapp reformulation of the Andrews test, the Court was not purporting to create a new s. 15 test. 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*?"** [...]. [emphasis added]

339. McLaughlin C.J. in her concurring reasons on section 15(1) expanded on Abella J.'s reasons by explaining:

> 417 Section 15 of the *Charter* protects against discrimination on the basis of personal characteristics, the enumerated or analogous grounds. Marital status is such a ground. To constitute discrimination, the impugned law must have the purpose or effect "of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration": *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 88; see also *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 171.
>
> 418 Most recently, this Court has articulated the approach in terms of two steps: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or false stereotyping? : *Kapp*, at para. 17; *Withler*, at para. 30. While the promotion or the perpetuation of prejudice, on the one hand, and false stereotyping, on the other, are useful guides, **what constitutes discrimination requires a contextual analysis, taking into account matters such as pre-existing disadvantage of the claimant group, the degree of correspondence between the differential treatment and the claimant group's reality, the ameliorative impact or purpose of the law, and the nature of the interests:** *Withler*, at para. 38; *Kapp*, at para. 19. [emphasis added]

340. The Applicants and ARPA argue that the Regulation, a law for the purposes of section 15, makes a distinction between TWU law graduates and law graduates from universities that do not have requirements similar to the Covenant. They argue that the distinction is based on a stereotype that individuals who choose to attend TWU, and by extension all Evangelical Christians, are predisposed to discriminate generally, and more particularly in the practice of law.

341. The Applicants' and ARPA's position reflects one of the misconceptions described above. The Society has not rejected any individual applicant from becoming a member of the Nova Scotia bar. Such a rejection is purely hypothetical at this stage. What the Society has done through the Regulation is determine that it will not recognize a degree from a discriminatory law school as a "law degree" in Nova Scotia. Section 15(1) has not been triggered by the Regulation at all, as no individual has been denied access to the practice of law in Nova Scotia. Further, the Resolution stating that TWU's Covenant

is discriminatory, has equally not denied access to any individual to the practice of law in Nova Scotia.

342. The refusal to approve a law degree from TWU has nothing to do with the competency of any prospective graduate, nor does it have anything to do with the individual beliefs of any potential TWU graduate. The distinction made by the Regulation and the Resolution, if there is one, is between students who attend law schools with discriminatory policies and those that do not, surely not an enumerated or analogous ground under section 15(1). The Society has never suggested that graduates of TWU (if it continues to require to enforce the Covenant) are predisposed to discriminate in the practice of law nor has it said that Evangelical Christians, regardless of where they obtain their law degree, are predisposed to discriminate in the practice of law.

343. The Regulation and the Resolution reflect the requirement of the Society to act in the public interest and to promote equality in the profession, authority over which has been fully delegated to it by the Province. The Regulation and the Resolution have an ameliorative purpose – to advance the public interest in eliminating discrimination in the practice of law on the basis of sexual orientation. To condone the exclusion of LGB students from a law school is not something that could conceivably be considered to be in the public interest.

344. As the Society stated in its Resolution, TWU is an approved law school in Nova Scotia, subject to it agreeing to remove the compulsory nature of the Covenant for law students. If the Society were to hold otherwise, it would be acting contrary to the *Charter* and to the *Nova Scotia Human Rights Act* which recognize the inherent dignity of LGB individuals to live their lives without restriction.

345. The Regulation is a rule that prohibits discrimination and the Resolution is a finding that TWU's Covenant offends that rule. TWU excludes students who will not sign the Covenant or who engage in conduct prohibited by the Covenant. While in the current case the focus is on sexual orientation, another law school could choose to exclude Jews, African Canadians, Women, Muslims, etc. all on the basis of a sincerely held religious belief. While a free society must tolerate these beliefs and allow them to be expressed, it is not required to give them official status or to endorse them through state action. These law schools would equally be subject to the Regulation.

346. The section 15(1) claim of a hypothetical future graduate of TWU cannot be sustained. Under the test set out above, it cannot be said that the Regulation creates a distinction between individuals on the basis of their religion. Evangelical Christians are welcome to practice law in Nova Scotia.

347. Further, even if such a distinction exists, the Regulation does not create a disadvantage for TWU graduates by perpetuating prejudice or false stereotyping. Evangelical Christians are not a historically disadvantaged group. In contrast, the historical dominance of Christianity in Canadian society is clear from the evidence and from the jurisprudence. Further, there is no evidence that Evangelical Christians have been stereotyped as intolerant.

(2) **Equality Rights of LGB People**

348. Although there is no individual before the Court who has raised a breach of section 15(1) on the basis of sexual orientation, it is worth noting that the failure of the Society to enact the Regulation to prevent such discrimination, could, in itself, ground a claim for such a breach. Further, in passing the Resolution and the Regulation, the Society itself is subject to the *Charter* and to the *Nova Scotia Human Rights Act*. The Society's Resolution finding that the Covenant is discriminatory was made with full consideration of the equality and human rights of LGB Canadians who want to attend a common law school in Canada.

349. The Society is an independent body with the jurisdiction to regulate the legal profession in Nova Scotia. With that jurisdiction comes the responsibility to promote equality in the profession and to prohibit discrimination. The Society is the ultimate gatekeeper to the practice of law in Nova Scotia, however, for the most part, Canadian law schools are those who have the authority to determine who may stand at that gate. TWU has chosen to exclude LGB students from proposed and much coveted law school spaces.[156] This is discriminatory and a violation of equality rights. The Society cannot be complicit in that discrimination and has a duty to regulate it through its gatekeeper function.

350. The Applicants argue that TWU is not subject to the *Charter* or to Nova Scotia Human Rights legislation. What the Applicants fail to recognize, however, is that the Society is

[156] Affidavit of Darrel Pink, Paragraph 33; TWU's Proposal to the Approvals Committee, Record, NSBS001387.

subject to the *Charter* and to the Nova Scotia *HRA*. Decisions and Regulations made by the Society by necessity target private activity (establishing prerequisites and requirements for the practice of law in Nova Scotia) and as a result will have an "effect" on private activity. It does not follow that this indirect effect should remove the Society's Regulations and Resolutions from the purview of the *Charter*.

351. The Supreme Court of Canada explained this distinction in *Vriend v. Alberta*, [1998] 1 SCR 493. In that case, an employee was fired from a private college in Alberta because he was gay. He could not seek recourse under Alberta human rights legislation because sexual orientation was not a prohibited ground of discrimination. Mr. Vriend challenged the legislature's failure to include sexual orientation as a ground of discrimination. The college argued that Mr. Vriend's challenge amounted to an attempt to apply section 15(1) of the *Charter* to a private institution, the college. The Court rejected this reasoning and explained:

> 65 The respondents further argue that the effect of applying the *Charter* to the IRPA would be to regulate private activity. Since it has been held that the *Charter* does not apply to private activity (*RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Tremblay v. Daigle*, [1989] 2 S.C.R. 530; *McKinney*, *supra*), it is said that the application of the *Charter* in this case would not be appropriate. This argument cannot be accepted. **The application of the *Charter* to the IRPA does not amount to applying it to private activity. It is true that the IRPA itself targets private activity and as a result will have an "effect" upon that activity. Yet it does not follow that this indirect effect should remove the IRPA from the purview of the *Charter*.** It would lead to an unacceptable result if any legislation that regulated private activity would for that reason alone be immune from *Charter* scrutiny.
>
> 66 The respondents' submission has failed to distinguish between "private activity" and "laws that regulate private activity". The former is not subject to the *Charter*, while the latter obviously is. It is the latter which is at issue in this appeal. [...] [emphasis added]

352. The Covenant has two principal discriminatory effects on LGB people: 1) it deters LGB students from attending the university; and 2) it requires LGB students to leave their identity at the door for the duration of their studies.

