2014 Hfx. No. 427840

Supreme Court of Nova Scotia

Between:

Trinity Western University and Brayden Volkenant

Applicants

and

Nova Scotia Barristers' Society

Respondents

and

Justice Centre for Constitutional Freedoms; Canadian Council of Christian Charities; The Attorney General of Canada; The Evangelical Fellowship of Canada and Christian Higher Education Canada; Association for Reformed Political Action; The Nova Scotia Human Rights Commission; The Christian Legal Foundation; Catholic Civil Rights League and the Faith and Freedom Alliance; and The Nova Scotia Human Rights Commission

Intervenors

BRIEF of the INTERVENOR

CHRISTIAN LEGAL FELLOWSHIP

KIRKBY FOURIE LAW OFFICE

BARRISTERS & SOLICITORS

#1 - 1235 Central Avenue
Prince Albert, Saskatchewan
S6V 4V9

Phone: 1-(306)-764-4673
Facsimile: 1-(306)-922-0434

Mr. Gordon M. Kirkby, B.Sc. (Adv) (Gr. Dist.), LL.B.
Mr. Philip (P.J.) Fourie, B.L.C., LL.B., M.Env.Mgmt. (Dist.)
Ms. Hiltila Krogh, B. Proc. Student-at-Law

kirkbylaw@sasktel.net
philip.kirkbylaw@sasktel.net
hilla.kirkbylaw@sasktel.net

October 28, 2014

The Honourable Justice Kevin Coady
Supreme Court of Nova Scotia
1815 Upper Water Street
Halifax, NS B3J 1S7

By Fax: (902) 424-0524

My Lord:

Re: Trinity Western University et al v. Nova Scotia Barristers' Society
Hfx. No. 427840

Christian Legal Fellowship ("CLF") was granted leave to intervene in the above-noted application for judicial review by your order in the within matter issued on September 5, 2014.

Please accept this letter as the submission of CLF. The Book of Authorities will follow. Where appropriate, CLF has made reference to the Applicant and Respondent's Joint Book of Authorities.

Overview & Facts

1. CLF is an association of lawyers, law students, professors, retired judges and other persons interested in the law, who share a commitment to the Christian faith. Its membership consists of nearly 600 people, representing more than 30 Christian denominations. It exists to encourage Christians in the practice of law, to provide a forum for fellowship, and to assert the relevance of Christianity to the legal community and society at large. CLF also acts to protect and promote the professional interests of its members.

2. While CLF is concerned with its own position as a faith-based organization, CLF will focus on the interests of its members; namely, the individual rights to freedom of religion and conscience, expression and association.

3. The issue at hand is the Nova Scotia Barristers' Society ("NSBS") April 25, 2014 Resolution to not approve the law school at Trinity Western University ("TWU") on the NSBS's belief that TWU's Community Covenant[1] discriminates, despite TWU meeting all necessary academic requirements.

4. Though the NSBS states its resolution is not based on the character or fitness of individual applicants,[2] should the NSBS decision stand, CLF has grave concerns about the nature and quality of *Charter*[3] freedoms accorded lawyers and lawyers-in-training in Nova Scotia.

5. CLF is concerned that allowing the resolution to stand sets a dangerous precedent for cavalier handling of *Charter* rights and freedoms by regulatory and administrative bodies.

6. Taken to its logical conclusion, the NSBS decision to preclude TWU law school graduates from becoming articled clerks in Nova Scotia would preclude *any* individual who exercises his or her right to religious freedom, expression and association from practicing law where that religion, expression or association fails to align with the NSBS view of what is acceptable.

7. Furthermore, this precise issue was raised in *Trinity Western University v. British Columbia College of Teachers*[4], albeit in the context of a teacher's college rather than a law school. The Supreme Court of Canada decided in favour of TWU and *Trinity Western* remains the law.

8. CLF accepts the facts as set out by the Applicants, TWU and Brayden Volkenant.

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[1] Trinity Western University, Community Covenant, **Exhibit "C" to the Affidavit of W. Robert Wood**, sworn August 29, 2014

[2] NSBS Notice of Participation, para 9

[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982)* (UK), 1982, c 11 [*Charter*], **CLF's Book of Authorities Tab 1 [CLF Authorities]**

[4] *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 [*Trinity Western*], **Joint Book of Authorities [JBOA] Tab 26**

Issues & Summary of Position

9. The issues CLF will address are as follows:

   A. ***Charter* freedoms of religion and conscience, expression and association are broadly defined and robustly protected.**[5] Understanding the nature and scope of these fundamental freedoms is essential to the proper exercise of delegated authority by an administrative body when it acts in a way that implicates *Charter* rights. In this case, NSBS failed to accord these freedoms their due scope.

