2014 Hfx. No. 427840

Supreme Court of Nova Scotia

Between:

Trinity Western University and Brayden Volkenant

Applicants

and

Nova Scotia Barristers' Society

Respondent

and

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

Intervenors

BRIEF of the INTERVENOR THE ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA

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October 28, 2014

BY FACSIMILE: 1 (902) 424-0524

The Honourable Justice Jamie S. Campbell
Supreme Court of Nova Scotia
The Law Courts
1815 Upper Water Street
Halifax, Nova Scotia B3J 1S7

My Lord:

RE: TRINITY WESTERN UNIVERSITY et al., v. NOVA SCOTIA BARRISTERS' SOCIETY
Hfx. No. 427840

Please find attached a copy of the written submissions of the intervenor, The Association for Reformed Political Action (ARPA) Canada in the above noted matter. A hard copy with a book of authorities will follow by courier.

This brief and book of authorities has been served electronically on counsel for the applicants, respondent and interveners. A hard copy has been sent to the applicants and respondent.

Yours very truly,

André Marshall Schutten

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Outline and Facts

1. On September 5, 2014, the Honourable Justice Kevin Coady granted The Association for Reformed Political Action ("ARPA Canada") leave to intervene in this matter, allowing 20 pages of written submissions and 20 minutes of oral argument. ARPA Canada sought leave to intervene in this application for judicial review of the decision made April 25, 2014 by the Nova Scotia's Barristers' Society ("the NSBS") deciding, *inter alia*:

> *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.*

2. The NSBS rendered this decision pursuant to s. 4 of the *Legal Profession Act* and part 3 of the *Regulations*. Although the NSBS admitted and acknowledged that the Trinity Western University ("TWU") Law School program meets the national academic requirements as previously agreed to by the NSBS, they nevertheless decided TWU Law School graduates would not be licensed to practice law in Nova Scotia unless TWU either amended its Community Covenant or exempted law students from signing it.

3. TWU has requested the decision of the NSBS be quashed and an order in the nature of mandamus requiring the NSBS to accredit graduates of TWU law school on the same basis as graduates of other Canadian common law schools.

4. ARPA Canada agrees with the facts as set out in the Applicant's Brief, paragraphs 3 – 23, filed with this Court on October 20, 2014.

5. ARPA Canada has a strong interest in these proceedings. This Honourable Court's decision in this application may significantly impact, for better or worse, the fundamental freedoms of all Canadians and, in particular, the fundamental freedoms of ARPA Canada's constituency. These proceedings have the potential to impact the individual and community of Reformed Christians who desire to engage in the public sphere, engage in the practice of law and potentially in any professional career that is licensed by the civil government or a government appointed regulatory

body. I may also impact ARPA Canada's constituents who seek legal help from professionals who share their beliefs and sincerely held religious convictions.

6. ARPA Canada is a not-for-profit and non-partisan organization devoted to educating, equipping, and assisting members of Canada's Reformed churches and the broader Christian community as they seek to participate in the public square. Reformed Christians are a distinct subset of the broader Evangelical Christian community. ARPA Canada's constituency is made up of approximately 100,000 Canadians.

7. As "faith without deeds is dead" (The Holy Bible, James 2:26) so ARPA Canada believes that the Christian faith must be applied in a Christian's life in both word and deed as they interact in Canadian society. Believing Biblical principles about social and political issues must translate into living these principles out, even in a secular culture that may disagree with these principles.

8. Reformed Christian individuals and communities believe in the infallibility of the Bible and its relevance in our daily individual lives and our shared life in community; consequently, we also uphold beliefs about liberty, parental responsibility, family life, sexuality, abortion, and economics, among others, that are often distinct from secular humanist beliefs that are predominant in the public square.

9. There is a real and wide-spread concern among Reformed church communities generally that legal developments are making it increasingly difficult to openly apply our faith in our public life and, if a decision such as that made by the NSBS is upheld, even to apply our faith within our corporate and professional lives. The proceedings before this Honourable Court is one example of the types of recent developments generating grave concern among Reformed Christian communities.

