NOVA SCOTIA COURT OF APPEAL

Citation: *The Nova Scotia Barristers' Society v. Trinity Western University*, 2016 NSCA 59

Date: 20160726
Docket: CA 438894
Registry: Halifax

Between:

The Nova Scotia Barristers' Society

Appellant

v.

Trinity Western University and Brayden Volkenant

Respondents

-and-

Association for Reformed Political Action (ARPA) Canada; Canadian Council of Christian Charities; The Catholic Civil Rights League and Faith and Freedom Alliance; The Attorney General of Canada; The Evangelical Fellowship of Canada and Christian Higher Education Canada; Justice Centre for Constitutional Freedoms; Schulich School of Law OUTlaw Society; The Advocates' Society; Canadian Bar Association; Christian Legal Fellowship; The Canadian Secular Alliance

Intervenors

Judges: Fichaud, Beveridge, Farrar, Bryson, and Bourgeois, JJ.A.

Appeal Heard: April 6, 7 and 8, 2016, in Halifax, Nova Scotia

Subject: *Vires* of regulations – administrative law

Summary: Trinity Western University is a private Christian university in British Columbia. Trinity Western's students must adhere to a "Community Covenant" that prohibits sexual intimacy outside the marriage of man and woman. Trinity Western seeks to establish a law degree. The Federation of Canadian Law Societies approved the proposed law degree.

Under the *Legal Profession Act*, S.N.S. 2004, c. 28 and its regulations, the Nova Scotia Barristers' Society regulates admission to law practice in Nova Scotia. The Society amended its regulations and passed a resolution that restricted the ability of Trinity Western's law graduates to article in Nova Scotia. The amended regulation said that, if the Council "determines that the university granting the degree unlawfully discriminates in its law school admissions or enrollment policies or requirements on grounds prohibited by either or both the *Charter of Rights and Freedoms* and the Nova Scotia *Human Rights Act*", then the University's degree would not be a "law degree" in Nova Scotia. The Society's resolution said that Trinity Western's law school would not be approved unless Trinity Western excluded law students from the Covenant.

Trinity Western challenged the Council's amended regulation and resolution as *ultra vires* the *Legal Profession Act* and, alternatively, as an infringement of Trinity Western's freedom of religion under the *Charter of Rights and Freedoms*. A judge of the Supreme Court of Nova Scotia agreed with both grounds, and held that the amended regulation and resolution were invalid. The Society appealed to the Court of Appeal.

Issues: First, is the amended regulation *ultra vires* the *Legal Profession Act* and is the resolution unauthorized by the *Legal Profession Act* and its regulations? Alternatively, do the amended regulation and resolution unjustifiably infringe Trinity Western's freedom of religion under the *Charter of Rights and Freedoms*?

Result: The Court of Appeal dismissed the Society's appeal. The *Legal Profession Act* did not authorize Council to enact a regulation that the Council could issue rulings whether someone in British Columbia "unlawfully" violated the *Human Rights Act* or the *Charter*.

Trinity Western's activity occurred in British Columbia, and was outside the reach of Nova Scotia's *Human Rights Act.* As a private university, Trinity Western was not subject to the *Charter of Rights*. Trinity Western did not act "unlawfully" under either enactment.

The amended regulation was *ultra vires* the *Legal Profession Act*, and the resolution was unauthorized by that *Act* and its valid regulations.

The Court of Appeal did not comment on the alternative issue – whether the amended regulation and resolution would unjustifiably infringe Trinity Western's freedom of religion under the *Charter*.

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Intervenors

Judges:	Fichaud, Beveridge, Farrar, Bryson, and Bourgeois, JJ.A.
Appeal Heard:	April 6, 7, and 8, 2016, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of the Court
Counsel:	Marjorie A. Hickey, Q.C., Peter Rogers, Q.C., and Jane O'Neill, for the appellant Brian Casey, Q.C. and Kevin Sawatsky, for the respondents André Marshall Schutton, for the Association for Reformed Political Action (ARPA) Canada Barry W. Bussey, for the Canadian Council of Christian Charities

Philip H. Horgan, for the Catholic Civil Rights League and Faith and Freedom Alliance

Albertos Polizopoulos and Kristin Debs, for the Evangelical Fellowship of Canada and Christian Higher Education Canada

Jay Cameron, for the Justice Centre for Constitutional Freedoms

Jack Townsend, for Schulich School of Law OUTlaw Society

Bruce T. MacIntosh, Q.C., for the Advocates' Society

David Grossman, Amy Sakalauskas, and Susan Ursel for the Canadian Bar Association

David St. Clair Bond, Derek B. M. Ross, and Deina Warren, for Christian Legal Fellowship

Tim Dickson and Catherine George, for the Canadian Secular Alliance

Reasons for judgment of the Court:

[1] Trinity Western University is a private institution in Langley, British Columbia. Founded by the Evangelical Free Church of America, it opened as a junior college, then obtained the right to grant university degrees. Trinity Western aims to add a law degree to its offering of 42 undergraduate majors and 17 graduate programs. That objective has situated it in the spotlight of Canada's legal community.

[2] In December 2013, the Federation of Canadian Law Societies approved Trinity Western's proposed law degree. Then the Nova Scotia Barristers' Society undertook broad consultations that culminated in a resolution and regulation to restrict the ability of Trinity Western's law graduates to article in Nova Scotia.

[3] Trinity Western and Mr. Volkenant, a prospective law student, applied to challenge the Society's statutory authority to pass the resolution and regulation. They also submitted that, if the resolution and regulation were *intra vires* the legislation, they infringed the applicants' religious and associational freedoms under the *Charter of Rights and Freedoms*. A judge of the Supreme Court of Nova Scotia agreed. The judge held that the resolution and regulation overstepped the Society's statutory authority and, in the alternative, unjustifiably infringed the *Charter* freedoms of Trinity Western and Mr. Volkenant. The Society appeals.

[4] We dismiss the appeal. The Society did not have the statutory authority to enact the regulation or adopt the resolution. We do not comment on the *Charter* issues.

Background

[5] Trinity Western is a private university. It operates under the aegis of the Evangelical Free Church of Canada, and views itself as "an arm of the Church". It was chartered by the *Trinity Junior College Act*, S.B.C. 1969, c. 44. That statute said the College would educate its students "with an underlying philosophy and viewpoint that is Christian". The College later changed its name to Trinity Western University. Since 1984, Trinity Western has belonged to the Association of Universities and Colleges of Canada. Its degrees, including those in nursing and teaching, have been recognized as academically sound in British Columbia and elsewhere. Its enrollment approximates 4,000.