353. The Applicants and the Intervenors make two main submissions regarding the effect of the Covenant on LGB prospective students and LGB actual students. First, they argue that the Covenant is "voluntary" and that if an LGB student does not want to attend TWU, that student can apply to another law school. Second, they argue that TWU does

not prohibit LGB students but rather, seeks only to prohibit their conduct while attending TWU.

354. As set out above, the Covenant is not voluntary, it is mandatory and any student who violates the Covenant is subject to expulsion with a permanent record on his or her transcript that they have been expelled. The mandatory nature of the Covenant requires LGB students to deny and/or hide their identities and to argue that they must simply abstain from sexual activity, even if they are married, is to deny them the ability to be who they are while at TWU.[157] It is difficult to imagine any other institution, except perhaps the Residential School System, that requires individuals to renounce their identities to receive an education and to accept and implicitly express that they are unworthy, sinful, contrary to nature and an abomination.

355. The rejection of the "love the sinner, condemn the sin" mentality is clear in recent Supreme Court of Canada jurisprudence. To prohibit the sexual conduct of LGB people is to prohibit the participation of LGB themselves.

356. The arguments made by the Applicants and some Intevenors that LGB students are free to attend another law school if they do not "voluntarily" choose to adhere to the Covenant must be rejected as they offend the principle of "substantive equality". The Supreme Court of Canada has repeatedly rejected arguments that "choice" protects a distinction from a finding of discrimination. Instead, the Court has stated that "the fact that a person could avoid discrimination by modifying his or her behaviour does not negate the discriminatory effect".[158] Telling an LGB student to go to a different law school because of their sexual orientation is no less discriminatory than telling a Muslim or female student to go to a different law school because of her religion or gender.

357. Further, the arguments made by the Applicants at paragraph 164 of their submissions, that TWU's law school is not objectionable because it frees up 60 spaces for LGB students at the other law schools in Canada must be rejected. This type of argument was rejected by the Saskatchewan Court of Appeal in *Saskatchewan (Marriage Act, Marriage Commissioners) (Re)* 2011 SKCA 3 at paragraphs 40 and 41, where it was argued that, since there were other civil marriage commissioners available to perform

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[157] See Dr. Bryson and Dr. Chenier's Reports.
[158] *Quebec v. A.* at paragraphs 335-337.

same sex marriages, the impact of the proposed legislation on gays and lesbians would be insignificant and therefore should be acceptable.

> 40 It was suggested in argument by Mr. Megaw, and some of the intervenors supporting him, that **any such impact** flowing from either the Grandfathering Option or the Comprehensive Option **will be insignificant because a gay or lesbian couple turned away by a commissioner who does not solemnize same-sex marriages will be able to easily contact another commissioner who will be prepared to proceed**. Moreover, they say the number of same-sex marriages will be small and the chances of a gay or lesbian couple being denied services will not be great. In my view, this line of argument is not persuasive.
>
> 41 First, and most importantly, this submission overlooks, or inappropriately discounts, the importance of the impact on gay or lesbian couples of being told by a marriage commissioner that he or she will not solemnize a same-sex union. As can be easily understood, such effects can be expected to be very significant and genuinely offensive. It is not difficult for most people to imagine the personal hurt involved in a situation where an individual is told by a governmental officer "I won't help you because you are black (or Asian or First Nations) but someone else will" or "I won't help you because you are Jewish (or Muslim or Buddist) but someone else will." Being told "I won't help you because you are gay/lesbian but someone else will" is no different.

358. TWU is seeking a benefit from the Society by requesting that the Society recognize a law degree from the university as a prerequisite to practicing law in Nova Scotia. The Society cannot, without straying from its mandate to act in the public interest or its duties under the *Charter*, confer that benefit on TWU and condone discrimination of LGB students.

359. The situation in the present case is very similar and perhaps analogous to the issue dealt with by the Supreme Court of the United States in *Bob Jones University v. United States*, 461 U.S. 574. The university and its members held a sincere religious belief that inter-racial dating was contrary to the Bible and on that basis, prohibited inter-racial dating between students. It had at one time prohibited African American students from attending the university on the same religious grounds but abandoned that practice in the late 1970s and instead chose only to prohibit inter-racial dating. The University argued, as does TWU, that it was not racially discriminatory as it allowed all races to attend, subject only to its restrictions on the conduct of all students, including its prohibitions of association between men and women of different races, and of interracial marriage.

360. The Supreme Court of the Unites States did not question the sincerity of the belief that "race mixing" was contrary to fundamental Christian beliefs. It also noted that Bob Jones

University, as a private, religious school, was entitled to prohibit any activity it chose, however, when it came to state sanction of those prohibitions through tax exemption status from the United States government, the Supreme Court of the United States held that that there was a strong public interest in ending racism and racial segregation in the United States and that the state could not confer a benefit on Bob Jones University, an institution that perpetuated discrimination, clearly against the public interest.

361. L'Heureux-Dubé J. made the same analogy in her dissenting reasons in *BC Teachers*, which the Society requests be adopted by this Court.[159]

362. In sum, it is the equality rights of LGB people that are at play and, had the Society not adopted an anti-discrimination policy in its Regulation and implemented it through its Resolution, those rights would be offended by the Society's lack of legislative and administrative action, both of which are subject to the *Charter*.

363. TWU's position that the Resolution and the Regulation offend the equality rights of future TWU students has more to do with framing than with facts. LGB students must leave their identity behind to attend TWU because TWU sees same-sex sexual activity as sinful. What is TWU being asked to do by the Society but to exempt law students from a Covenant that is discriminatory? This requirement that the Society has imposed is not based on any stereotype or view of Evangelical Christians. The Society is simply requiring that TWU not discriminate on the basis of sexual orientation.

364. Both collectively and individually, TWU and its students can continue to believe, profess and practice the view that the only acceptable sexual relationships are between a married man and woman. To walk the halls of the law school with someone who does not share that belief, professes otherwise or practices differently does not draw a distinction against members of the Evangelical faith. No one is asking anyone at TWU to personally approve of same-sex relationships. They are simply being asked not to interfere with others' rights and orientations at a law school when they seek to have that law school's degrees recognized by the Society.

365. While it may seem disingenuous to look to the United States for jurisprudence protecting sexual orientation equality rights, the Supreme Court of the United States' 2010 decision in *Christian Legal Society v. Martinez* 2010 S. Ct. 2971 is instructive. In that case, a

[159]See L'Heureux-Dubé J. at paragraphs 70-71.

student chapter of the Christian Legal Society operated at Hastings University College of Law. The College, like the Society in the present case, had a non-discrimination policy providing that any student groups who wanted the benefit of recognition from the college had to have an "all welcome policy".