10. The effect of this Court's ruling in these proceedings will have an impact beyond the interests of the immediate parties to the proceedings. Members of Reformed Christian church communities across Canada have a direct interest in the legal, public policy and constitutional issues that have been raised in these proceedings and, in particular, (though certainly not limited to) the proper interpretation of their constitutionally assured equality rights as enshrined in section 15(1) of the *Charter*. These submissions will focus on the legal questions surrounding equality rights only.

11. ARPA Canada is acutely aware that section 2(a) (freedom of religion), section 2(b) (freedom of expression) and section 2(d) (freedom of association) *Charter* rights are also raised in this application. While we feel those freedoms are fundamental and need to be vigorously protected, we are confident that they will be adequately addressed by other intervenors.

Issues

A. Section 15(1), *Canadian Charter of Rights and Freedoms*

a. Does the decision of the NSBS constitute "government action" and "law" within the meaning of section 15(1) of the *Charter*?

b. If so, do the actions of the NSBS violate the section 15(1) equality rights of Evangelical and Reformed Christian individuals?

c. Does the entire group need to be targeted in order for stereotyping or discrimination to occur and the test for section 15(1) discrimination to be met?

d. Does section 15 specifically, and do "*Charter* values" generally, create an obligation or justification for the State to violate the equality rights or other constitutional freedoms of an individual who is a member of a group listed in the enumerated grounds of section 15(1)?

B. Section 1, *Canadian Charter of Rights and Freedoms*

a. If the decision of the NSBS is found to violate section 15(1), are the discriminatory actions of NSBS justified under section 1?

b. What is the proper approach the State should adopt in balancing competing rights?

C. Human Rights Law, Nova Scotia *Human Rights Act*

a. Are the actions of the NSBS discriminatory under the Nova Scotia *Human Rights Act*?

b. Would the actions of Trinity Western University be considered discriminatory under the Nova Scotia *Human Rights Act*?

Argument and Analysis

12. When religious rights are implicated in a legal struggle between citizens and their civil government, the natural inclination is to look to the express protection of religious freedom section 2(a) of the *Charter*,[1] where our Constitution protects from State interference the "fundamental" "freedom of conscience and religion".[2] And certainly, that's where most of the Canadian jurisprudence on religious freedom has been established over the past three decades. Legal scholar Dr. Iain Benson makes this observation:

> There are various rights within Section 15 that mirror rights found elsewhere. Thus, the right to be free from discrimination on the basis of religion is an equality dimension of religious rights in addition to the freedom of conscience and religion in Section 2(a). Over the years it has been startling to see how, for example, one aspect of an equality right, such as "sexual orientation," is hived off and played against a Section 2(a) right without any realization that there is also a corresponding equality right touching on religion within Section 15 itself."[3]

Courts must also look beyond section 2(a) to other sections of the *Charter*, including section 15(1), which protects the equality rights of, *inter alia*, religious individuals.

A – Section 15 Equality Analysis

13. Section 15(1) of the *Charter* reads:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[4]

14. This section applies to individual members of a Reformed Christian community and protects their right to be treated equally before the law and under the law, and protects each of these Christian's individual's right to the equal protection of the law and the equal benefit of the law, all without discrimination on the basis of "creed" or religion.

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[1] *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*"] **ARPA Canada Book of Authorities ["ARPA BoA"], TAB 17.**

[2] *Charter*, *supra* note 1 at s. 2(a), **ARPA BoA, TAB 17**.

[3] Iain T. Benson, "The Freedom of Conscience and Religion in Canada: Challenges and Opportunities" (2007) 21 Emory Int'l L. Rev. 111 at 148, **ARPA BoA TAB 19.**

[4] *Charter*, *supra* note 1 at s. 15(1), [emphasis added], **ARPA BoA, TAB 17.**

15. In order to demonstrate a violation of a section 15(1) *Charter* right, a claimant must prove, on a balance of probabilities, four things. The first two items are preliminary, the second two the actual section 15(1) test:

    (1) That the infringer of the rights is a State actor;[5] and

    (2) That the infringing action constitutes "law" within the meaning of section 15(1);[6]

    If the claimant can demonstrate that the *Charter* should be applied, then the claimant must pass the two-stage section 15(1) analysis (again, on a balance of probabilities):

    (3) First: Does the law create a distinction based on an enumerated or analogous ground?