[6] It is not Trinity Western's academic standards that have attracted critics' attention. Rather, it is the "Community Covenant" to which all students and staff must adhere. The Covenant is an encompassing code of conduct that, in addition to mundane items, prohibits sexual intimacy outside the marriage between a man and a woman. Excerpts from the Covenant include:

> 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:
>
> . . .
>
> • 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 . . .
>
> . . .
>
> In keeping with biblical and TWU ideals, community members voluntarily abstain from the following actions:
>
> . . .
>
> • Sexual intimacy that violates the sacredness of marriage between a man and a woman . . .
>
> . . .
>
> … according to the Bible, sexual intimacy is reserved for marriage between one man and one woman … .

[7] Trinity Western's student body includes LGBTQ students. The Covenant prohibits harassment based on sexual orientation.

[8] The Covenant governs the student's term at Trinity Western in British Columbia. It does not govern post-graduation activities, such as articling or law practice. Discipline for non-compliance may include suspension or expulsion from Trinity Western.

[9] The Covenant has prompted a harsh reaction from the legal community and beyond. It is castigated as a discriminatory infringement of legally protected equality rights of members of the LGBTQ community. Trinity Western and its supporters say the Covenant manifests their genuine beliefs that are protected in a pluralistic society governed by constitutional freedoms of religion, conscience and association. From strongly held opposing convictions, conflict may emerge.

[10] Having developed its plan for a law school and its proposed curriculum, Trinity Western sought approval from the Federation of Canadian Law Societies. The Federation represents the 14 law societies in Canada, and has adopted uniform standards for law school curricula. In the decision under appeal, Justice Campbell described the process that followed:

> [45] . . . After a process that involved consultation with lawyers, judges and legal academics TWU made a presentation to the Federation of Canadian Law Societies (the "Federation"). The Federation is the national coordinating body of the 14 law societies that govern lawyers and notaries across the country. One of its functions is to develop national standards of regulation. Each law society in the common law provinces and territories requires applicants for bar admission to hold a Canadian common law degree or its equivalent. The Federation adopted a uniform national requirement for Canadian common law programs in 2010. The Approval Committee is the body responsible for making the determination as to whether a degree complied with those national standards.
>
> [46] Canadian law societies had agreed to rely on the recommendations of the Approval Committee. That approval would be required for graduates of the school of law to be able to practise in Canada.
>
> [47] By a letter dated 22 April 2013 the Federation advised TWU that it would be establishing a Special Advisory Committee to consider the effect of the Community Covenant on the Federation's decision whether or not to approve the proposal. That Special Advisory Committee had the mandate to consider what additional considerations should be taken into account in determining whether future graduates of TWU's proposed law school should be eligible for admission into any of Canada's law societies, given the requirement that students sign the Community Covenant. The Special Advisory Committee was to take into account all representations that had been received, the applicable law, including the *Charter* and the Supreme Court of Canada decision in *Trinity Western University v. British Columbia College of Teachers*, and any other information that the committee decided was relevant.
>
> [48] The Special Advisory Committee released its final report in December 2013. It found that there was no public interest reason for preventing graduates of the JD Program at TWU from practising law. The Special Advisory Committee acknowledged the arguments raising important issues of equality rights and freedom of religion. If the Approval Committee concluded that the TWU proposed law school met the national requirement there was no public interest bar to the approval of the school.
>
> [49] The Approval Committee approved the law degree from TWU's proposed law school and in doing so referenced and relied on TWU's statements that it was fully committed to addressing ethics and professionalism, that it recognized its duty to teach equality and to promulgate non-discriminatory practices, and that it

> would ensure that students understood the full scope of protections from discrimination based on sexual orientation. That approval would be followed by an annual review.

[11] The Nova Scotia Barristers' Society, through its 21 member Council, regulates the legal profession in Nova Scotia. Its authority stems from the *Legal Profession Act*, S.N.S. 2004, c. 28 and the regulations, enacted by the Society's Council, under that *Act*.

[12] At the time of the Federation's approval, the Society's regulations provided simply for the adoption of the Federation's sanctioned law degree. In early 2014, Regulations 3.3.1 and 3.1(b)(i) under the *Legal Profession Act* said:

> - 3.3.1 An applicant for enrolment as an articled clerk must:
>
> . . .
>
> (d) have a law degree;
>
> - 3.1 In this Part
>
> . . .
>
> (b) "law degree" means
>
> (i) A Bachelor of Laws degree or a Juris Doctor degree from a faculty of common law at a Canadian university approved by the Federation of Law Societies of Canada for the granting of such degree, or an equivalent qualification . . .

[13] Trinity Western's Covenant discomforted the Society. In January 2014, the Society began a consultative process to determine its response should Trinity Western's law graduates apply for articles in Nova Scotia. After two public meetings and hearing Trinity Western's presentation, and with the benefit of over 150 written submissions, on April 16, 2014 the Society's Executive Committee submitted a report to the Society's Council. The Report summarized 3 options:

> The Federation of Law Societies of Canada (FLSC) Approval Committee has granted preliminary approval of the TWU Law School. A Special Advisory 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. The Nova Scotia Barristers Society (NSBS) held a public consultation

that provided for written and oral submissions from members of the public, the profession, students, clergy, and representatives from TWU. This report identifies three (3) options available to Council:

> A – Accept the FLSC Approval Committee conclusion and approve the TWU Law School
>
> B – Decline to approve TWU Law School
>
> C – Conditionally approve TWU Law School

[14] For Option C, the Report noted:

> It is neither the responsibility nor the right of the NSBS to revise the Community Covenant so, in the context of the historical discrimination in the Nova Scotia justice system, 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.
>
> TWU has the power to take action to address this discrimination. The University can continue to believe in the sanctity of marriage between a man and a woman so long as the actions it takes in that regard do not negatively affect LGBT individuals. Given the work of the Federation Approval Committee, TWU has an acceptable proposal in all respects other than the Community Covenant. If TWU were to change the Covenant or exempt law students from the Covenant, the school can be approved in Nova Scotia. This approach would minimally impair freedom of religion and promote equality. It balances the competing values by placing freedom of choice on the school rather than on students, and by allowing TWU to find an appropriate and lawful way to promote and practice its religious freedom in a manner that respects the equality of all Canadians.

[15] At its meeting on April 25, 2014, the Society's Council accepted Option C. The minutes record a vote of 10 to 9 with one abstention. The resolution reads:

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

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

[16] There were no further written reasons. The Council's resolution of April 25, 2014 ("Resolution") is a target in this litigation.