366. The Christian Legal Society excluded students who would not sign its Statement of Faith and/or who engaged in "unrepentant homosexual conduct." Justice Ginsburg, writing for the majority prefaced her opinion by stating the general rule that the First Amendment generally precludes public universities from denying student organizations access to school sponsored forums because of the groups views. The question in the case was described as "May a public law school condition its official recognition of a student group – and the attendant use of school funds and facilities – on the organization's agreement to open eligibility of membership and leadership to all students?" [160]

367. The Christian Legal Society requested an exemption from the "all welcome policy". The request for an exemption, or in other words, the request to exclude unrepentant LGB students, was rejected by Hastings. It took the position that if CLS wished to operate within Hastings' program of student groups, it must "open its membership to all students, irrespective of their religious beliefs or sexual orientation." Hastings recognized that it could not suppress CLS's endeavours, however, it could also not lend support to them. The CLS claimed that Hastings' decision violated their constitutional rights to free speech, expressive association and free exercise of religion.

368. By analogy, in the present case, TWU is free to set up a private law school that discriminates against LGB persons – provided it does not expect conferral by a public entity such as the Society of a statutorily regulated benefit, such as recognition of a law degree for Bar admission purposes. If it wants the public benefit, it must comply with the anti-discrimination requirements of the statutory entity.

D. Limits on Charter Rights: The Resolution – Balancing Competing Rights

369. Even if, contrary to the Society's submissions above, the Applicants' Charter rights have been engaged by the Resolution, the Society proportionately balanced these rights with competing Charter values of equality and the Society's statutory objectives.

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[160] See page 2978.

370. The Resolution is not subject to a conventional Section 1 analysis in regards any infringement by it of *Charter* rights. The Resolution is not legislation, but an administrative law decision which in effect applies the test in the amended Regulation.[161] As the Supreme Court of Canada held in *Doré* at paragraphs 55-56, the Society in exercising its statutory discretion in respect of determining whether TWU's Covenant was unlawfully discriminatory, was required to balance the *Charter* rights and interests affected with its statutory objectives and make a decision in accordance with *Charter* values. According to *Doré*, first, the statutory objectives of the Society should be considered, and then the question should be answered how the *Charter* value (or values) at issue will best be protected in view of the statutory objectives. This involves an *Oakes*-like proportionality exercise, which test will be satisfied if the Society's decision on TWU falls within a reasonable range of alternatives.

371. The framework for finding a just balance between conflicting rights was established by the Supreme Court of Canada in *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835 and later clarified in *R. v Mentuck*, [2001] 3 SCR 442. The Court explained at paragraph 23:

> Lamer C.J. found that the "pre-Charter common law rule governing publication bans emphasized the right to a fair trial over the free expression interests of those affected by the ban". (*Dagenais*, *supra*, at p. 877). **Given the courts' obligation to develop the common law in a manner consistent with *Charter* values, however, he found that it was inappropriate to continue assigning this priority to the right of the accused to a fair trial, when s. 2(b) of the *Charter* recognized an equally important right to freedom of expression.** Instead, he adopted a new approach to assessing whether a common law publication ban should be ordered. This new approach aimed to balance both the right to a fair trial and the right to freedom of expression rather than enshrining one at the expense of the other. The approach adopted was intended to reflect the substance of the *Oakes* test and its valuable function in determining what reasonable limits on the rights to be balanced might be. [...] [emphasis added]

[161] Nothing turns on the fact that the Regulation was enacted after the Resolution. There were no TWU law graduates seeking admission under the old Regulation and the Society was obviously concerned to communicate its decision to TWU and to potential students at its potential law school as soon as possible after an extensive process of input from TWU, lawyers and members of the public was completed, and before TWU expended funds and made irreversible commitments in the expectation that the Society would cast a blind eye to the discriminatory Covenant. The Resolution reflected in its text the fact that the Regulation would be amended in a manner consistent with the Resolution. If the Regulation is valid, as the Society asserts it to be irrespective of the decision regarding TWU, the issue in this case is simply whether the decision regarding TWU embodied in the Resolution is also valid from a jurisdictional and Constitutional law standpoint. No public interest would be served in analyzing the decision about TWU under a regulatory regime that is acknowledged to be required to be changed, and which was changed shortly afterwards, to implement a regulatory regime consistent with the decision.

372. Iacobucci J. went on in *Mentuck* to state that "[i]t also bears repeating that the relevant rights and interests will be aligned differently in different cases, and the purposes and effects invoked by the parties must be taken into account in a case-specific manner" [at paragraph 37]. The parties, and even the Court, may have different thoughts about what the result of this balancing should be, but this alone is no reason to reconsider the Society's decision, so long as the Society's balancing resulted in a measure that was within a reasonable range.

373. The *Dagenais* framework was applied in *R. v N.S.*, 2012 SCC 72 (see paragraphs 8-9). The majority in *R. v N.S.*, held that, where a niqab (a garment shielding the face from view) is worn by a witness because of a sincerely held religious belief, a judge may order it removed if wearing it poses a serious risk to trial fairness, if there is no way to accommodate both rights to avoid a conflict, and if the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so (at paragraph 46). The *Dagenais/NS* framework may be stated in the context of the present case as follows:

> Does unconditional approval of TWU's law degree interfere with the equality interests of the LGB community?
>
> Does conditional accreditation of TWU's law degree create a substantial risk to the Applicants' freedom of religion, association, expression and/or equality rights?
>
> If there is interference with both rights, are there any alternative measures which can accommodate both sets of rights and avoid a conflict between them?
>
> If no accommodation is possible, and there is a true conflict of rights that cannot be avoided, do the salutary effects of the Society's conditional accreditation of TWU's law degree outweigh the deleterious effects on the Applicants of doing so?

374. The Society says that the only outcome available to the Court in answering these questions is to find that the Society's Resolution was reasonable.

375. As part of its public consultation process for the consideration of TWU's proposed law degree, the Society received 168 submissions, more than 100 of which were from Nova Scotians.[162] Many of these submissions are summarized in a document prepared by the Society entitled "Trinity Western University Law Degree Approval: Review of

[162] Record: NSBS001082/6, TWU Law Degree Approval: Review of Submissions.

Submissions".[163] In addition, oral submissions were heard by the Executive on February 13, 2014 from members of the public[164] and on March 4, 2014 from TWU[165].

376. It was within the context created by these oral and written submissions, together with Council's understanding of the Society's mandate and of the applicable Constitutional and human rights issues that the Society balanced the relevant interests and statutory objectives and passed the Resolution at Council's meeting on April 25, 2014.[166] It should be kept in mind that the Resolution was a policy resolution, not an adjudicative proceeding such as a disciplinary hearing, but the process was nevertheless both extensive and open. The Society's decision to pass the Resolution was a reasonable one.