    (4) Second: Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[7]

    ARPA Canada will deal with each question individually, applying the facts of this case to the case law. We will then deal with two common objections.

i – The NSBS is subject to the Charter

16. The NSBS is a regulatory body established by the Province of Nova Scotia and is thus subject to the *Charter*.

17. The seminal section 15(1) equality rights case is *Andrews v. Law Society of British Columbia* (1989).[8] Though the Supreme Court never actually dealt with the question of whether the Law Society was subject to the *Charter* (it was the legislation itself that was challenged, and not an administrative decision in that case), the Law Society was accepted as the responding party in the challenge, and the Court never suggested that it ought not to be. In the same year, the Supreme Court found that two rules of the Law Society of Alberta violated section 6 of the *Charter*.[9]

18. The Supreme Court stated in *Eldridge* that "it is a basic principle of constitutional theory that since legislatures may not enact laws that infringe the *Charter*, they cannot authorize or empower another person or entity to do so."[10] The NSBS was created by statute to regulate the practice of law in Nova Scotia. In fact, it has a monopoly on that function – no lawyer can practice in the

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[5] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 265, ["*McKinney*"], **ARPA BoA, TAB 8.**
[6] Peter W. Hogg, *Constitutional Law of Canada: 2012 Student Edition* (Toronto: Thomson Reuters Canada Ltd., 2012), pp.55-10 – 55-11 ["Hogg"], **ARPA BoA TAB 21**.
[7] *R. v. Kapp*, [2008] 2 S.C.R. 483 at para. 17 ["*Kapp*"], **ARPA BoA TAB 12**.
[8] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, ["*Andrews*"], **ARPA BoA TAB 2**.
[9] See *Black v. Law Society of Alberta* [1989] 1 SCR 591, conclusion of the court at p. 634, 635, **ARPA BoA TAB 2B**.
[10] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 35, **ARPA BoA TAB 6**.

province without NSBS approval. If the Nova Scotia legislature cannot ignore *Charter* rights when deciding who can become a lawyer in the province, neither can the NSBS.

19. The Supreme Court also clarified that where a decision maker is "part of the governmental administrative machinery for effecting the specific purpose of the statute", then "the close nexus between the statute and the legislative scheme and governmental administration is immediately obvious."[11]

20. The *Charter* therefore applies to the NSBS, and its decisions may be evaluated by this court in light of the *Charter*.

ii – The decision of the NSBS constitutes "law" under Section 15(1)

21. A different, but related, question as to whether the NSBS is bound by the *Charter* is whether the decision of the NSBS constitutes "law" within the meaning of "law" in section 15. Professor Hogg suggests that "law" in section 15 "applies to the same range of governmental action as other Charter rights" and submits that "law" covers the "range of governmental action… defined in section 32" of the *Charter*.[12]

22. In *McKinney*, Justice LaForest explained that the term "law" includes more than just the obvious statutes and regulations of the legislatures. For the purposes of section 15, "exercise by government of a statutory power or discretion would, if exercised in a discriminatory manner prohibited by s. 15, constitute an infringement of that provision." He goes on to state that, if a university were found to be part of the "fabric of government", then their retirement age policies would also be included as "law" within the meaning of this section.[13] In this light, the policies and decisions of the NSBS constitute "law" within the meaning of section 15(1).

iii – The NSBS decision creates a distinction based on a Section 15(1) enumerated ground

23. Having demonstrated that section 15(1) applies to the NSBS and to its regulations, there is a two-part test for analyzing whether the NSBS violated section 15(1) of the *Charter* when it refused to approve the TWU law school. "(1) Does the law create a distinction based on an enumerated or