[17] On May 29, 2014, Trinity Western and Mr. Volkenant filed with the Supreme Court of Nova Scotia a Notice of Judicial Review to quash the Resolution. Mr. Volkenant is an evangelical Christian and a graduate of Trinity Western's undergraduate program. He believes in the precepts of the Covenant and wants to be a lawyer. Trinity Western and Mr. Volkenant challenged the NSBS' statutory authority to pass the Resolution, and alternatively claimed that the Resolution infringed their *Charter* freedoms.

[18] On June 23, 2014, the Society filed a Notice of Participation, requesting that the application for judicial review be dismissed with costs.

[19] On July 23, 2014, the Society's Council adopted a motion that amended Regulation 3.1(b)'s definition of "law degree", by adding the following italicized words:

> 3.1 Interpretation
>
> (b) "law degree" means
>
> (i) a bachelor of laws degree or a juris doctor degree from a faculty of common law at a Canadian university approved by the Federation of Law Societies of Canada for the granting of such degree, ***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.***

[20] The amendment of July 23, 2014 ("Amended Regulation") is the second target of this litigation.

[21] Normally a resolution would follow the enactment of the law upon which the resolution is based. Here the order was reversed. The April Resolution was premised on an unformulated future amendment of Regulation 3.1(b). In its submissions during the litigation, the Society urged that the Resolution and the Amended Regulation be considered as complementary and indivisible. In the Court of Appeal, Trinity Western took no issue with that approach.

[22] We return to the chronology. On August 21, 2014, the Society moved in chambers to include the validity of the Amended Regulation in the issues to be litigated. Justice Coady's Order of October 6, 2014 granted that motion and the parties' request to file supplementary affidavits, and converted the proceeding to "a combined Application for Judicial Review and Application in Court". The combined application challenged both the Resolution and the Amended Regulation. Various parties sought and obtained intervenor status.

The Proceeding in the Supreme Court

[23] On December 16-19, 2014, Justice Jamie Campbell heard the combined applications. The parties filed affidavits and tendered exhibits by consent.

[24] On January 28, 2015, the judge issued a written decision, followed by an Order on March 26, 2015 and a costs decision on April 21, 2015. The judge granted Trinity Western's motion for judicial review, quashed the Society's Resolution and held that the Amended Regulation was invalid. He directed the Society to pay costs of $70,000.

[25] We will summarize the judge's reasons.

[26] Justice Campbell identified an administrative or *vires* issue, and a constitutional issue:

> [128] There are really two broad legal issues. The first is the administrative law question of whether the NSBS, in refusing to accept a law degree from TWU, was attempting to regulate a law school or was upholding and protecting the public interest in the practice of law in Nova Scotia. The former it cannot do. The latter it can.

> [129] The second issue is a constitutional law matter. It is whether the NSBS appropriately considered and applied the balancing of the *Charter* rights to equality and freedom of religion.

[27] On the first issue, the judge held that the Resolution and Amended Regulation were unauthorized by the *Legal Professions Act*. On the second, he held that the Resolution and Amended Regulation infringed Trinity Western's freedom of religion under s. 2(a) of the *Charter* and the infringement was unjustified by s. 1.

[28] In our view, the first issue determines the outcome of this appeal. We will confine our synopsis of the judge's reasoning to that matter.

[29] The judge (paras. 156-58) held that the standard of review for *vires* was reasonableness under *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

[30] Justice Campbell held that the *Legal Professions Act* defined the Society's mandate, in the words of s. 4(1), "to uphold and protect the public interest in the practice of law". He said:

> [166] The purpose of the NSBS under the *Legal Profession Act* is to "uphold and protect the public interest in the practice of law". It is not an expansive mandate to oversee the public interest generally, or all things to which the law relates. It is a mandate to regulate lawyers and the practice of law as a profession within Nova Scotia. In order to have any authority over a subject matter, a person or an institution, that subject, matter, person or institution has to relate to or affect the practice of law. Both the federal income tax reporting requirements and the *Civil Procedure Rules* affect lawyers and the practice of law but they are not part of regulation of the profession. In order for the NSBS to take action pertaining to TWU, that institution must in some way affect the practice or the profession of law in Nova Scotia.

[31] The judge turned to the Resolution and Amended Regulation. He found that the Society's objective was to regulate the conduct of Trinity Western in British Columbia, not the practice of law in Nova Scotia:

> [168] Once the graduate applies for an articling position in Nova Scotia the NSBS can determine whether or not he or she should be permitted to article. The profession of law is no place for the bigoted or the intolerant. The NSBS has agreed that TWU graduates will be no less willing and capable to comply with ethical requirements to respect LGBT equality rights than anyone else. TWU graduates receive proper training in the ethical issues regarding non-discrimination and equality. There is no reason to place any additional burden on

> TWU graduates to make sure that they are willing to comply with their ethical obligations. Refusing to accept a TWU law degree has nothing to do with weeding out bigoted or intolerant lawyers.
>
> [169] The NSBS has an obligation [to] make sure that students have the appropriate legal education in order to equip them to practice law in Nova Scotia. The NSBS has the authority to establish qualifications for those seeking admission to the profession. Under that authority it has passed regulations that allow the NSBS to define what law degrees it will accept. The NSBS of course does not have the authority to define what is or is not a "law degree" in Nova Scotia or anywhere else. That is an academic degree and a matter over which the NSBS has no legal authority. Its definition of the degree is for its own regulatory purposes only.
>
> …
>
> [172] The regulation passed to implement the resolution focuses on whether the university that grants the law degree, in the opinion of the Council, discriminates in its policies. Once again, though couched in terms of approving the law degree, the action is directed toward the institution of the law school and not the quality of the law degree, or the qualification or lack of qualification of the student or potential lawyer in Nova Scotia.

[32] Justice Campbell held that the *Legal Profession Act* gave to the Society no authority to regulate law schools, in British Columbia or Nova Scotia:

> [173] The NSBS of course has no statutory authority to regulate a law school or university outside Nova Scotia or inside Nova Scotia for that matter. There are other regulators in Nova Scotia and in other provinces who have the authority to determine how degree-granting institutions function, including whether they comply with human rights legislation, workplace safety regulations, employment standards regulations, charitable status reporting requirements, and the entire intricate legal web of obligations that apply to post-secondary educational institutions. Legal practice and legal education are now quite different things. Many people receive a legal education and never practice or intend to practice law. An interpretation of the *Legal Profession Act* that supported NSBS general regulatory power over every law school in Canada would undoubtedly prompt a deluge of articles in learned legal journals in support of the traditional independence of those institutions.
>
> [174] The NSBS has no authority whatsoever to dictate directly what a university does or does not do. It could not pass a regulation requiring TWU to change its Community Covenant any more than it could pass a regulation purporting to dictate what professors should be granted tenure at the Schulich School of Law at Dalhousie University, what fees should be charged by the University of Toronto Law School, or the admissions policies of McGill. The legislation, quite sensibly, does not contain any mechanism for recognition or enforcement of NSBS