   B. **These freedoms include the right to a diversity of opinion on marriage and sexual morality.** In this case, NSBS failed to recognize that diversity of opinion is protected both by the *Charter* and other legislation.

   C. **As an administrative body, NSBS is bound to act in a *Charter*-compliant manner.** In exercising its statutory grant of discretion, NSBS must act consistently with *Charter* values.[6] It has failed to act in accordingly. CLF takes no position with respect to the standard of review except to submit that even on a deferential standard of reasonableness the NSBS's actions do not withstand judicial scrutiny.

   D. **The Resolution adopted by NSBS violates *Charter* rights and values.** The *Charter* rights to religion and conscience, expression and association at issue are not in conflict with those of equality on the basis of sexual orientation.[7] Even if a true conflict could be found (which CLF denies exists), *Charter* rights must not be placed in hierarchy. Instead, a balancing is required. The point at which rights are balanced is the point at which there is actual harm. There is no evidence of harm. Denying TWU law graduates the ability to practice law, therefore, unjustifiably violates fundamental *Charter* rights and freedoms.

[5] Equality guarantees are also at issue in this matter, but that discrete argument will be left to other intervenors so as to avoid unnecessary duplication.
[6] *Doré v. Barreau du Québec*, 2012 SCC 12 at para 24 [*Doré*], **JBOA Tab 6**
[7] *Trinity Western*, *supra* note 4 at paras 26, 35, **JBOA Tab 26**

E. **The implications of allowing the Resolution to stand are far-reaching and chilling.** As noted in *Trinity Western*, if the NSBS logic holds, what is to prevent denying accreditation to members of a particular church?[8] A different school with a tradition of religious affiliation?[9] One could add, in this case, a lawyer with an undergraduate degree from TWU? A student from a private Muslim secondary school? A lawyer member of a faith-based organization? Tolerance of divergent beliefs is a hallmark of a democratic society[10] and should also be the hallmark of a provincial law society.

Argument

A. *Charter* freedoms of religion and conscience, expression, and association are broadly defined and robustly protected

The decision of the NSBS demands a return to the basics of *Charter* principles. In order to properly exercise its statutory decision-making function within the context of *Charter* rights, those rights must be properly understood. CLF submits that such a proper understanding of the *Charter* values at play demonstrates the NSBS decision unjustifiably violates each one.

Freedom of Religion Defined

Freedom of religion was defined by the Supreme Court of Canada in *R. v. Big M Drug Mart.* Chief Justice Dickson stated:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.

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[8] *Trinity Western, supra* note 4 at para 33, **JBOA Tab 26**
[9] *Trinity Western, supra* note 4 at para 34, **JBOA Tab 26**
[10] *Trinity Western, supra* note 4 at para 36, **JBOA Tab 26**

> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. [...] Freedom in a broad sense embraces both the absence of coercion and constraint and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.
>
> What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of 'the tyranny of the majority'.[11]

Religion is not mere thought, but action. Its definition is replete with verbs: declare, manifest, worship, practice, teach, disseminate.

For a TWU student, he or she may be declaring or manifesting one aspect of her religious beliefs by voluntarily signing a Community Covenant. In the case of practicing lawyers, they may manifest religious beliefs in part by signing a membership agreement or a statement of beliefs at a church, mosque, synagogue.

The concept of religious freedom was expanded upon by the Supreme Court of Canada in *R. v. Edwards Books*:

> 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, human nature, and in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices.[12]

This is an equally expansive definition that includes the right to form an opinion on human nature. Human nature includes the concept of human sexuality, morality in general, and sexual morality specifically. To hold otherwise is illogical: you may hold religious beliefs, but not form a moral framework based on that religious belief.

For individual TWU students or graduates and practicing lawyers the *Charter* guarantee to freedom of religion therefore includes the right to abide by a faith that views marriage as a sacred covenant between one man and one woman.

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[11] *R v Big M Drug Mart*, [1985] 1 SCR 295 at 336-337 [*Big M Drug Mart*], **JBOA Tab 14**

[12] *R. v. Edwards Books and Art Ltd.*, [1986] 2 SCR 713 at para 97 [*Edwards Books*], **CLF Authorities Tab 2**

Indeed, Justice Iacobucci described religion as:

> ...deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.[13]

Adherence to a specific set of behaviours is one practice that allows individuals to foster a connection with the divine. In the case of a TWU student or graduate, it simply happens that some of those practices are codified in a document entitled "Community Covenant". That these practices take place within the context of education does not negate the protection accorded those practices by the *Charter*.