[11] *McKinney*, *supra* note 5 at 265, **ARPA BoA, TAB 8**.
[12] Hogg, *supra* note 6 at 55-11, **ARPA BoA, TAB 21**.
[13] *McKinney*, *supra* note 5 at 276, **ARPA BoA, TAB 8**. Incidentally, in this case universities were not found to be subject to the *Charter*, and so their retirement policies are not considered "law" within the meaning of section 15(1).

analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?"[14]

24. First: "Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis."[15] The NSBS, in its decision, makes a distinction on the basis of religion, an enumerated ground. In particular, the decision of the NSBS makes a distinction between graduates of a law school that would otherwise be acceptable and qualified under the NSBS agreement with the Canadian Federation of Law Societies, simply on the basis of a community covenant that is grounded on common religious beliefs. The community covenant is what the NSBS has decided distinguishes TWU graduates from graduates of all other law schools in Canada.

iv – The distinction creates a disadvantage by perpetuating prejudice and by false stereotyping

25. Second, having demonstrated that the law creates a distinction, it is necessary to demonstrate that the distinction creates a disadvantage. "The analysis at the second step is an inquiry into whether the law works substantive inequality by [1] perpetrating disadvantage or prejudice, or [2] by stereotyping in a way that does not correspond to actual characteristics or circumstances."[16] The case law requires only a demonstration of one of the two patterns of discrimination be made.

26. The first means of substantive inequality:

> The first way that substantive inequality, or discrimination, may be established is by showing that the impugned law, in purpose or effect, perpetuates prejudice and disadvantage to members of a group on the basis of personal characteristics within s. 15(1).[17]

27. Already in the lead-up to the first *Trinity Western* case, a professional government body (the British Columbia College of Teachers) held TWU graduates to a different standard, seemingly not trusting them to teach children without "secular" oversight of a significant component of their education even though instruction complied with all professional and academic standards.[18] In the public attention that has been paid to the idea of a Christian law school, it has been made clear that many believe that students/graduates of TWU Law School are, *ipso facto,* less qualified, or (more

[14] *Kapp*, *supra* note 7 at para. 17, **ARPA BoA TAB 12,** repeated verbatim in *Withler v. Canada (A.G.)*, [2011] 1 S.C.R. 396, ["*Withler*"] at para. 30, **ARPA BoA TAB 16**.
[15] *Withler, supra* note 14 at para. 63, **ARPA BoA TAB 16**.
[16] *Withler*, *supra* note 14 at para. 65, **ARPA BoA TAB 16**.
[17] *Withler*, *supra* note 14 at para. 35, **ARPA BoA TAB 16.**
[18] *Trinity Western University v. B.C.C.T.,* [2001] 1 S.C.R. 772, ["*Trinity Western*"] **ARPA BoA TAB 15.**

accurately) *not* qualified to practice law because of a tenet of their religious beliefs and practices. The decision of the NSBS perpetuates this prejudice.

28. The second means of substantive inequality:

> The second way that substantive inequality may be established is by showing that the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group. Typically, such stereotyping results in perpetuation of prejudice and disadvantage. However, it is conceivable that a group that has not historically experienced disadvantage may find itself the subject of conduct that, if permitted to continue, would create a discriminatory impact on members of the group.[19]

29. The decision of the NSBS stereotypes all TWU Law School students and graduates, and by extention all Evangelicals including members of the Reformed Christian community, as being predisposed to discriminate generally, and more particularly in the practice of law, and inclined to be intolerant of others. This stereotype is baseless.[20] Importantly, the Supreme Court of Canada guides us to not only ask whether there is different treatment based on characteristics, "but also whether those characteristics are relevant considerations under the circumstances."[21] The personal view on marriage and sexuality of TWU graduates are *not* relevant to their ability to practice law. The moral standards by which a person governs their own life is immaterial to the NSBS. Licensed members of the NSBS are required to adhere to the professional code of conduct of the NSBS as the measure by which their practice capacity and performance will be assessed. If the characteristics of their religious beliefs are not relevant, then it is unjustified discrimination and the claimant passes the section 15(1) test.