> regulations purporting to control how university law schools operate because it was never intended that they would be subject to its control. If it did, the operations of every law school in the country would be subject to the varying requirements of, potentially, 14 law societies. Each could require, for its purposes, that harassment policies reflect its protocols and the human rights legislation in its own jurisdiction, or require admission policies that prefer the equity-seeking group that each law society determines has been most historically disadvantaged.
>
> [175] The NSBS cannot do indirectly what it has no authority to do directly. TWU or any other law school can do whatever it wants. It need not worry about a NSBS regulation that requires it to do anything. But the NSBS has used the arbitrary on-off definition of "law degree" to impose a penalty on the graduate. When a body purporting to act under legislative authority imposes a sanction in response to non-compliance with its directives, that's regulation. The NSBS is attempting to regulate TWU and its policies.

[33] Justice Campbell concluded:

> [181] The NSBS did not act reasonably in interpreting the *Legal Profession Act* to grant it the statutory authority to refuse to accept a law degree from TWU unless TWU changed it[s] Community Covenant. It had no authority to pass the resolution or the regulation.

[34] On May 5, 2015, the Society filed a Notice of Appeal. The next day, Trinity Western filed a Notice of Contention. Many parties have intervened to support one side or the other.

Issues

[35] The Society's Notice of Appeal cites these grounds:

> 1. The Court erred in law by concluding that the Nova Scotia Barristers' Society (the "Society") had purported to regulate a law school in British Columbia, as opposed to defining a law degree for the purposes of admission to the Society, a matter clearly within the Society's jurisdiction;
>
> 2. The Court erred in law in concluding that the Society had no authority to pass the impugned resolution and the impugned regulation respecting the definition of a law degree, by failing to properly analyze and give weight to the broad statutory authority and mandate of the Society under the *Legal Profession Act*, SNS 2004, c 28;
>
> 3. The Court properly identified reasonableness as the standard of review, but erred in law by failing to apply that standard to the reasonableness of the Society's interpretation or application of its statutory mandate;

> 4. The Court erred in law by failing to consider:
>
> > (a) the application of the *Charter* to the actions of the Society;
> >
> > (b) the Society's obligations to consider the *Charter* when exercising its statutory authority and mandate; and
> >
> > (c) the Society's obligation to exercise its statutory authority and mandate in a non-discriminatory way, including an obligation to not condone discrimination;
>
> 5. The Court erred in law by concluding that no equality rights under section 15(1) of the *Charter* were engaged in the Society's decisions, or ought to have been considered by the Society in its decisions, in relation to the impugned resolution and regulation;
>
> 6. The Court properly identified reasonableness as the standard of review when balancing freedom of religion and equality rights, but erred in law by not accepting that the Society reasonably concluded that any infringement of freedom of religion was outweighed by equality rights and values, or alternatively that any infringement of freedom of religion was a reasonable limit justified pursuant to s. 1 of the *Charter*;
>
> 7. In reaching its conclusions, the Court erred in law by:
>
> > (a) relying on evidence that was not before it; and
> >
> > (b) ignoring relevant evidence before it;
>
> and
>
> 8. Such other grounds as may appear.

[36] Trinity Western's Notice of Contention contests Justice Campbell's choice of the reasonableness standard of review for the *vires* issues:

> 1. The resolution of the Nova Scotia Barristers' Society under review is subject to a correctness standard of review; and
>
> 2. The regulations under review are subject to a correctness standard of review.

[37] The submissions restructured some of the formal grounds. Points that were mentioned in the factums were expanded in exchanges with the bench over three days of argument. Fully canvassed in the exchanges at the appeal hearing was this issue:

> What is the effect on the validity of both the Amended Regulation and the Resolution of the criterion "unlawfully discriminates … on grounds prohibited by either or both of the *Charter of Rights and Freedoms* or the Nova Scotia *Human Rights Act*" in the Amended Regulation?

[38] As we will explain, the Amended Regulation is *ultra vires* the *Legal Profession Act*. So the Amended Regulation, and the Resolution that depends on it, are invalid. That disposes of the matter. This Court will not comment on either (1) Trinity Western's claimed infringement of s. 2(a) of the *Charter* or (2) whether such an infringement, if it exists, would be either justified under s. 1 and *R. v. Oakes*, [1986] 1 S.C.R. 103, or proportionate under *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395 and *Loyola High School v. Québec (Attorney General)*, [2015] 1 S.C.R 613.

[39] We will organize the *vires* issues as follows:

1. What standards of review govern whether the Amended Regulation and the Resolution are authorized by the *Legal Profession Act*?
2. Is the Amended Regulation *intra vires* the *Legal Profession Act*?
3. Is the Resolution authorized by the *Legal Profession Act* and its Regulations?
4. If the Amended Regulation is *ultra vires* and the Resolution is unauthorized, should the Court determine what alternative wording in a regulation and resolution would be *intra vires* and authorized by the *Legal Profession Act*?

Issue # 1 – What Standards of Review?

[40] The Society says that, to pass its Resolution and enact its Amended Regulation, the Society interpreted its home statute and is owed deference. Though Justice Campbell cited reasonableness, the Society contends that he applied correctness. Trinity Western submits the Society's authority to enact the Amended Regulation and pass the Resolution are both reviewable for correctness.

[41] In our view, distinct standards of review govern Council's different functions. The enactment of a regulation and the adoption of a resolution engage separate principles of judicial scrutiny.

[42] **The Amended Regulation:** The Council's enactment of the Amended Regulation exercised a subordinate legislative function.

[43] In *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, [2013] 3 S.C.R. 810, Justice Abella for the Court explained the approach to assess the *vires* of subordinate legislation:

[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 object(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.
>
> (*Waddell v. Governor in Council* (1983), 8 Admin. L.R. 266, at p. 292)

[25] Regulations benefit from a presumption of validity (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 458). 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 (John Mark Keyes, *Executive Legislation* (2nd ed. 2010), at pp. 544-50); and it favours an interpretative approach that reconciles the regulation with its enabling statute so that, *where possible* [Justice Abella's emphasis], the regulation is construed in a manner which renders it *intra vires* (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, vol. 3 (loose-leaf), at 15:3200 and 15:3230).

[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" (*United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485, at para. 8; see also Brown and Evans, at 13:1310; Keyes, at pp. 95-97; *Glykis v. Hydro-Québec*, 2004 SCC 60, [2004] 3 S.C.R. 285, at para. 5; Sullivan, at p. 368; *Legislation Act*, 2006, S.O. 2006, c. 21, Sch. F, s. 64).