Freedom of Expression Defined

The right to free expression "is central to our democracy".[14] The values underlying freedom of expression include "individual self-fulfilment, finding the truth through the open exchange of ideas, and the political discourse fundamental to democracy".[15]

Its importance was underlined by McLachlin J. (as she then was) in *R. v. Keegstra*:

> The right to fully and openly express one's views on social and political issues is fundamental to our democracy and hence to all the other rights and freedoms guaranteed by the *Charter*. Without free expression, the vigorous debate on policies and values that underlies participatory government is lacking. Without free expression, rights may be trammelled with no recourse in the court of public opinion. Some restrictions on free expression may be necessary and justified and entirely compatible with a free and democratic society. But restrictions which touch the critical core of social and political debate require particularly close consideration because of the dangers inherent in state censorship of such debate.[16]

It is in this context that a law student may choose to attend TWU and voluntarily adhere to the Community Covenant; not as an exercise of religious freedom, but as an exercise of free expression. A student may seek individual self-fulfillment and truth by immersing himself or herself in a Christian environment. By graduation, a student may not be fulfilled by the

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[13] *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at para 39, **JBOA Tab 22**

[14] *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 at para 64 [*Whatcott*], **CLF Authorities Tab 3**

[15] *Whatcott*, para 65, citing *Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 SCR 927 at 976 [*Irwin Toy*], **CLF Authorities Tabs 3, 4**

[16] *R. v. Keegstra*, [1990] 3 SCR 697 at 849, **CLF Authorities Tab 5**

Christianity modeled at TWU and abandon the lifestyle described by the Community Covenant. On the other hand, a student may find truth and fulfillment and continue to maintain practices outlined in the Community Covenant. In either case, the practices and their associated expression are protected activity because, as with freedom of religion and conscience, freedom of expression is broad and inclusive: if the activity conveys or attempts to convey a meaning it has expressive content and *prima facie* falls within the scope of the guarantee.[17]

By its very nature, free expression does not limit "offensive ideas";[18] rather, expression ensures "that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream."[19] It is a fundamental freedom "because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual".[20] This diversity of ideas promotes democracy by encouraging participation and debate by all individuals. Oppressive regimes are characterized by shutting down debate and excluding "offensive ideas" from the public square, whereas healthy democracy refuses to impose penalties for so-called "wrong thinking".

As noted by Rothstein J. in *Saskatchewan (Human Rights Commission) v. Whatcott*, with the exception of hate speech, "freedom of religious speech and the freedom to teach or share religious beliefs are unlimited".[21]

Freedom of Association Defined

Though largely established in the context of labour relations, freedom of association is nonetheless equally relevant to the current case. In a dissent that has become the accepted approach to s.2(d), Dickson C.J.C. defined freedom of association as:

> ...the freedom to combine together for the pursuit of common purposes or the advancement of common causes. [...] Through association individuals are able to

[17] *Irwin Toy, supra* note 15 at 969, **CLF Authorities Tab 4**
[18] *Whatcott*, at para 90, **CLF Authorities Tab 3**
[19] *Irwin Toy, supra* note 15 at 968, **CLF Authorities Tab 4**
[20] *Irwin Toy, supra* note 15 at 968, **CLF Authorities Tab 4**
[21] *Whatcott, supra* note 14 at para 97, **CLF Authorities Tab 3**

> ensure that they have a voice in shaping the circumstances integral to their needs, rights and freedoms.[22]
>
> [...]
>
> In my view, while it is unquestionable that s.2(d), at a minimum, guarantees the liberty of persons to be in association or belong to an organization, it must extend beyond a concern for associational status to give effective protection to the interests to which the constitutional guarantee is directed.[23]

The right to association is not "restricted to associational activities involving independent constitutional rights".[24] If that were the case, "the express conferral of a freedom of association is unnecessary".[25]

So while the Supreme Court had stated freedom of religion "has both individual and collective aspects"[26] and that the right "to congregate with others" or "associate freely"[27] is of primary importance to religious freedom, freedom of association can be a standalone right.

In the present case, the student who chooses to associate herself with TWU, irrespective of whether she shares (or even complies with) the views set out in the Community Covenant, by virtue of that association transforms from an otherwise qualified candidate into an unqualified candidate according to the NSBS.