30. The important thing to demonstrate at this stage is **impact or effect:**

> We must be careful not to treat *Kapp* and *Withler* as establishing an additional requirement on s. 15 claimants to prove that a distinction will perpetuate prejudicial or stereotypical attitudes towards them. Such an approach improperly focuses attention on whether a discriminatory *attitude* exists, not a discriminatory impact, contrary to *Andrews*, *Kapp* and *Withler.*"[22]

31. In *Andrews*, the Supreme Court applied this standard to measure the effect of the prohibition in B.C. on non-citizens from practicing law there. Justice McIntyre, for the majority decision on

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[19] *Withler*, *supra* note 14 at para. 36, **ARPA BoA TAB 16**.

[20] The discussion of stereotyping by Justice LeBel is helpful for understanding this point. *Quebec (Attorney General) v. A.*, [2013] 1 S.C.R. 61, at para. 201-203, ["*Quebec v. A.*"], **ARPA BoA TAB 10**.

[21] *Withler*, *supra* note 14 at para. 39, **ARPA BoA TAB 16**.

[22] *Quebec v. A., supra* note 20 at para. 327, **ARPA BoA TAB 10**. See para. 325 – 334 for a fuller discussion on this point.

section 15(1), concluded that "[t]he distinction therefore imposes a burden in the form of some delay on permanent residents who have acquired all or some of their legal training abroad and is, therefore, discriminatory."[23] McIntyre J. also noted that what made the discrimination especially problematic was that the lawyers were otherwise qualified. He wrote,

> [a] rule which bars an entire class of people from certain forms of employment, solely on the grounds of a lack of citizenship status and <u>without consideration of educational and professional qualifications or the other attributes or merits of individuals in the group</u>, would, in my view, infringe s. 15 equality rights.[24]

The unacceptable discriminatory effect for non-citizens in *Andrews* was "some delay" before being called to the bar for otherwise qualified lawyers.

32. The practical effect in the case at bar is not yet fully known, though at a minimum it will include "some delay". The discriminatory effect is that a qualified lawyer, having completed an academically and professionally approved program of law vetted and approved by the Federation of Law Societies and the British Columbia Ministry of Advanced Education and admitted to be academically and professionally sound by the NSBS[25] is banned from practicing law in the province on the sole basis of his or her view on marriage and sexuality. As the Supreme Court of Canada has already stated in an analogous case, "There is no denying that the decision of the BCCT places a burden on members of a particular religious group".[26]

33. In *Andrews*, the Supreme Court defined discrimination as

> a distinction… based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. *Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination*.[27]

34. As set out above, the decision of the NSBS squarely fits this definition:

    (1) The group: TWU graduates;

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[23] *Andrews*, *supra* note 8 at p. 183, **ARPA BoA TAB 2**.
[24] *Andrews*, *supra* note 8 at p. 183, [emphasis added], **ARPA BoA TAB 2**.
[25] See paragraph 1 of this brief, where the NSBS council stated, *"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"*
[26] *Trinity Western*, *supra* note 18 at para. 32, **ARPA BoA TAB 15**.
[27] *Andrews*, *supra* note 8 at p. 174, **ARPA BoA TAB 2**.

(2) The personal characteristics: "the voluntary adoption of a code of conduct based on a person's own religious beliefs";[28]

(3) The disadvantage or limited access: banned from practicing law in Nova Scotia for publicly adopting a religiously informed code of conduct;

(4) Available to others: the adoption of a personal moral code is done by all people – no person is morally neutral – but the decision of the NSBS does not distinguish between those moral actors;

(5) Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group: The NSBS hopefully is not intending to ban Evangelical Christian lawyers from practicing who do not attend TWU, but who hold to the same code of behaviour as that voluntarily agreed to by TWU students. The NSBS decision specifically disadvantages those Christians (and other graduates of TWU law school) who choose to associate with people who identify with the Christian faith by signing a personal commitment to a perfectly legal standard of moral living.