[27] This inquiry does not involve assessing the policy merits of the regulations to determine whether they are "necessary, wise, or effective in practice" (*Jafari v. Canada (Minister of Employment and Immigration*), [1995] 2 F.C. 595 (C.A.), at p. 604). As explained in *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)* (2002), 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" (*Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106, at pp. 112-13). Nor does the *vires* of regulations hinge on whether, in the court's view, they will actually succeed at achieving the statutory objectives (*CKOY Ltd. v. The Queen*, [1979] 1 S.C.R. 2, at p. 12; see also *Jafari*, at p. 602; Keyes, at p. 266). 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 (*Alaska Trainship Corp. v. Pacific Pilotage Authority*, [1981] 1 S.C.R. 261; *Re Doctors Hospital and Minister of Health* (1976), 12 O.R. (2d) 164 (Div. Ct.); *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at p. 280; *Jafari*, at p. 604; Brown and Evans, at 15:3261). 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" (*Thorne's Hardware*, at p. 111).

[44] The *Katz* standard governs whether the Amended Regulation is *intra vires* the *Legal Profession Act.*

[45] The *Katz* standard is not *Dunsmuir*'s reasonableness. *Dunsmuir* governs adjudicative or discretionary administrative decisions. In *National Railway Co. v. Canada (Attorney General)*, [2014] 2 S.C.R. 135, Justice Rothstein for the Court noted the distinction:

> [51] This case is not about whether a regulation made by the Governor in Council was *intra vires* its authority. Unlike cases involving challenges to the *vires* of regulations, such as *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, the Governor in Council does not act in a legislative capacity when it exercises its authority under s. 40 of the *CTA* to deal with a decision or order of the Agency. The issue is the review framework that should apply to such a determination by the Governor in Council. I am of the view that the *Dunsmuir* framework is the appropriate mechanism for the court's judicial review of a s. 40 adjudicative decision of the Governor in Council.

[46] The *Katz* principles are not supplanted by *Doré* and *Loyola*. In *Loyola* (para. 4), Justice Abella said that *Doré*'s approach applies to "a discretionary administrative decision" (see also paras. 35 and 42). To the same effect: *Doré*, paras. 3-5, 36-38, 43, 56-58; *Bonitto v. Halifax Regional School Board*, 2015 NSCA 80, leave to appeal refused February 18, 2016 (S.C.C.), para. 38; *Labourers International Union of North America, Local 615 v. CanMar Contracting Ltd.*, 2016 NSCA 40, para. 122. The Council's enactment of the Amended Regulation was a subordinate legislative function, not a discretionary administrative decision. *Doré* and *Loyola* do not govern the *vires* of subordinate legislation.

[47] **The Resolution:** The Council's adoption of the Resolution was an administrative decision. Whether the Resolution was authorized by the *Legal Profession Act* and its regulations is governed by *Dunsmuir*'s reasonableness. To the extent the Resolution engages Trinity Western's *Charter* rights, the proportionality test from *Doré* and *Loyola* would apply: *i.e.* the court would determine whether the Resolution has proportionately balanced the *Charter* values and statutory objectives.

Issue # 2 – Is the Amended Regulation Intra Vires the Act?

[48] *Katz* directs the Court to consider the scheme of the *Legal Profession Act* – *i.e.* its wording, context and objective and the Society's statutory mandate, interpreted purposively and broadly. *Katz* instructs that the impugned regulation benefits from a presumption of validity, and its purpose is interpreted liberally. It is *ultra vires* only if it is "irrelevant", "extraneous" or "completely unrelated" to its statutory authority. Neither the policy merits of the regulation nor the underlying "political, economic, social or partisan considerations" pertain to the inquiry.

[49] First, the scheme of the *Legal Profession Act*.

[50] Section 4 states 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
>
> (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.
>
> [emphasis added]

[51] Sections 2(ac) and 16(1) define "practice of law":

2. In this Act,

. . .

(ac) "practice of law" means the practice of law as described in subsection 16(1);

16 (1) The practice of law is the application of legal principles and judgement with regard to the circumstances or objectives of a person that requires the knowledge and skill of a person trained in the law, and includes any of the following conduct on behalf of another:

(a) giving advice or counsel to persons about the persons legal rights or responsibilities or to the legal rights or responsibilities of others;

(b) selecting, drafting or completing legal documents or agreements that affect the legal rights or responsibilities of a person;

(c) representing a person before an adjudicative body including, but not limited to, preparing or filing documents or conducting discovery;

(d) negotiating legal rights or responsibilities on behalf of a person.

[52] Section 5 deals with membership. It includes:

5 (1) Subject to subsection (8), the following persons are members of the Society:

(a) lawyers registered on the Roll of Lawyers;

(b) articled clerks; and

(c) other persons who qualify as members under the regulations.

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

. . .

(8) **The Council may make regulations**

(a) establishing 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; . . .

[emphasis added]

[53] Section 6 empowers the Society's 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 the 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.
>
> [emphasis added]

[54] Also pertinent to the Society's mandate is s. 28 from Part III, entitled "Protection of the Public":

> 28(1) The Society has jurisdiction over
>
> (a) members of the Society in respect of their conduct, capacity and professional competence in the Province or in a foreign jurisdiction;
>
> (b) persons who were members of the Society at the time when a matter regarding their conduct or professional competence occurred;
>
> (c) lawyers from foreign jurisdictions in respect of their practice of law in the Province;
>
> (d) members of the Society, who have been subject to a disciplinary proceeding in a foreign jurisdiction, in respect of the members' behaviour in a foreign jurisdiction and regardless of disciplinary proceedings taken in that jurisdiction.

[55] In summary, the *Legal Profession Act* aims to uphold and protect "the public interest in the practice of law" [s. 4(1)]. To that end, the Society's Council may, among other powers: (1) enact regulations that establish educational and other requirements for membership [ss. 4(2)(a) and 5(8)(b)], (2) seek to improve the administration of justice in the Province [s. 4(2)(d)], and (3) act by resolution consistently with the *Act* [s. 6(3)].

[56] We turn to the Amended Regulation.

[57] The Amended Regulation added the passage that includes these italicized words:

> 3.1 Interpretation
>
> (b) "law degree" means
>
> (i) a bachelor of laws degree or a juris doctor degree from a faculty of common law at a Canadian university approved by the Federation of Law Societies of Canada for the granting of such a degree, ***unless Council***, acting in the public interest, ***determines that the university granting the degree unlawfully discriminates*** in its law student admissions or enrollment policies or requirements ***on grounds prohibited by either or both of the Charter of Rights and Freedoms and the Nova Scotia Human Rights Act.*** [emphasis added]

[58] Regulation 3.1(b)(ii), governing civil law degrees, was similarly amended.