The concern in the context of association is the same as the concerns outlined under freedom of religion and conscience, and expression. Lawyers and law students frequently associate themselves with groups, religious organizations, community clubs, charities any of which could share the moral and ethical views of TWU. The lawyers and law students who choose to associate with those groups may not even fully agree with or adhere to those moral and ethical views in their daily lives. Yet it would seem, based on the NSBS approach to TWU, that by mere association with those groups, one disqualifies oneself from practicing law.

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[22] *Reference re Public Service Employee Relations Act (Alta),* [1987] 1 SCR 313 at para 22 [*Alberta Reference*], **JBOA Tab 18**

[23] *Alberta Reference, supra* note 22 at para 82, **JBOA Tab 18**

[24] *Alberta Reference, supra* note 22 at para 84, **JBOA Tab 18**

[25] *Alberta Reference, supra* note 22 at para 84, **JBOA Tab 18**

[26] *Edwards Books, supra* note 12 at para 140, **CLF Authorities Tab 2**; *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 31 [*Hutterian Brethren*], **CLF Authorities Tab 6**

[27] *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48 at paras 9, 68, **CLF Authorities Tab 7**

Freedom of association recognizes "the profoundly social nature of human endeavours" and protects "the individual from state-enforced isolation in the pursuit of his or her ends".[28] Association permits individuals to determine and control "the rules, mores and principles which govern the communities in which they live".[29] To put it in terms directly relevant to this case: the TWU Community Covenant is an associational means by which an individual can determine and control the rules, mores and principles governing the educational community in which he or she lives.

Therefore, the individual choice to associate with TWU or a likeminded association should be protected. The fact of association should not disqualify an individual from the practice of law, nor should it impose on an individual an additional burden of having to prove fitness to practice law above and beyond the requirements for a public law school graduate.

This undue focus on the sectarian nature of TWU was described as "disturbing" by the Supreme Court in *Trinity Western*:

> We would add that the continuing focus of the BCCT on the sectarian nature of TWU is disturbing. It should be clear that the focus on the sectarian nature of TWU is the same as the original focus on the alleged discriminatory practices. It is not open to the BCCT to consider the sectarian nature of TWU in determining whether its graduates will provide an appropriate learning environment for public school students as long as there is no evidence that the particularities of TWU pose a real risk to the public educational system.[30]

NSBS acknowledges the academic qualifications of TWU graduates are satisfactory;[31] freedom of association protects those graduates from having their satisfactory qualifications rendered unsatisfactory by virtue of their affiliation with TWU.

B. These freedoms include the right to a diversity of opinion on marriage and sexual morality

There is more than one view on the definition of marriage. Some are founded in religious belief, some in conscience and all are certainly protected as expression as outlined in the preceding

[28] *Alberta Reference, supra* note 23 at para 86, **JBOA Tab 18**
[29] *Alberta Reference, supra* note 23 at para 86, **JBOA Tab 18**
[30] *Trinity Western, supra* note 4 at para 42, **Joint BOA Tab 26**
[31] NSBS Notice of Participation, para 9

section. But the *Charter* is not alone in protecting diversity of opinion in regard to marriage. The *Civil Marriage Act*[32] affirms section 2 *Charter* rights and goes on to state:

> WHEREAS nothing in this ACT affects the guarantee of freedom of conscience and religion and, in particular, the freedom of members of religious groups to hold and declare their religious beliefs and the freedom of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs;
>
> WHEREAS it is not against the public interest to hold and publicly express diverse views on marriage;
>
> [...]
>
> 3.It is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs.
>
> 3.1For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms* or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom.

In its discussion of the constitutionality of a proposed act extending marriage rights to same-sex couples, the Supreme Court of Canada explained that

> ...human rights codes must be interpreted and applied in a manner that respects the broad protection granted to religious freedom under the *Charter*.[33]

And further:

> ...state compulsion on religious officials to perform same-sex marriages contrary to their religious beliefs would violate the guarantee of freedom of religion under s.2(a) of the *Charter*. It also seems apparent that, absent exceptional circumstances which we cannot at present foresee, such a violation could not be justified under s.1 of the *Charter*.[34]

While it affirmed the constitutionality of creating legal civil unions for same-sex couples, the Supreme Court also recognized the fulsome nature of religious freedom. This decision and the

[32] *Civil Marriage Act*, SC 2005, c 33, ss 3, 3.1, **CLF Authorities Tab 8**
[33] *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 55 [*Marriage Reference*], **Joint BOA Tab 19**
[34] *Marriage Reference, supra* note 33 at para 58, **Joint BOA Tab 19**

concomitant *Civil Marriage Act* exemplify a rigorous protection of freedoms by which one may express a different view on marriage whether via religion, expression or association.