35. The *Charter* applies to the NSBS and that the decision of the NSBS constitutes "law" within the meaning of section 15(1). The decision creates a distinction based on the enumerated ground of religion, and the distinction creates a discriminatory disadvantage for TWU graduates/students (Evangelical Christian law students) on the basis of religion. Having completed the section 15(1) analysis, two potential objections will be considered before turning to the section 1 analysis.

v – The discrimination does not need to be universally applied to a group

36. Some object to the conclusion that the NSBS has violated the equality rights of Evangelical Christians since not <u>*all*</u> Evangelical Christians are effectively barred from practicing law in the province. Indeed, it is possible that many Evangelical Christians will attend secular law schools and could then apply and be accepted to practice law in Nova Scotia. Does this fact undermine the conclusion that the NSBS has violated section 15(1)?

37. The Supreme Court has addressed this objection directly. In *Quebec v. A.,* Justice Abella wrote that "this Court has held that heterogeneity within a claimant group does not defeat a claim of discrimination… [and this Court] squarely rejected the idea that for a claim of discrimination to

[28] *Trinity Western, supra* note 18 at para. 25, **ARPA BoA TAB 15.**

succeed, all members of a group had to receive uniform treatment from the impugned law."[29] She cites Dickson C.J. in *Janzen* where he states

> If a finding of discrimination required that every individual in the affected group be treated identically, legislative protection against discrimination would be of little or no value. It is rare that a discriminatory action is so bluntly expressed as to treat all members of the relevant group identically.[30]

38. Although *Janzen* was decided in the context of human rights legislation, Justice Gonthier applied the principle expressed there to the *Charter* context years later. He wrote, "this Court has long recognized that differential treatment can occur… despite the fact that not all persons belonging to the relevant group are equally mistreated."[31] In other words, says Justice Abella, "even if only some members of an enumerated …group suffer discrimination by virtue of their membership in that group, the distinction and adverse impact can still constitute discrimination."[32]

39. It is clear then that even though the NSBS has not at this time discriminated directly against Evangelical Christian law students who attend secular law schools (or other Christian law school in the United States or around the world), nevertheless the discrimination in violation of section 15(1) has been made out in regards to TWU graduates, that is, graduates from an Evangelical Christian law school which is a qualified school of law. Furthermore, the effect of this overt discrimination against those holding Biblical view of marriage and sexuality will no doubt have consequential negative effects for other lawyers in the province, including other Evangelical and Reformed Christian lawyers, whether they attended TWU or not, by the message sent by the NSBS to the profession and the public about the place and value of religious individuals, particularly Evangelical Christian lawyers, in the legal profession.

vi – Section 15 and "Charter values" do not create a justification for the State to violate the equality rights or other constitutional freedoms of an individual

40. A second objection to a section 15(1) claim might be, "What about *Charter* values? Shouldn't the idea of *Charter* values permeate the decisions of State actors, and doesn't TWU's Community Covenant offend *Charter* values such that the NSBS has an obligation to send a message that offensive violations of *Charter* values are not tolerated in the legal profession?"

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[29] *Québec v. A., supra* note 20 at para. 354, **ARPA BoA TAB 10**.
[30] *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, at 1288-89, ["*Janzen*"], **ARPA BoA TAB 7**.
[31] *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504 at para. 76, ["*Nova Scotia WCB*"], **ARPA BoA TAB 9**.
[32] *Quebec v. A., supra* note 20 at para. 355, **ARPA BoA TAB 10**.