[59] The amended wording prescribes that the Society's Council "determines" whether the University "unlawfully discriminates" under the *Charter* or Nova Scotia's *Human Rights Act*. If the University has a sustainable defence to a hypothetical challenge under the *Charter* or *Human Rights Act*, the University would not act "unlawfully". The Amended Regulation delegates to the Council the function of making this determination.

[60] The Amended Regulation does not merely authorize the Council to weigh human rights or *Charter* values in the exercise of an administrative discretion to promote diversity in the practice of law. Nor does it just say the Council may consider a ruling, issued by a tribunal constituted under the *Human Rights Act* or a court of competent jurisdiction under the *Charter*, that the University has violated the *Human Rights Act* or *Charter*. Rather, the Amended Regulation directs the Council to make a free-standing determination whether the University "unlawfully" contravened the *Human Rights Act* and *Charter*.

[61] The Society acknowledges that the *Charter* does not apply to Trinity Western. It is a private university. The Supreme Court has held that the *Charter* does not apply even to an autonomous public university: *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, paras. 40-47. The Supreme Court also has said that Trinity Western "is a private institution … to which the *Charter* does not apply": *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, para. 25. Trinity Western did not "unlawfully" violate an enactment that has no application to it.

[62] Trinity Western's conduct respecting the Covenant occurred in British Columbia, not Nova Scotia. Nova Scotia's *Human Rights Act* applies to civil rights "in the Province": *Constitution Act, 1867*, s. 92(13). It has no application to events

that occurred entirely outside Nova Scotia. At the appeal hearing, counsel for the Society was asked what would happen to a complaint filed with Nova Scotia's Human Rights Commission alleging that Trinity Western's Covenant unlawfully violated Nova Scotia's *Human Rights Act.* Counsel replied that the complaint would be "thrown out on its ear" as extraterritorial.

[63] Nothing in the *Legal Profession Act* authorizes the Society to issue an independent ruling that someone has violated Nova Scotia's *Human Rights Act*. Nor does the *Human Rights Act*, R.S.N.S. 1989, c. 214, as amended, contemplate the Society's intervention. The *Human Rights Act* says the Human Rights "Commission shall … administer and enforce" the *Act* [s. 24(1)(a)]. A complaint is to be filed with the Human Rights Commission, and may be disposed of by the Commission or referred by the Commission for adjudication by a board of inquiry [ss. 29, 32A]. The *Human Rights Act* prescribes the constitution of and process for appointment of a board of inquiry, and the board of inquiry's procedure [s. 32A]. That procedure includes a public hearing with transcribed sworn evidence, written reasons and an appeal to the Court of Appeal on issues of law [ss. 33-36]. That is the Legislature's intended process leading to a determination whether someone has unlawfully discriminated under the *Human Rights Act*. The Amended Regulation circumvents every step of this process.

[64] It is inconceivable that the Legislature, without expressing a supportive word in either the *Legal Profession Act* or the *Human Rights Act*, intended that the Society's Council could assert for itself an autonomous jurisdiction concurrent with that of a human rights board of inquiry.

[65] Neither does the *Legal Profession Act* contemplate that the Council may enact a regulation that establishes Council as a court of competent jurisdiction under the *Charter* with the authority to rule that someone's conduct in British Columbia unlawfully violated the *Charter*.

[66] The Council's structure and powers under the *Legal Profession Act* do not accommodate such a process. This is apparent from what occurred between April and July, 2014. A ruling of "unlawfulness" is supposed to follow an adjudication that applies facts to law. An adjudicatory tribunal does not determine a dispute by enacting its own legislation in mid-trial. The Resolution of April 25, 2014 said:

> 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.

On July 23, 2014, Council enacted the Amended Regulation to justify its earlier Resolution. July 23, 2014 was the first appearance of the pivotal criterion – "Council … determines that the university … unlawfully discriminates". On April 25, 2014, the twenty members of Council who attended did not adjudicate the "unlawfulness" of Trinity Western's conduct; that criterion did not yet exist in Council's regulations. After April 25, 2014, there was no adjudication of anything, merely the enactment of the Amended Regulation by a vote among the twenty-two members of Council in attendance on July 23. If, at some point, the "unlawfulness" of Trinity Western's conduct under the *Charter* had been squarely addressed, then one would see some consideration of whether the *Charter* even applied to Trinity Western. In the shuffle, that critical factor escaped Council's attention.

[67] The Amended Regulation's key criterion is that Council "determines" that the University "unlawfully discriminates" contrary to the *Charter* or Nova Scotia *Human Rights Act*. In our respectful view, under *Katz*'s test that criterion is completely unrelated to the Council's regulation-making authority under the *Legal Profession Act*.

[68] We would dismiss the Society's appeal from the judge's ruling that the Amended Regulation is *ultra vires* the enabling legislation.

Issue # 3 – Is the Resolution Authorized?

[69] The Resolution is invalid for two reasons.

[70] **First:** The Society urges, and Trinity Western accepts, that the Resolution and Amended Regulation be treated as complementary and indivisible. For instance, the Society's brief of September 2, 2014 to the chambers justice said:

> 5. … the NSBS Council passed a conditional resolution not to approve a degree from the proposed TWU law school, which was premised on the enactment of an amended Regulation.
>
> …
>
> 7. Because the April Resolution could not be given effect without the amended Regulation, it is the language of the amended Regulation that must be considered in determining the jurisdictional issues raised by the Applicants. …
>
> …

> 12. … The inclusion of the amended Regulation is not an "expansion of the proceedings", as suggested by the Applicants. It is indeed the very basis for the proceedings, as it is the instrument by which the April Resolution is given effect.

[71] The Resolution is premised entirely on the Amended Regulation. If the Amended Regulation was valid, then clearly the Resolution would apply the Council's explicit mandate from the Amended Regulation. The Resolution's *vires* would be assessed for reasonableness under *Dunsmuir*, and Trinity Western's *Charter* claim would trigger *Doré*/*Loyola*'s proportionality test. Conversely, given that the Amended Regulation is *ultra vires* the *Legal Profession Act*, the Resolution has no support in the *Legal Profession Act* or the *Act*'s remaining regulations and is unreasonable under *Dunsmuir*.

[72] **Second:** Even if the Amended Regulation were *intra vires*, the Resolution would be unauthorized. The Resolution assumed that Trinity Western had contravened the standard of the Amended Regulation.