It is therefore wrong for the NSBS to suggest that availing oneself of these protections thereby disqualifies one from practicing law in Nova Scotia. While the NSBS maintains the Resolution did not result from the consideration of the fitness or character of any individual applicant, the Resolution in effect considers the fitness of applicants who (for a limited period of time) agreed to conduct themselves in accordance with a view of marriage that is legitimate and protected, and finds the fitness wanting.

C. As an Administrative Body, NSBS is Bound to Act in a *Charter*-Compliant Manner

An administrative decision-maker must exercise its statutory discretion in accordance with the *Charter*.[35] While taking no position with respect to the standard of review, CLF is of the view that neither a high degree of deference nor the application of a reasonableness standard justify the *Charter* violations inherent in the NSBS Resolution. The analysis below therefore follows the prescription outlined by the Supreme Court of Canada in *Doré v. Barreau du Québec*.

Doré obliges the NSBS to act in a manner that best protects the *Charter* value at issue in view of its statutory objectives, taking into account the severity of the *Charter* interference, an analysis akin to the *Oakes* test.[36]

On judicial review of a decision implicating *Charter* rights, "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* protections at play".[37]

Statutory Objectives & *Charter* Values at Issue

In this case the *Charter* values at issue are the rights to religious freedom and conscience, expression, and association of TWU students and, as we argue elsewhere, practicing lawyers whose religion, expression and association align with those of TWU students and graduates.

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[35] *Doré, supra* note 6 at paras 24, 42, **Joint BOA Tab 6**
[36] *Doré, supra* note 6 at paras 41, 55-56, **Joint BOA Tab 6**
[37] *Doré, supra* note 6 at para 57, **Joint BOA Tab 6**

The statutory objective of the NSBS is to "uphold and protect the public interest in the practice of law". This overarching purpose is achieved through a variety of ways, including establishing standards for qualifications of lawyers, establishing standards for professional responsibility and competence, regulating the practice of law and improving the administration of justice.[38]

The NSBS is the gatekeeper of the legal profession in Nova Scotia and pursues its function in the public interest. As overseer of the legal profession in Nova Scotia it would be incongruous for the NSBS to pursue a statutory objective that is at odds with the *Charter*. And on its face, the pursuit of the public interest does not conflict.

However, the NSBS has conflated and limited its statutory objective of protecting the public interest to promoting a singular aspect of equality. This represents a limited and impoverished view of the public interest and the diversity to which NSBS is committed and results in a Resolution that undermines and fails to protect the *Charter* values at issue.

Assuming that it is appropriate to view the public interest and section 15 equality rights as one and the same,[39] the Resolution does not properly balance even this concept of the public interest with the section 2 *Charter* values at issue for the reasons set out below. Thus, the requirement in *Doré* that the outcome fall "within a range of possible, acceptable outcomes" is not met.[40]

D. The Resolution Adopted by NSBS Violates *Charter* Rights and Values

<u>No Conflict of Rights</u>

The Resolution is not a reasonable outcome because it suggests a conflict of rights where none exists.

When there is an apparent collision of rights it must first be determined whether the rights alleged to conflict can be reconciled in a manner that fully respects the importance of both sets of rights.[41] In the present case there is no true conflict of rights. Section 15 equality rights on the

[38] *Legal Profession Act*, SNS 2004, c 2, ss 4(1)-(2), 5(2), 16(2) [*LPA*], **CLF Authorities Tab 9**
[39] *Trinity Western* found it appropriate for the College to consider equality concerns under the public interest component of the *Teaching Profession Act* so it would presumably be reasonable for the NSBS to do the same. The concern is that this was the *only* factor considered by NSBS under the umbrella of the public interest. See paras 26, 28 *Trinity Western, supra* note 4, **Joint BOA Tab 26**
[40] *Doré, supra* note 6 at para 56, **Joint BOA Tab 6**
[41] *Trinity Western, supra* note 4 at para 31, **Joint BOA Tab 26**

basis of sexual orientation are not in conflict with the right to religious freedom and conscience, expression and association.