377. An unconditional approval of a law degree from TWU interferes with the equality rights of LGB people. It results in the perpetuation of under-representation of LGB persons at the Nova Scotia Bar, a fact which is reinforced by the evidence from the Society's survey of its members.[167] The number of self-identified LGB lawyers in Canadian surveys among a demographic sample similar in socio-economic status as the overall population of lawyers in Nova Scotia ranges from 2% to 8% of the total.[168] Even accepting the Applicants' criticism at paragraph 183 of their brief of the Society's survey data, self-identified LGB lawyers in Nova Scotia are only 2.7% of **all** of the respondents. There is no evidence to contradict Ms. Bryson's conclusion that "it is probable that sexual minorities are under-represented in the legal profession in Nova Scotia".[169]

378. The Constitutionally-guaranteed equality interests of the LGB community are clearly engaged and the Society was required to consider them as part of its mandate to uphold the public interest in the practice of law.

379. The conditional approval of TWU's law degree does not create a substantial risk to the Applicants' freedom of religion, association, expression and/or equality rights. For the reasons provided above, the decision embodied in the Resolution does not violate a religious or other *Charter*-protected freedom or right.

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[163] *Ibid.*
[164] Record: NSBS000699, Transcript of Meeting of the Executive Committee, February 13, 2014
[165] Record: NSBS000936, Transcript of TWU Hearing, March 4, 2014.
[166] Record: NSBS001255, Council Meeting Minutes, April 25, 2014.
[167] Affidavit of Darrel Pink, paragraph 26, Exhibit 7.
[168] Affidavit of Mary Bryson, paragraph 19.
[169] Affidavit of Mary Bryson, paragraph 19.

380. There is therefore no conflict of rights and the Society was required only to proportionately balance the equality interests of the LGB community with the Society's statutory objectives. Since both the Society's statutory objectives and the equality interests of the LGB community aligned in favour of conditional TWU approval, a proportionate balancing would necessarily result in the Resolution being within the reasonable range of outcomes and therefore must not be interfered with by this Court.

381. Alternatively, if the Resolution interferes with the Applicants' rights, there is no accommodation which can avoid a conflict of rights. The only alternative to the Resolution which the Applicants and Intervenors have proposed is that their rights and freedoms should trump the equality rights of LGB persons, and the Society should in effect turn a blind eye to the Covenant. Unconditional accreditation of a TWU law degree does not further the Society's objectives and heavily interferes with the equality rights of the LGB community.

382. There is no other accommodation of the interests of TWU and its prospective law students that anyone else has suggested, and the conditional recognition of a TWU law degree is the least invasive means towards TWU and its students available to the Society for accomplishing its objectives and recognizing the equality rights of LGB persons.

383. The salutary effects of conditional TWU accreditation to the LGB community outweigh any deleterious effects to the Applicants. Therefore, the Resolution is within the reasonable range of alternatives and should not be interfered with by the Court. This part of the *Dagenais* test is similar to the third branch of the proportionality test from *Oakes*.

384. Many of the salutary effects of the Resolution have been described previously in this brief. A few additional considerations are set forth below.

385. As noted in *Whatcott* at paragraph 66 and *Doré,* at paragraph 57, *Charter* rights must be balanced in the context in which they are invoked. The balancing of competing interests will be informed by judicial attitudes as reflected in jurisprudence, as well as evolving social norms, consistent with the notion that the Constitution is a "living tree". According to *R. v Tran*, 2010 SCC 58 (at paragraph 34), the ordinary person standard must be informed by contemporary norms of behaviour, including fundamental values such as the commitment to equality provided for in the *Charter.* The context of the history of

discrimination against those of same-sex orientation and the relatively recent recognition of their equality rights and protection as a vulnerable group must be recognized in this case, as it was in *Whatcott.*[170] The balancing in this case must acknowledge the evolution in the law and social norms since *BC Teachers* was decided in 2001.

386. In order to fulfill its statutory objectives and values, the Society was obligated to ensure that LGB persons do not experience barriers to entry to the legal (and judicial) professions in Nova Scotia on the basis of their sexual orientation. The Society's policy decision encapsulated in the Resolution serves the same kinds of ameliorative purpose contemplated in section 15(2) of the *Charter*, in furtherance of the Society's purpose and in accordance with the Society's statutory mandate and its requirements under the *Charter.* The salutary effects of the Resolution are clearly very significant.

387. In contrast, the deleterious effects on the Applicants, if any, are minor. The Resolution makes it clear that TWU's law school will not be considered to be discriminating in its admission policies if it exempts law students from signing the Covenant or amends the Covenant for law students in a way that ceases to discriminate. The Society's conditional accreditation of TWU's law degree still leaves the Applicants with a meaningful opportunity to exercise their own religious beliefs and practices, and therefore proportionately balances any competing rights and interests. Each student who wishes to do so can commit to the Covenant. The only thing that cannot occur in order to maintain recognition of the TWU law degree by the Society is the mandatory imposition of the Covenant as a condition of enrolment in the law degree program – which is actually more of an interference with the freedom of religion of other individuals than it is a free exercise of the religion of Evangelical Christians.

388. Any deleterious effects of the Resolution on the Applicants are costs of exercising those rights that are reasonable in these circumstances to impose on the Applicants. The recognition of a law degree by the public interest regulator of the legal profession in this province is a privilege, not a right.[171] Admission into the Society for membership to practice law in this province is a privilege, not a right. Just like the requirement of a photo for a license was considered by the SCC to be a justifiable limit on a genuinely held religious belief in *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567,

[170] At paragraph 169.
[171] See section 4(2) of the *LPA*.

("*Hutterian*") the non-discrimination requirement imposed by the Resolution in order to obtain the privilege of law degree recognition in Nova Scotia is justified. If there is any non-trivial interference with the Applicants' *Charter* rights, that interference is simply a reasonable burden imposed in exchange for TWU's choice to venture into the secular domain of providing a legal education which TWU hopes to market to prospective students as meeting the requirements of Canadian law societies.

389. Through the Resolution the Society was able to ensure that a law degree recognized by the Society for the legal education qualification for membership is consistent with its regulation of the practice of law within Nova Scotia and, in particular, with its goals and objects in relation to diversity, inclusion and non-discrimination.

390. Contrary to the Applicants' submission at paragraph 234 of their brief, the Society's Resolution is not a blanket prohibition against TWU.[172] It is a conditional approval of TWU's law degree which accommodated religious freedom by permitting acceptance of TWU's religious orientation to the extent possible without ignoring the legal profession's goals of promoting equality and diversity and anti-discrimination in respect of the LGB community. TWU wants no accommodation of LGB equality interests and wants to preserve its discriminatory universal imposition of its Covenant even in circumstances of non-Christian students engaging in sexual activity off-campus.

391. The majority of the Court in *R v N.S.*, in rejecting a rule that would see a total ban on wearing a niqab when testifying in Court, stated at paragraph 56:

> [...] A total ban that would permit the state to intrude on freedom of religion where it cannot be justified is not consistent with the premise on which the Charter is based -- a generous approach to defining the scope of the rights it confers, coupled with the need to justify intrusions on those rights because of conflicting interests or the public good.

392. The Resolution is not a total ban on TWU's law degree. Consistent with the approach approved in *R v N.S.* the Resolution was passed as a result of a thoughtful and balanced approach by the Society to define the scope of rights conferred by the *Charter* to the Applicants, and justifying any intrusion on those rights because of the conflicting interests of the LGB community and the public interest.