41. First, the State cannot take the shield of the *Charter* and turn it into a sword. The *Charter* does not create grounds for the State to impose the *Charter* onto private citizens and private institutions. *Charter* values cannot be applied to private associations and individuals. Trinity Western is not a public university. It is private. "To open up all private and public action to judicial review could strangle the operation of society and… diminish the area of freedom within which individuals can act."[33] We cannot apply the *Charter* to a private institution through a back door of "*Charter* values" language. The Supreme Court in *Andrews* confirms this when it states that section 15(1) does not "impose on individuals and groups an obligation to accord equal treatment to others. It is concerned with the application of the law."[34]

42. The Supreme Court also spoke directly to this issue in the first *Trinity Western* case, where it wrote: "To state that the 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".[35]

43. Furthermore, those who advocate a "*Charter* values" approach should be reminded that freedom of conscience and religion, freedom of expression, freedom of association and equal benefit of the law *vis-à-vis* the State are all *Charter* values, and that these values are to be applied to the activity of State actors.

44. Additionally, "[t]here is no need to look for an attitude of prejudice motivating, or created by, the exclusion… Nor need we consider whether the exclusions promote the view that the individual is less capable or worthy of recognition as a human being or citizen… What is relevant is not the *attitudinal* progress towards them, but… their discriminatory *treatment*."[36]

45. The attitude of the NSBS towards TWU graduates is irrelevant. What is important is the discriminatory effect on the individuals graduating from TWU's law school.

[33] *McKinney*, *supra* note 5 at p. 262, **ARPA BoA TAB 8**.
[34] *Andrews*, *supra* note 8 at 163-64, **ARPA BoA TAB 2**.
[35] *Trinity Western*, *supra* note 18 at para. 25, **ARPA BoA TAB 15**.
[36] *Quebec v. A., supra* note 20 at para. 357 [emphasis in original], **ARPA BoA TAB 10**.

B – Section 1 Reasonable Limits Analysis

46. Having demonstrated, on a balance of probabilities, that the NSBS has violated the section 15(1) rights of Evangelical Christians, the onus now shifts to the State to demonstrate that the violation is justified in a free and democratic society, as required by section 1 of the *Charter*.[37]

47. First, a brief note about the *Doré* case and the proper standard of review. The Applicant submits in their brief (in paragraphs 219 – 220) that *Doré* requires a full *Oakes* analysis in this case.[38] ARPA Canada accepts the assessment by the Applicant and will not repeat what has already been written on this point.

i – The objective of the NSBS decision is not pressing and substantial

48. The objective of the NSBS's decision to limit access to the practice of law in the province is presumably to prevent discrimination and promote diversity.[39] There is no pressing or substantial need to promote diversity or to remedy perceived discrimination within a private, expressly religious organization. As noted by the Supreme Court of Canada, this goal would itself be inimical to the protection of Charter rights.[40] . Furthermore, there is no evidence that excluding TWU graduates, or Evangelical and Reformed Christians, from the practice of law in Nova Scotia accomplishes such a goal.

49. Indeed, McLachlin J.A. (as she then was) has stated that "s. 1 would apply to permit discrimination in extraordinary circumstances, such as the internment of enemy aliens in wartime which would create discrimination not to be tolerated in peacetime."[41] Surely, banning qualified lawyers who graduated from a qualified law school purely on the basis of religion does not rise to the level of concern as the internment of enemy aliens in wartime. It is a high standard for the State to justify discriminatory action against its citizens.

50. Even if the NSBS is particularly concerned about minority rights, it is necessary to heed the warning of Justice Wilson in *Andrews* where she wrote that "the range of discrete and insular minorities has changed and will continue to change with changing political and social

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[37] *Charter*, *supra* note 1 at s. 1, **ARPA BoA TAB 17**, *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 137, **ARPA BoA TAB 14**.
[38] *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, at para. 3-5, 36, 42-43, **ARPA BoA TAB 5**.
[39] See, for example, paragraphs 9 – 17 of the Affidavit of Darrel Pink, executive director of the Nova Scotia Barristers' Society, sworn 23 September 2014 and filed by the Respondent with this Court on 26 September 2014 [hereinafter "Pink affidavit"].
[40] *Trinity Western, supra* note 18 at para. 25, **ARPA BoA TAB 15.**
[41] As quoted by McIntyre J., in *Andrews*, *supra* note 8 at p. 163, **ARPA BoA TAB 2**.

circumstances."[42] Today, Evangelical Christians are a minority.[43] The NSBS is required under the *Charter* to treat all individuals of all groups equally, whether they are recognized as part of a minority group or not.