As explained in *Trinity Western*:

> ...the admissions policy of TWU alone is not in itself sufficient to establish discrimination as it is understood in our s.15 jurisprudence. [...] To state that voluntary adoption of a code of conduct based on a person's own religious beliefs, in a private institution, is sufficient to engage s.15 would be inconsistent with freedom of conscience and religion, which co-exist with the right to equality.[42]
>
> [...]
>
> While homosexuals may be discouraged from attending TWU, a private institution based on particular religious beliefs, they will not be prevented from becoming teachers. In addition, there is nothing in the TWU Community Standards that indicates that graduates of TWU will not treat homosexuals fairly and respectfully. [...] Absent concrete evidence that training teachers [lawyers] at TWU fosters discrimination in the public schools [courts] of B.C. [Nova Scotia], the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected.[43]

The Supreme Court recently addressed a true conflict between equality rights on the one hand and freedom of religion and expression on the other in the *Whatcott* decision. Balancing freedom of expression and equality rights in the context of hate speech allegations, Rothstein J. held that "people are free to debate or speak out against the rights or characteristics of vulnerable groups" until that debate or speech "is objectively seen" to cause harm.[44] To quote Mr. John Laskin in summary of the *Whatcott* decision, "absent evidence of actual harm [...] freedom of religion values must be given effect."[45]

But rather than accord it the expansive scope it requires[46], the NSBS has purported to find unlawful discrimination in the very essence of religious beliefs, expression, and association.

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[42] *Trinity Western, supra* note 4 at para 2, **Joint BOA Tab 26**
[43] *Trinity Western, supra* note 4 at paras 35, 36 [emphasis added], **Joint BOA Tab 26**
[44] *Whatcott, supra* note 14 at para 145, **CLF Authorities Tab 3**
[45] "Appendix C" to the Special Advisory Committee on Trinity Western's Proposed School of Law, Final Report, December 2013, at 6
[46] *Marriage Reference, supra* note 33 at para 50, **Joint BOA Tab 19**

Rather than adopt its Resolution on the basis of evidence of harm, the NSBS has adopted its resolution on purely speculative concerns.[47]

Rights Must Not Be Placed in Hierarchy

The Resolution is not a reasonable outcome because it impermissibly places *Charter* rights in hierarchy.

Where an actual conflict of rights exists the Supreme Court requires a balancing of the interests at stake; a balancing that does *not* create a hierarchy of rights; a balancing that bears in mind the expansive nature of section 2 *Charter* rights.[48]

> A hierarchical approach to rights, which places some over others, must be avoided [...] When the protected rights of two individuals come into conflict ... Charter principles require a balance to be achieved that fully respects the importance of both sets of rights.[49]

The NSBS, by virtue of its Resolution, suggests it found an irreconcilable conflict of rights and to resolve that conflict, placed equality rights squarely above fundamental freedoms of religion, expression and association.

Rights Must be Balanced Considering the Severity of the Interference

The Resolution is not a reasonable outcome because it failed to provide any protection for the *Charter* values at issue in light of the statutory objectives.

It is difficult to overstate the severity of the *Charter* interference in this case. By choosing "Option C", the NSBS has determined that by virtue of its Community Covenant, TWU "exceeds the bounds of protected religious freedom" and "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".[50]

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[47] *Hutterian Brethren, supra* note 26 at paras 81-83, **CLF Authorities Tab 6**. See also *Multani v. Commission scolaire Marguerite-Bourgeoys,* 2006 SCC 6, where the issue was whether a student should be permitted to wear a kirpan to school. In that case at para 67, the Supreme Court stated "...the existence of concerns relating to safety must be unequivocally established for the infringement of a constitutional right to be justified." **CLF Authorities Tab 10**

[48] *Marriage Reference, supra* note 33 at para 50, **Joint BOA Tab 19**

[49] *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835 at para 72, **CLF Authorities Tab 11**

[50] Memo to NSBS Council from Executive Committee at p 17

In essence, this decision is a dictate from a quasi-governmental body on the legitimate content of one's religious beliefs and a severe restriction on the right to expression and association. The Supreme Court addressed this in *Trinity Western*:

> While the BCCT says that it is not denying the right to TWU students and faculty to hold particular religious views, it has inferred without any concrete evidence that such views will limit consideration of social issues by TWU graduates and have a detrimental effect on the learning environment in public schools. There is no denying that the decision of the BCCT places a burden on members of a particular religious group and in effect, is preventing them from expressing freely their religious beliefs and associating to put them into practice. If TWU does not abandon its Community Standards, it renounces certification and full control of a teacher education program permitting access to the public school system. Students are likewise affected because the affirmation of their religious beliefs and attendance at TWU will not lead to certification as public school teachers...[51]

A person wanting to study law at TWU faces a stark choice: exercise your religious beliefs, right to expression and/or association by attending TWU and be denied the ability to practice law in Nova Scotia *or* keep your religious beliefs private, don't exercise expression, and don't associate with TWU, and be permitted to practice law.