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[172] It is worth noting that the Resolution is also restricted in that it only affects the Covenant to the extent that the Covenant applies to law students. TWU's requirement that its students in other TWU academic programs adopt and ascribe to the Covenant is untouched by the Resolution.

393. Also contrary to the Applicants' submission at paragraph 209 of their brief, and like submissions in some Intervenors' briefs, the Society did not "undo the bargain" in the *Marriage Reference.* Contrary to the Applicants' and Intervenors' submissions, the protections for religious officials under the *Civil Marriage Act* do not apply to TWU. TWU is not analogous to religious officials who carry out the religious rite of marriage. TWU is providing a legal education to students who, if they wish to practice law, will be governed by the provincial law societies. There is no suggestion in the Society's decision of compelling evangelical Christian ministers to perform same-sex marriages or even of condoning same-sex sexual activity. They are free to disengaged and separate from anything concerning sexual conduct of students who do not choose to adhere to the Covenant.

394. Protections under the *Civil Marriage Act* are not instructive in this case and cannot be relied upon to assist the Applicants' position. If any useful guidance is to be obtained from the law pertaining to solemnization of marriages, it is more appropriately found in the *Saskatchewan (Marriage Act, Marriage Commissioners) (Re)* case, *infra.* That case involved, as does the present Application, a secular function (presiding over a civil marriage in that case; providing a legal education in this case). The finding in that case, i.e. that the religious beliefs of the provincial marriage commissioners must yield to the broader public interest if they wish to continue to perform civil marriages, is more instructive.

395. The same result would apply even if the analytical framework mandated by the *Doré* and *Dagenais* cases were for some reason inapplicable and a traditional *Oakes* analysis[173] were used in its place. The balancing approach described above applies similar criteria to those applied in *Oakes.* Since the Resolution involves the least interference with the religious or other freedoms and rights of TWU or its students consistent with advancing pressing and substantial LGB equality and public interest objectives, the *Oakes* analysis would yield the same result: any interference with the *Charter* rights of TWU or its proponents caused by the Resolution is modest and proportional to the pressing and substantial equality objectives of the Society.

396. Although we do not hold out American standards as exemplary in regards recognizing LGB rights or in balancing those rights with religious freedoms, it is instructive that even

[173] Such as used above in relation to the section 1 review of the Regulation.

in the United States, the American Association of Law Schools has by-laws requiring non-discrimination on the grounds of sexual orientation:[174]

> Bylaw Section 6-3. Diversity: Nondiscrimination and Affirmative Action.
>
> a. **A member school shall provide equality of opportunity in legal education for all persons**, including faculty and employees with respect to hiring, continuation, promotion and tenure, applicants for admission, enrolled students, and graduates, **without discrimination or segregation on the ground** of race, color, religion, national origin, sex, age, disability, or **sexual orientation**. [emphasis added]

397. The AALS "Interpretive Principles to Guide Religiously Affiliated Member Schools as They Implement Bylaw Section 6-3(a) and Executive Committee Regulation 6-3.1" include the following direction for religious schools with codes of conduct:

> Moreover, if the essential religious tenets lead to a prohibition of all non-marital sexual conduct, the school must, nevertheless, comply with Bylaw 6-3(a), which prohibits differences in treatment based on sexual orientation.

398. The text of this principle indicates that even religiously affiliated law schools are required, as a condition of membership, not to discriminate on the grounds of sexual orientation in implementing a religious tenet prohibiting all non-marital sexual conduct. In other words, in a jurisdiction which recognizes same-sex marriages, the non-marital sex prohibition must apply evenly as between different-sex marriages and same–sex marriages.

399. The TWU covenant would fall short of the applicable AALS principle in balancing religious rights with LGB equality rights.

E. Limits on Charter Rights: The Regulation – *Oakes* Analysis under s. 1

400. If there is an infringement of the Applicants' *Charter* rights, any such infringement by the Regulation is a justified limit on those rights under Section 1 of the *Charter*, which states:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[174] The AALS Bylaws, Executive Committee Regulations and "Interpretive Principles to Guide Religiously Affiliated Member Schools as They Implement Bylaw Section 6-3(a) and Executive Committee Regulation 6-3.1" have been admitted by consent, without formal proof being required, and will be included in the hard copy materials provided to the Court.

401. It is important to approach the Section 1 analysis of the Regulation without making the assumption that the text of the Regulation is hostile to freedom of religion or other *Charter* rights.

402. The Regulation allows Council to uphold equality rights by requiring that for recognition of a law degree for the purpose of the Society's admission regulations, the institution which grants the law degree must not have unlawfully discriminatory admissions and enrolment policies. Under the Regulation, Council makes the determination concerning unlawful discrimination in the first instance, but its decision is reviewable by the Courts in the ordinary fashion, as this case amply demonstrates. In cases where freedom of religion and equality rights are in conflict, Council is liable to be over-turned if it does not engage in an appropriate balancing exercise. The Regulation therefore addresses discrimination in a neutral fashion, allowing it to occur only when equality rights must lawfully give way to other *Charter* protected rights.

403. Because of the reviewable nature of the determination by Council, the Regulation should not ultimately lead to an infringement of freedom of religion except one that is constitutionally justified. At most the Regulation could lead to a temporary infringement that has to be over-turned by a Court, presumably at some cost to the applicant, although even in those circumstances it is not the Regulation which is causing the infringement, but the erroneous determination by Council.

404. For present purposes, we will assume that the putative *Charter* infringement caused by the Regulation is the creation of a situation in which religious freedom is impaired by the cost and delay of over-turning occasional erroneous determinations by Council of unlawful discrimination.

405. The Supreme Court of Canada in *R. v Oakes*, [1986] 1 SCR 103 (at paragraphs 69-70) set out the test under Section 1 of the *Charter*. The *Oakes* test asks if the objective of the limit is of a pressing and substantial nature, and whether the means chosen to achieve the objective are proportionate (that is, whether the means are rationally connected to the objective, whether the means are minimally impairing, and whether the effects of the law are proportionate).

406. The Society bears the burden of proving that the amended Regulation is reasonable and justifiable on a balance of probabilities. The Applicants make this point at paragraph 224

of their brief by relying on an incomplete quote from paragraph 68 of *Oakes*. The last sentence of that paragraph states: "I should add, however, that there may be cases where certain elements of the s. 1 analysis are obvious or self-evident."

407. In *Jones*[175], the Supreme Court of Canada, at paragraph 30, held that no proof was required to show the importance of education in society or its significance to government. The importance of diversity and inclusion and encouragement of access by members of historically disadvantaged groups to professions traditionally dominated by majoritarian, historically privileged demographic groups is obvious and self-evident. In any event, the Record and Affidavit evidence before this Court, which will be discussed below, prove the pressing and substantial nature of the governmental objective which prompted regulatory action by the Society.