[73] The Amended Regulation requires that, before denying a Trinity Western law graduate, the Council must determine that Trinity Western "unlawfully discriminates" under the *Charter* or Nova Scotia's *Human Rights Act*. The *Charter* does not apply to Trinity Western. The Nova Scotia *Human Rights Act* does not apply to Trinity Western's conduct entirely in British Columbia. Trinity Western did not "unlawfully" discriminate under either enactment. The Resolution would not satisfy the Amended Regulation's stated condition.

[74] **Result:** The Resolution is unauthorized and unreasonable under *Dunsmuir*'s standard of review. We dismiss the appeal from the judge's order that quashed the Resolution.

[75] Because the Resolution is invalid, nothing has infringed or engaged Trinity Western's *Charter* freedoms. The first step of the *Doré*/*Loyola* test is not met: *Loyola*, paras. 4 and 39; *Bonitto*, para. 49. So there is no proportionality analysis to be performed under the second step.

Issue # 4 – What Wording Would be Intra Vires?

[76] At the hearing of this appeal, the Society's counsel candidly acknowledged that the Amended Regulation's use of "unlawfully discriminates …" was problematic. Counsel said that, if necessary, the Society could re-word the

Amended Regulation, and invited the court to either read down the Amended Regulation or endorse wording of a prospective replacement regulation.

[77] In several respects, this court can respond to the thorough and able submissions on this appeal. But, at the end of the day, we respectfully decline the invitation to redraft the regulation. Moving from the general to the specific:

(a) The Society's Broad Mandate

[78] The Society stressed its purpose to protect the public interest [s. 4(1)], and to improve the administration of justice in the Province [s. 4(2)(d)].

[79] Section 4(1) is worth repeating:

> 4(1) **The purpose** of the Society is to uphold and protect the public interest **in the practice of law**. [Emphasis added]

The Society's function to "improve the administration of justice in the Province" from s. 4(2)(d), is qualified by "in pursuing its purpose".

[80] The Society does not have stand-alone authority over the public interest and the administration of justice. The Society's statutory authority may differ, in this respect, from that of the Law Society of Upper Canada expressed in s. 4.2 of the *Law Society Act*, R.S.O. 1990, c. L8, as amended. The Nova Scotia Society's mandate must pertain to the public interest in the "practice of law". Its factum acknowledges the point:

> 42 … • uphold and protect the public interest in the practice of law (s. 4(1)). This broadly stated purpose must guide the Society in all of its decision-making. It is the foundational premise against which all its decisions must be measured. …

[81] The *Legal Profession Act*, s. 16(1), defines "practice of law" as "the application of legal principles and judgement with regard to the circumstances or objectives of a person that requires the knowledge and skill of a person trained in the law …"

(b) Qualifications Referring to a University

[82] Justice Campbell's reasons include:

> [173] The NSBS of course has no statutory authority to regulate a law school or university outside Nova Scotia or inside Nova Scotia for that matter. …
>
> [174] The NSBS has no authority whatsoever to dictate directly what a university does or does not do. …
>
> [175] The NSBS cannot do indirectly what it has no authority to do directly. TWU or any other law school can do whatever it wants. It need not worry about a NSBS regulation that requires it to do anything. …

[83] These assertions, if unqualified, may imply that any attempt by the Society to fashion requirements for membership based on features of the law graduate's institution, as opposed to the law degree, would be *ultra vires* the *Legal Profession Act*.

[84] In our view, the conclusion is not that categorical. The Council may frame a properly worded regulation that establishes requirements based on features of the articling applicant's law school.

[85] Section 5(8)(b) of the *Legal Profession Act* enables the Council to make regulations "establishing requirements to be met by members, including educational, good character and other requirements."

[86] Regulation 3.1(b) under the *Legal Profession Act* defines "law degree" as a degree in common law from "a Canadian university approved by the Federation of Law Societies of Canada". Regulation 3.1(b) then continues with the words that are subject to this litigation: "unless Council … determines that the university … unlawfully discriminates … on grounds prohibited by either or both the *Charter of Rights and Freedoms* or the Nova Scotia *Human Rights Act*".

[87] Nobody has questioned the *vires* of Regulation 3.1(b)'s opening statement that the "university" must be "approved" by the Federation of Law Societies. The *Legal Profession Act* neither mentions nor gives any legal status to the Federation's approval of a university. The Society's Council's authority to enact a regulation that adopts the Federation's approval of the university stems from s. 5(8)(b)'s general words: to make regulations concerning the "educational … and other requirements" for membership.

[88] If the Society may enact a regulation that adopts the Federation's approval of the university, then similarly the Society may enact a regulation to bring the approval process, or aspects of it, in house. Such a regulation, if it squares with the *Katz* principles, would be authorized by s. 5(8)(b).

[89] There are sound reasons to feature an approval of the degree-granting institution as a criterion for the law graduate's admission to membership in the Society. For example, some law schools may be taken presumptively to generate satisfactory legal education, and others not. The "approval of the institution" enables the licensing law society to assess the quality of the applicant's legal education without undertaking a separate detailed inquiry into the particulars of each applicant's law school experience. That outcome fully conforms to the Society's mandate of assessing "the public interest in the practice of law" under s. 4(1) of the *Legal Profession Act*. Under such a regulation, the approval of a particular institution would be a discretionary administrative decision for the Society, subject to *Dunsmuir* or, if there are *Charter* implications, *Doré* and *Loyola*.

[90] Ontario's approach is instructive. The *Law Society Act*, R.S.O. 1990, c. L8, as amended, says:

> 27(3) If a person who applies to the Society for a class of license in accordance with the by-laws meets the qualifications and other requirements set out in this Act and the by-laws for the issuance of that class of license, the Society shall issue a license of that class to the applicant.
>
> 62 (0.1) Convocation may make by-laws
>
> …
>
> 4.1 governing the licensing of persons to practice law in Ontario as barristers and solicitors and the licensing of persons to provide legal services in Ontario, including prescribing the qualifications and other requirements for the various classes of license and governing applications for license.

The LSUC's Convocation enacted By-law 4 ("Licensing") that includes:

> 7. In this Part "accredited law school" means a law school in Canada that is accredited by the Society.
>
> …
>
> 9(1) The following are the requirements for the issuance of a Class L1 license:
>
> 1. The applicant must have one of the following:
>
> (i) A bachelor of laws or a juris doctor degree from a law school in Canada that was, at the time the applicant graduated from the law school, an accredited law school;

> (ii) A certificate of qualification issued by the National Committee on Accreditation appointed by the Federation of Law Societies of Canada and the Council of Law Deans.