The Supreme Court made it clear in its analogous *Trinity Western* decision that

> Students attending TWU are free to adopt personal rules of conduct based on their religious beliefs provided they do not interfere with the rights of others. Their freedom of religion is not accommodated if the consequence of its exercise is the denial of the right of full participation in society. [52]

Is an outright denial of fundamental freedoms and the right of full participation in society the only means by which the protecting the public interest can be attained? Surely not. An outright denial of rights does not in any way balance rights and cannot meet the standard required by *Doré*.

In the *Trinity Western* decision sound balance was achieved by according full weight to freedom of religion because there was no conflict of rights. Emphasizing the importance of equality and considering the disadvantage suffered by the LGBQT community, religious freedom was nonetheless granted full scope – even before many legal advances of the LGBQT community had

[51] *Trinity Western, supra* note 4 at para 32 [emphasis added], **Joint BOA Tab 26**
[52] *Trinity Western, supra* note 4 at para 35, **Joint BOA Tab 26**

been achieved. Equality rights are now further protected by virtue of the fact that the right to same-sex marriage is enshrined in the *Civil Marriage Act*. No beliefs, expression or association by TWU students or others will alter or diminish this fact. There is now *more* protection for same-sex couples than when *Trinity Western* was decided, their legal protection secure and their position *less* vulnerable.

Indeed, the NSBS already has the ability to ensure equality rights are protected. It prescribes that all members must conduct themselves in a manner that does not discriminate, pursuant to its *Code of Professional Conduct*.[53] Should any graduate, from TWU or otherwise, engage in discriminatory conduct in the practice of law, the NSBS has recourse to address that discrimination. By availing itself of this disciplinary measure the NSBS can ensure equality rights are respected.

The NSBS also has recourse to the *Human Rights Act* which precludes articling students and lawyers alike from discriminating on the ground of sexual orientation.[54]

But that is not the issue here. The NSBS does not seek to exclude those who discriminate from the practice of law in Nova Scotia. Rather, the NSBS seeks to exclude those who hold a contrary view on marriage.

The NSBS has chosen to *carte blanche* pre-determine that by virtue of attending TWU, those law students are disqualified from practicing law despite meeting all academic requirements. The Resolution utterly fails to balance *Charter* rights and fails to follow clear guidance from the Supreme Court. It does not fall within a range of reasonable alternatives. The NSBS Resolution renders illusory the protection of religion, conscience and expression and has repercussions beyond TWU law students.

E. The Implications of Allowing the Resolution to Stand are Far-Reaching and Chilling

Law students at TWU exercise a variety of fundamental freedoms by voluntarily agreeing to be bound by a Community Covenant. Because of (a) their religious and conscientious beliefs, (b)

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[53] Nova Scotia Barristers' Society *Code of Professional Conduct*, s.6.3-5 (see s.8.1 of the Regulations made pursuant to the *LPA, supra* note 38), **CLF Authorities Tab 12**
[54] *Human Rights Act*, RSNS 1989, c 214, ss 4, 5(1)(n)-(nb), **CLF Authorities Tab 13**

their chosen means of expression, and (c) their exercise of associational rights, the NSBS sees fit to prevent those students from practicing law in Nova Scotia.

The implications of allowing the Resolution to stand are foreshadowed in *Trinity Western*:

> Indeed, if TWU's Community Standards could be sufficient in themselves to justify denying accreditation, it is difficult to see how the same logic would not result in the denial of accreditation to members of a particular church.[55]

Nor would this logic be limited to members of a particular church but could readily extent to other schools. As the Supreme Court also noted in *Trinity Western*:

> Many Canadian universities, including St. Francis Xavier University, Queen's University, McGill University and Concordia University College of Alberta, have traditions of religious affiliations.[56]

That the NSBS has adopted the Resolution as it did begs a series of questions: What about the law student at a public institution who joins a faith-based student club? What about the law student at a public institution who joins a church, mosque, temple or other religious community? What about the law student who joins a faith-based community organization? What about the law student who attended TWU as an undergraduate? What about the law student who attended a faith-based secondary school? A faith-based primary school?