408. In assessing whether the amended Regulation is reasonable and justifiable, the values and principles essential to a free and democratic society must be taken into account. The SCC in *Oakes*[176] enumerated some of these principles at paragraph 64:

> [...] to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

409. As will be made clear below, the Society enacted the amended Regulation in furtherance of these very principles.

410. It is also important to keep in mind in a Section 1 analysis that "a measure of leeway must be accorded to governments in determining whether limits on rights in public programs that regulate social and commercial interactions are justified under s. 1 of the *Charter*".[177] In addition to recognizing deference, the SCC in *Hutterian,* at paragraph 37 also cautions against this Court holding the Society to a standard of perfection judged in hindsight:

> If the choice the legislature made is challenged as unconstitutional, it falls to the courts to determine whether the choice falls within a range of reasonable alternatives. Section 1 of the Charter does not demand that the limit on the right be perfectly calibrated, judged in hindsight, but only that it be "reasonable" and "demonstrably justified". Where a complex regulatory response to a social

[175] *R. v. Jones*, [1986] 2 SCR 284.
[176] *R. v. Oakes*, [1986] 1 SCR 103.
[177] *Hutterian* at paragraph 35.

> problem is challenged, courts will generally take a more deferential posture throughout the s. 1 analysis than they will when the impugned measure is a penal statute directly threatening the liberty of the accused. [...] The bar of constitutionality must not be set so high that responsible, creative solutions to difficult problems would be threatened. A degree of deference is therefore appropriate [...]

411. The SCC in *Hutterian* reminds us that "[m]uch of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief. Giving effect to each of their religious claims could seriously undermine the universality of many regulatory programs [...] to the overall detriment of the community" (at paragraph 36). This point is particularly apt in this Application, where the Applicants' claims seek to undermine the amended Regulation to the detriment of LGB communities, whose *Charter* rights are also engaged.

412. The SCC in *Whatcott* described the approach to the Section 1 analysis where there are competing *Charter* values at stake at paragraph 66:

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

413. Finally, a formalistic approach to the *Oakes* test must be rejected; rather, the *Oakes* test should be applied flexibly, so as to achieve a proper balance between individual rights and community needs *(RJR MacDonald Inc. v Canada (Attorney General)*, [1995] SCJ No 68, at paragraphs 62, 132).

(1) **The Regulation is a limit prescribed by law**

414. The Society rejects the Applicants' submission at paragraphs 227-229 of their brief that the amended Regulation is too vague to be a limit "prescribed by law". The Applicants mischaracterize the amended Regulation throughout their submissions. The Regulation does not provide, as they repeatedly say it does, that "a law degree is not a law degree if determined by Council". The Applicants effectively suggest through that phrase that Council could deny recognition of a law degree for any reason whatsoever[178], whereas the Council's authority under the Regulation is only to deny recognition in circumstances of unlawful discrimination, a determination that calls for application of legal standards, and which is subject to judicial review for compliance with those standards.

[178] At paragraph 229, Applicants refer to Council's discretion under the Regulation as unlimited.

415. Following the litigation of the present case, and other cases involving TWU dealing with similar issues in British Columbia and Ontario, it is anticipated that there will be very considerable judicial guidance on unlawful discrimination in the law school setting, providing a tighter understanding of the applicable legal standards. In the meantime, the existence of debate over TWU's Covenant does not mean that the standard contained in the Regulation is so uncertain that it confers unlimited discretion, as asserted by the Applicants. As will be seen below, the test for vagueness and uncertainty recognizes that debate occurs about the interpretation of many statutory and regulatory standards, without resulting in the standards being characterized as unduly vague.

416. The Regulation requires that Council, in making its determination regarding discrimination, must apply the legal standards set out in the *Charter* or the *Nova Scotia HRA*.

417. The Applicants reproduce paragraph 51 of *Osborne v Canada*, [1991] SCJ No 45 in support of their position on this issue. In the quoted paragraph that follows, Justice Sopinka acknowledges that Courts have properly shown a reluctance to find that a law is too vague to be a limit "prescribed by law":

> This Court has shown a reluctance to disentitle a law to s. 1 scrutiny on the basis of vagueness which results in the granting of wide discretionary powers. Much of the activity of government is carried on under the aegis of laws which of necessity leave a broad discretion to government officials. See *R. v. Jones*, [1986] 2 S.C.R. 284, *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469, and *R. v. Beare*, [1988] 2 S.C.R. 387. Since it may very well be reasonable in the circumstances to confer a wide discretion, it is preferable in the vast majority of cases to deal with vagueness in the context of a s. 1 analysis rather than disqualifying the law in limine. In this regard, I adopt the language of McLachlin J. in *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, at p. 956:
>
> That is not to say that the alleged vagueness of the standard set by the provision is irrelevant to the s. 1 analysis. For reasons discussed below, I am of the opinion that the difficulty in ascribing a constant and universal meaning to the terms used is a factor to be taken into account in assessing whether the law is "demonstrably justified in a free and democratic society". **But I would be reluctant to circumvent the entire balancing analysis of the s. 1 test by finding that the words used were so vague as not to constitute a "limit prescribed by law", unless the provision could truly be described as failing to offer an intelligible standard.** That is not the case here. [emphasis added]

418. The SCC in *Osborne,* went on at paragraph 53 to quote from *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927, where the SCC stated at paragraph 63 as follows:

> Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies. On the other hand, where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no "limit prescribed by law". [emphasis added]

419. The cases of *Osborne*, *Taylor,* and *Irwin Toy,* were all referred to by the SCC in its summary of the law of vagueness in *Pharmaceutical Society* at paragraphs 18-28. The SCC in *Pharmaceutical Society* concluded at paragraph 71 that "a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate". The Court elaborated at paragraph 63:

> A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary. This is an exacting standard, going beyond semantics. The term "legal debate" is used here not to express a new standard or one departing from that previously outlined by this Court. It is rather intended to reflect and encompass the same standard and criteria of fair notice and limitation of enforcement discretion viewed in the fuller context of an analysis of the quality and limits of human knowledge and understanding in the operation of the law. [emphasis added]

420. The SCC in *Pharmaceutical Society* at paragraphs 66 to 69 acknowledged that the state, in attempting to realize important social objectives, sometimes must necessarily frame an enactment in relatively general terms. The SCC explained at paragraph 68:

> [...] The modern State intervenes today in fields where some generality in the enactments is inevitable. The substance of these enactments remains nonetheless intelligible. **One must be wary of using the doctrine of vagueness to prevent or impede State action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject-matter does not lend itself.** A delicate balance must be maintained between societal interests and individual rights. A measure of generality also sometimes allows for greater respect for fundamental rights, since circumstances that would not justify the invalidation of a more precise enactment may be accommodated through the application of a more general one. [emphasis added]

421. The Regulation incorporates by reference the grounds of discrimination contained in the *Charter* and the *NS Human Rights Act*. The Regulation clearly frames the boundaries for legal debate. Any uncertainty over the outcome of the debate concerning the Council's

Resolution is not a testament to the absence of standards or reference points in the Regulation, but to the healthy evolution of Canadian society and jurisprudence on the question of LGB equality rights, and consequently to public debate on issues such as those presented by this case.

(2) **The amended Regulation addresses a pressing and substantial objective**

422. The Applicants have mischaracterized the Society's objective throughout their submissions. As previously noted, the Regulation was not based on a hypothesis that TWU law school graduates would be unable to follow Nova Scotia professional ethics because of a propensity to discriminate. Accordingly, the Applicants' brief is not a helpful guide to the issues which this Court should consider under Section 1.