[91] Ontario's LSUC "accredits" law schools as a requirement for the issuance of a practicing license. The system is established by subordinate legislation – *i.e.* the by-laws of the LSUC's Convocation. The LSUC's statutory authority to enact those requirements is generic, as is Nova Scotia's s. 5(8)(b), and does not mention "accreditation" of institutions.

[92] In *Trinity Western University v. The Law Society of Upper Canada*, 2016 ONCA 518, the Ontario Court of Appeal accepted that the accreditation system was authorized by the *Law Society Act*. Justice MacPherson for the Court said:

> [35] Pursuant to its by-law making powers, the LSUC introduced accreditation of law schools as part of the licensing process. By-law 4 prescribes that one of the requirements for a class L1 license to practise law is a degree from "an accredited law school". An "accredited law school" is defined as a "law school in Canada that is accredited by the Society".

[93] Nova Scotia's *Legal Profession Act* enables the Society's Council to enact a properly worded regulation, relating to qualifications for membership, that incorporates the Society's approval of the *institution* which issued the applicant's law degree. By "properly worded" we mean a regulation that satisfies the *Katz* criteria. To the extent that Justice Campbell's reasons in the decision under appeal indicate otherwise, we respectfully disagree.

(c) Disqualification of a Graduate Based on University's Conduct

[94] Justice Campbell found that the Society's aim was not to regulate Trinity Western's law degree or law graduate, but to incentivize and alter Trinity Western's behaviour in British Columbia [see above, paras. 31-32]. In the judge's appraisal, the Society's focus on the University did not relate to the practice of law in Nova Scotia.

[95] The judge's factual finding is supported by the evidence. The Report of the Society's Executive Committee explained the Option C that the Council adopted with its Resolution:

> TWU has the power to take action to address this discrimination. … Given the work of the Federation Approval Committee, TWU has an acceptable proposal in

> all respects other than the Community Covenant. If TWU were to change the Covenant or exempt law students from the Covenant, the school can be approved in Nova Scotia.
>
> [see above, para. 14]

[96] The Resolution said that "Council does not approve the proposed law school at Trinity Western University unless TWU either (i) exempts law students from signing the Community Covenant; or (ii) amends the Community Covenant for law students in a way that ceases to discriminate." [see above, para. 15]

[97] At the hearing in this Court, the Society's counsel acknowledged that Trinity Western's law graduate would have an identical law degree whether or not Trinity Western amended the Covenant or exempted law students. Yet, the Amended Regulation treats the amendment or exemption as a fault line for the existence of a "law degree".

[98] Before Justice Campbell, and later on the appeal to this Court:

- The Society asserted that its concern was with Trinity Western's discriminatory Covenant, not with Trinity Western law graduates.
- The Society acknowledged that the academic content of the Trinity Western law degree, including legal ethics and professional responsibility, would adequately prepare its graduates to article in Nova Scotia.
- The Society acknowledged that there was no basis to believe that Trinity Western's law graduates would be more likely than anyone else to discriminate against members of the LGBTQ community.
- The Society's stated objective with the Resolution and Amended Regulation, was to ensure that LGBTQ individuals have equal access to enter the legal profession and judiciary in Nova Scotia. The Society says it sought to implement that goal by defining "law degree" to exclude degrees from institutions that discriminate in their admission policies.

[99] The judge's findings and the Society's acknowledgements remind us that Trinity Western's law graduate is not Trinity Western's alter ego. The graduate is a vital stakeholder in his or her own right. The Society's purpose is to protect the public interest in the "practice of law". Section 16(1) of the *Legal Profession Act* defines "practice of law" (above, para. 51). Trinity Western's law graduate would

have the same ability to practice law, as defined, as would a graduate from another law school.

[100] To this, the Society responds that its restriction on Trinity Western's law graduate serves the Society's foundational mandate to serve the "public interest in the practice of law". The Society's factum did not address the *Legal Profession Act*'s definition of "practice of law". Rather, the Society says it is in the broad public interest that the demographics among legal practitioners reflect the diversity of protected human rights criteria, including sexual orientation. The Society's factum elaborates:

> 42. When reviewing the Society's decision, this broad, purposive approach to statutory interpretation must be applied to the *LPA*'s purpose provision (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 (s. 4(1)). This broadly stated purpose must guide the Society in all of its decision-making. It is the foundational premise against which all its decisions must be measured;
>
> • establish standards for the qualifications of those seeking the privilege of membership in the Society (s. 4(2)(a)). This section does not restrict the standards to educational or competence standards, but speaks more generally to the "qualifications" of those seeking membership;
>
> • seek to improve the administration of justice in the Province (s. 4(2)(d)). The *LPA* recognizes this can be done in a variety of ways, and the one example the statute provides specifically mentions consulting with those who reflect the sexual diversity of the Province. A strong signal is sent in the *LPA* itself that diversity and equality are necessary parts of the administration of justice;
>
> • make regulations establishing requirements to be met by members, including educational, good character and other requirements (s. 5(8)(b)). Again in this articulation of its authority, the Society is not restricted to regulations addressing educational requirements alone. Authority is more widely given to make other regulations. Notably, and unlike most self-regulating professions in the Province, those regulations are not subject to approval by the Governor-in-Council. It is the Society itself, through its Council that gives final authority to its regulations. This lack of government oversight of the Society's regulations underscores the independence the Society must have to do what is needed to uphold and protect the public interest in the practice of law and to improve the administration of justice in the Province without these, the public will lack confidence in the self-regulation of the profession;

> • 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 (s. 6(2)). Under this authority the Council of the Society is reminded that all of its actions must be tied back to the Society's purpose. It is the foundation for its jurisdiction.
>
> 43. This collective broad grant of statutory authority, in the context of a regulator that plays a "crucial role" in protecting the public interest provides powerful support for a generous rather than narrow interpretation of the Society's mandate, with a broad range of actions open to it.

[101] Those are the intersecting perspectives. At this juncture, the court must exit the field of hypothesis. In the abstract it is not apparent how Council may alter its approach and wording by redrafting the invalid Amended Regulation of July 23, 2014. It is up to the Council to enact its new regulation. Then there would be actual wording, accompanied by a record with evidence of the regulation's background, and if challenged, focused pleadings and submissions of counsel.

Conclusion

[102] We would dismiss the appeal.

[103] The Society and the respondents agree that substantial costs were incurred in the appeal. The preparation undertaken by the parties and intervenors was evident from the volume of materials before the Court and the high quality of representations made over the three days of hearing. The Society shall pay to the respondents appeal costs of $35,000.00, inclusive of disbursements.

Fichaud, J.A.

Beveridge, J.A.

Farrar, J.A.

Bryson, J.A.

Bourgeois, J.A.