What of the student who completes two years of law school at TWU then transfers to a different law to school to complete his or her program? Do those two years of TWU education disqualify that graduate from practice in Nova Scotia?

Where does this leave lawyers with beliefs similar to those on which TWU is founded who currently practice in Nova Scotia? Judges?

And what of those lawyers who practice, without complaint from the public, having graduated from a foreign institution with a similar code of conduct, statement of faith or community covenant to that of TWU? Or the TWU graduate who is called to the bar in Manitoba, practices for two, five or ten years then moves to Nova Scotia? Is he or she eligible to practice?

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[55] *Trinity Western, supra* note 4 at para 33, **Joint BOA Tab 26**
[56] *Trinity Western, supra* note 4 at para 34, **Joint BOA Tab 26**

How does this align with the National Mobility Agreement,[57] the purpose of which is to facilitate temporary and permanent mobility of lawyers between Canadian jurisdictions? Under this Agreement, a host jurisdiction (i.e., Nova Scotia) allows lawyers entitled to practice law in their home jurisdiction to also practice temporarily in Nova Scotia. What if the lawyer temporarily practicing in Nova Scotia has been educated at TWU?

Will each of these lawyers now be subject to additional inquiries from NSBS to ensure that any past or current associations, religious beliefs or expression align with the NSBS definition of the public interest?

The *Vision and Values* statement of the NSBS states that in regard to Respect, "we treat all persons with dignity regardless of their circumstances. We listen, consider and seek to understand other points of view." In regard to 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."[58]

However, in its decision, the NSBS has effectively stated that "Christians[59] need not apply". It promotes diversity but not to the point of permitting conflicting views. This is not diversity, but intolerance masquerading itself as diversity. True diversity demands grace and tolerance to live respectfully with conflict and disagreement. The false diversity promoted by the NSBS demands uniformity, to the point of institutionalizing discrimination against potential and current members who might disagree.

This version of diversity is hypocritical and antithetical to the Canadian concept of a free society. To quote *Big M Drug Mart*: "a truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct."[60] A truly free society is one which can accommodate opposing views. A truly free society can accept that lawyers have religious beliefs. A truly free society can permit an individual search for the truth. A truly free society can allow lawyers to associate with like-minded persons. A truly free society cannot allow the actions of the NSBS to stand.

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[57] Federation of Law Societies of Canada, *National Mobility Agreement*, 7 December 2002, **CLF Authorities Tab 14**

[58] Nova Scotia Barristers' Society *Vision and Values*, **CLF Authorities Tab 15**

[59] Or Muslims, or Jews.

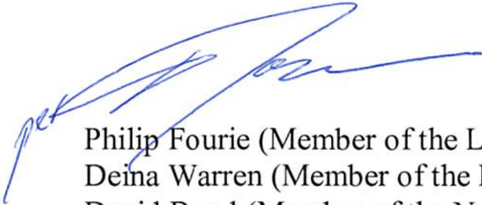
[60] *Big M Drug Mart, supra* note 11 at 336, **Joint BOA Tab 14**

Costs

CLF does not seek costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of October, 2014.

Sincerely,



Philip Fourie (Member of the Law Society of Saskatchewan)
Deina Warren (Member of the Law Society of Upper Canada)
David Bond (Member of the Nova Scotia Barristers' Society)
Co-Counsel for the Intervenors, Christian Legal Fellowship

cc by email:
Brian Casey, Q.C. (Applicants) BCasey@boyneclarke.ca
John Carpay (Justice Centre for Constitutional Freedoms) jcarpay@jccf.ca
André Marschall Schutten (Association for Reformed Political Action) andre@arpacanada.ca
A Polizogopoulos (Evangelical Fellowship of Canada and Christian Higher Education) albertos@vdg.ca
Jessica Harris (Attorney General of Canada) Jessica.Harris@justice.gc.ca
Philip H. Horgan (Catholic Civil Rights Leagues and Faith and Freedom Alliance) phorgan@carltonlaw.ca
David St. C. Bond (Christian Legal Fellowship) dbond@davidbondlaw.com
Barry W. Bussey (Canadian Counsel of Christian Charities) barry.bussey@cccc.org
Marjorie Hickey, Q.C. (Respondent, Nova Scotia Barristers' Society) marjorie.hickey@mcinnescooper.com
Peter Rogers, Q.C. (Respondent, Nova Scotia Barristers' Society) peter.rogers@mcinnescooper.com
Jane O'Neill (Respondent, Nova Scotia Barristers' Society) jane.oneill@mcinnescooper.com