423. The Regulation addresses several objectives of the Society, which are individually, as well as collectively, pressing and substantial. The amended Regulation was made in furtherance of the Society's commitment as the governing body of the profession to avoid or ameliorate discrimination in the justice system and to promote and protect the public interest in the practice of law in Nova Scotia.[179]

424. The Society enacted the amended Regulation as part of its efforts to promote diversity and inclusion within the legal profession in order to avoid the injustices that in the past have resulted, at least in part, from a lack of diversity in the justice system. The 1989 Royal Commission on the Donald Marshall Jr. Prosecution[180] found that racism and discriminatory attitudes within the province's justice system had contributed to the serious miscarriage of justice in that case.

425. Since the Marshall Inquiry, the work of the Society's Race Relations Committee, Gender Equality Committee, and Equity Office have focused on addressing ways to make the legal profession more diverse and reflective of the full range of communities in the province, with an emphasis on equity seeking or historically disadvantaged communities.[181] This work has more recently included consideration of the legal issues which impact LGB communities in Nova Scotia.

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[179] Affidavit of Darrel Pink, paragraphs 9, 21-24.
[180] Affidavit of Darrel Pink, paragraphs 4-10.
[181] Affidavit of Darrel Pink, paragraphs 11-19.

426. While the discriminatory activities of TWU which provided the immediate spark for the Regulation were in relation to equality rights of LGB persons, the Regulation is neither dedicated solely to sexual orientation discrimination, nor restricted to TWU in its application.

427. An important aspect of the reasoning behind the Regulation is the reality that discrimination often results in under-representation. Under-representation of a minority or disadvantaged group in the Bar not only results in substantive inequality in the distribution of influential and well-paid legal careers, but also can result in miscarriages of justice from lack of understanding by lawyers and judges of minority social and cultural issues which may adversely affect the outcome of legal proceedings.

428. The administration of justice certainly involves concern for actual fairness, impartiality and correctness of outcome. However, it is also concerned with maintaining a favourable perception of the public about the justice system, without which complainants and witnesses may not come forward, or, if they do, they may not respect the system by telling the truth under oath or affirmation, or by obeying Court orders. In short, the sound and efficient administration of justice requires public legitimacy. This requirement for public legitimacy is explicitly recognized in the *Charter* in s. 24(2)[182], as well as in other Constitutional settings such as the law concerning the independence of the judiciary.[183] Legitimacy is threatened by minority under-representation, as it also is by decisions connoting unfairness to those who have experienced long-standing historical disadvantage. For the regulatory authority of the legal profession, the importance of diversity and inclusion - and the need to show intolerance towards discrimination - are even more important than these values may be in other settings. The public interest mandate of the Society includes furthering the respect of Nova Scotians for the administration of justice.

429. The evidence establishes that access to a common law legal education in Canada is restricted. There are currently only 18 existing law schools in Canada that currently offer common law degrees and TWU will be the 19th. Information is available about 16 of the existing schools and the number of applicants to these schools has significantly exceeded the number of offers made and number of seats available over the last several

[182] This provision contemplates the admission of evidence obtained unconstitutionally to be admitted if its exclusion would bring the administration of justice into disrepute.
[183] *Reference re Remuneration of Judges et al*, [1997] 3 SCR 3, at paragraph 112.

years. Reserving all of the spaces at a new law school for heterosexuals or those willing to deny, suppress and cover up their true LGB nature adds to historical patterns of discrimination and under-representation in the profession by a disadvantaged group.

430. The advancement of inclusion and diversity and the avoidance of the harms caused by the institutionalization of discrimination by the governing body of the legal profession, are objectives sufficiently important to pass this stage of the *Oakes* test, even if they adversely effect the Applicants' *Charter* interests. As the Court stated at paragraph 77 of *Saskatchewan (Marriage Act, Marriage Commissioners) (Re)*, 2011 SKCA 3:

> [...] It seems clear enough that a law aimed at preserving or accommodating a constitutionally guaranteed right or freedom must normally be taken to satisfy this aspect of the *Oakes* test even if the effect of the law in question is to impinge on other *Charter* interests. Otherwise, at this opening stage of the inquiry, a court would be forced to somewhat blindly choose one right or freedom over another. Here, for example, we effectively would be obliged to endorse s. 2(a) interests in priority to those arising under s. 15(1), or vice versa, without the benefit of a full assessment of all the factors relevant to the best reconciliation of those rights and freedoms. [emphasis added]

(3) **The means by which the objective is furthered is proportionate**

(i) There is a rational connection between the objective and the amended Regulation

431. The requirement under the Regulation that, for an institution to succeed in obtaining status for its law degrees from the Society, it must not unlawfully discriminate in its enrolment or admissions policies is rationally connected to the Society's objectives of promoting diversity and inclusion in the NS legal profession. The Regulation avoids the harms of institutionalized discrimination and equal access for LGB persons to stand at the starting gate to a career in the legal profession.

432. The issue at this stage of the *Oakes* test is whether there is a rational link, on the basis of reason or logic, between the infringing measure and the Society's goals.[184] To establish a rational connection, the Society need only show that "it is reasonable to suppose that the limit **may** further the goal, not that it **will** do so".[185]

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[184] *Hutterian* at paragraph 51; *RJR MacDonald* at paragraph 153.
[185] *Hutterian* at paragraph 48, emphasis added.

433. It is reasonable to conclude that, by not sanctioning an institution's discriminatory admissions and enrolment policies, the Society may increase the current under-representation of LGB communities in its membership and thereby promote diversity and inclusion in the membership of the Society and legal profession in the province. More significantly, the message that the Society has sent, that it will not condone or be complicit in institutionalized and systemic discrimination against LGB communities, may encourage current and future lawyers from LGB communities to seek membership in the Society and to practice law in Nova Scotia.

434. The Regulation may also result, or contribute to a result, whereby a prospective law school removes a discriminatory component of its admission or enrolment policies, in order to have its law degree recognized by all jurisdictions including Nova Scotia. This would further the Society's goals of eradicating the discriminatory treatment in access to legal education for members of LGB communities, increasing the number of future lawyers who are members of LGB communities and are therefore eligible to practice in Nova Scotia.

435. The potential that the Regulation may result in a prospective law school removing the discriminatory component of its admission or enrolment policies would also achieve the Society's goals of not sanctioning the harm to prospective students that the law school's discrimination has on those students and the larger LGB community, including the harms of minority stress discussed by Elise Chenier at paragraphs 72-77 of her Affidavit. While the avoidance of discrimination by TWU is not for the Society to regulate at large, the avoidance of complicity by the Society in its harmful discrimination practices is needed to maintain the perception of the public that the regulatory authority governing Nova Scotia lawyers is indeed welcoming and open to minorities of any kind.

436. Had the Society not enacted the amended Regulation, and recognized law degrees from institutions that discriminate in their admissions and enrolment policies, the Society would have been complicit in significant harms to prospective LGB law students and possibly other disadvantaged groups in the future; it would have been a participant in causing harms to the greater LGB community; it would not have promoted the diversity and inclusion of its membership, and would not have reinforced the legitimacy of the administration of justice in the Province. It is reasonable therefore to conclude that the

Society, by enacting the amended Regulation, would bring about the opposite, and thereby may achieve its pressing and substantial objectives.

(ii) The amended Regulation is minimally impairing

437. This stage of the *Oakes* test asks whether the limit on the right is reasonably tailored to the pressing and substantial goal that the Society says justifies the limit. The impugned measures need not be the least impairing option; rather, if the means falls within a reasonable range of alternatives it will pass the test. This standard was set out in *RJR MacDonald* at paragraph 160:

> As the second step in the proportionality analysis, the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. **The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement** [...]. On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail. [emphasis added][186]

438. However, what is clear is that the Applicants assert that the Society should simply recognize a TWU law degree as a law degree equivalent to a law degree from any other Canadian law school, and not concern itself with TWU's discrimination against LGB persons.

439. For the Applicants, the only acceptable measure is one that entirely removes the alleged limit on their *Charter* rights and freedoms. That is, the only acceptable alternative to the Applicants is for the Society to be blind to the discrimination in TWU's Covenant and not legislate a non-discrimination requirement into the definition of a "law degree".

440. If the Applicants' position is accepted, the Society's ability to advance its objectives of promoting diversity and inclusion in the legal profession, and not condoning and being seen to condone discrimination will surely be compromised. The Applicants' suggested measure does not fall within the range of reasonable alternatives, because it accomplishes none of the objectives underlying the Regulation.

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[186] See also *Hutterian* at paragraph 54, and *Whatcott* at paragraphs 78 and 101]. Courts will accord the Society a measure of deference at this stage [*Hutterian* at paragraph 53].

441. As discussed above, the impairment, if any, of the Applicants' actual *Charter* rights as a result of the amended Regulation is minimal. From the Resolution, it is readily apparent that the only thing being asked of TWU in order for TWU law degrees to be considered on the same footing as degrees from other law schools, is to make the Covenant optional, for example allowing those with a belief in the Covenant's contents to promise to adhere to those beliefs, and others not to do so. The amended Regulation permits the Applicants to meaningfully exercise their religious practices and beliefs, and to express them meaningfully, but prevents them from imposing their own religious belief about the wrongful nature of same-sex sexual conduct upon others. Without evidence that the religious belief of the Applicants requires them to impose their beliefs about LGB people on persons of other religions, it is difficult to credit that the Regulation, when interpreted in light of the Resolution, interferes at all with anyone's religious freedoms, but if it does, any impairment caused by the amended Regulation is minimal and represents an acceptable cost to the Applicants to exercise their rights in the secular context of legal education.

442. The evidence discloses no alternative measure which would substantially achieve the Society's objectives while impacting the Applicants' rights any less. Given that the amended Regulation is aimed at addressing a pressing and substantial objective and is rationally connected to that objective, the Applicants' position must be rejected, as occurred in *Hutterian* at paragraphs 57-60. The Society's amended Regulation clearly falls within the range of reasonable alternatives and therefore meets this stage of the proportionality test (*RJR MacDonald* at paragraph 160).

(iii) The salutary effects of the amended Regulation outweigh any deleterious effects

443. The final stage of the *Oakes* analysis asks whether the limitation on *Charter* rights and freedoms in the impugned legislation is disproportionate in effect to the public benefit conferred by the limitation.[187]. This calls for a judgment of the balance between the extent of harm to *Charter* rights against the benefits of the provision imposing the limitation on those rights.

444. As noted previously, there is no harm whatsoever to *Charter* rights caused by the substantive test of "unlawfully discriminates". At most the Regulation, by potentially

[187] *Hutterian* at paragraph 73.

enabling a temporary breach of *Charter* rights in instances where Council makes an erroneous determination, may impose some procedural cost and delay in obtaining a vindication of *Charter* rights through a judicial review of Council's decision. It is noteworthy that this is a common issue in virtually all settings in which Constitutional decision-making occurs, including in the Court setting, where decisions ultimately found to be incorrect have to be over-turned by an appeal, which likewise takes resources and time to prosecute. The adverse impact from the Regulation is accordingly of minimal weight, as cost and time to vindicate rights are simply the procedural friction that must be tolerated in order to obtain Constitutional adjudication. This *de minimis* impairment is more than offset by the potential advancement of the pressing and substantial objectives outlined above.

PART V - CONCLUSION

445. The Society requests that the Application for Judicial Review be dismissed and that this Court declare that Regulation 3.1, as amended, is not *ultra vires* the *Act* or contrary to the Applicants' *Charter* rights and freedoms, or alternatively, that it is a reasonable limit prescribed by law under section 1 of the *Charter*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 18th day of November, 2014.

Marjorie Hickey, Q.C.

Peter Rogers, Q.C.

Jane O'Neill

COUNSEL FOR THE NOVA SCOTIA BARRISTERS' SOCIETY

TAB “A”

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.

TAB “B”

COUNCIL RESOLUTION
April 25, 2014

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.

TAB "C"

PART 3

ADMISSIONS

3.1 Interpretation

In this Part

(a) **"Committee"** means the Credentials Committee;

(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;*

ii) a degree in civil law, if the holder of the degree has passed a comprehensive examination in common law or has successfully completed a common law conversion course approved by the Credentials Committee 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;* or

iii) a Certificate of Qualification issued by the National Committee on Accreditation of the Federation of Law Societies of Canada;

3.2 Exceptional circumstances

3.2 The Executive Director may, in exceptional circumstances and when it is in the public interest to do so, waive one or more of the requirements for admission.

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;
(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 in a manner prescribed by the Executive Director;
(l) be proficient in the English language and if English is not the first language of the applicant, provide proof of English language proficiency in a manner prescribed by the Executive Director; and
(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;

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

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.

Responsibility of the Executive Director on Approval

3.3.6 When the application is approved, the Executive Director shall:

(a) notify the applicant and the principal of the approval and the effective date on which the applicant will be enrolled as an articled clerk, and
(b) on the effective date, register the applicant on the Register of Articled Clerks.

TAB “D”

Extracts from *Legal Profession Act*

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; and

(d) seek to improve the administration of justice in the Province by

> (i) regularly consulting with organizations and communities in the Province having an interest in the Society's purpose, including, but not limited to, organizations and communities reflecting the economic, ethnic, racial, sexual and linguistic diversity of the Province, and
>
> (ii) engaging in such other relevant activities as approved by the Council. *2004, c. 28, s. 4; 2010, c. 56, s. 2.*

. . .

Members

5

(8) The Council may make regulations

(a) establishing categories of membership in the Society and prescribing the rights, privileges, restrictions and obligations that apply to those categories;

(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;

(c) governing the educational program for articled clerks;

(d) establishing the procedures and the oath or affirmation of office for calling lawyers to the Bar;

. . .

Council

6 (1) The Council under the former Act is continued and is the governing body of the Society.

(2) The Council shall govern the Society and manage its affairs, and may take any action consistent with this Act that it considers necessary for the promotion, protection, interest or welfare of the Society.

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

(4) Where there is a quorum at a meeting of the Council, the Council may exercise its powers under this Act notwithstanding any vacancies among the members of the Council.

(5) In addition to any specific power or requirement to make regulations under this Act, the Council may make regulations to manage the Society's affairs, pursue its purpose and carry out its duties. *2004, c. 28, s. 6.*