51. Although the NSBS' decision fails the first element of the *Oakes* analysis, and this Court is therefore not required to proceed with the *Oakes* analysis, we will proceed with the remainder of the section 1 analysis.

52. The decision of the NSBS categorically fails all three parts of the proportionality test: there is no rational connection, the means are not minimally impairing, and the decision is grossly disproportionate.

ii – There is no rational connection between the objective and the means adopted by the NSBS

53. At the rational connection stage, the government must show "that it is reasonable to suppose that the limit may further the goal, not that it will do so."[44]

54. If the objective of the NSBS is to reduce discrimination and to promote diversity,[45] it chose a curious way to do so. There is no rational connection between discriminating against a class of individuals in order to stop discrimination. There is no rational connection between insisting on a monolithic approach to teaching law in order to promote diversity. The very approach adopted by the NSBS to advance its objective undermines "diversity" and perpetuates "discrimination".

55. Schools of a particular religious identity form part of, and have a place in, our multicultural, religiously diverse society.[46] In *Big M Drug Mart,* the Supreme Court of Canada recognized that "[a] truly free society is one that can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs, and codes of conduct."[47] This was affirmed in *Trinity Western*, where the Court noted that "[t]he diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected."[48]

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[42] *Andrews*, *supra* note 8 at p. 152, **ARPA BoA TAB 2**.
[43] For more on this point, see the factum of the intervenor EFC/CHEC.
[44] *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 at para. 37, 53 ["*Hutterian Brethren*"] **ARPA BoA TAB 1**.
[45] Pink affidavit, *supra* note 35.
[46] The diversity of Canada is also a *Charter* value, protected under section 27: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." **ARPA BoA TAB 17**.
[47] *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, at p. 336, ["*Big M*"], **ARPA BoA TAB 11**.
[48] *Trinity Western, supra* note 18 at para. 33, **ARPA BoA TAB 15**.

56. Continuing to recognize the legitimacy and religious integrity of schools from a particular faith, *and their graduates*, as alternatives to State-run schools, is entirely appropriate – indeed necessary – within our pluralistic society. There is no question that these schools have a right to exist. Their existence is undermined if students/graduates of these schools are then not permitted to practice in their professions simply because they have been taught from a particular religious perspective. As the Supreme Court also noted in *Trinity Western*, "[i]t cannot be reasonably concluded that private institutions are protected but that their graduates are *de facto* considered unworthy of fully participating in public activities."[49]

57. The issue, when it comes to religious individuals is whether the public square should be stripped of religion (if that were possible) or merely be indifferent to religion. To suggest that a lawyer cannot be educated at a Christian university and practice in Nova Scotia is to strip the public square in Nova Scotia of a particular religion. A better approach to fostering diversity is proposed by political philosopher William Galston:

> A liberal polity guided… by a commitment to moral and political pluralism will be parsimonious in specifying binding public principles and cautious about employing such principles to intervene in the internal affairs of civil associations. It will, rather, pursue a policy of *maximum feasible accommodation*, limited only by the core requirements of individual security and civic unity [emphasis in original]. [50]

58. There is no rational connection between the objective of promoting "diversity" and reducing discrimination on one hand, and the means employed in this case: excluding graduates from a Christian university from the practice of law is the exact opposite of "diversity" and the epitome of "discrimination." The means employed in this case are simply "not rationally connected" to the stated objective.

iii – The means by which the NSBS chose to advance their objective do not minimally impair the section 15(1) rights of Evangelical Christians

59. The means by which the NSBS chose to advance their objective radically impairs the rights of TWU law school graduates and all Evangelical Christians wanting to practice law in Nova Scotia. There is room at this stage for "a range of reasonable alternatives".[51] However, the approach taken by the NSBS is outside the reasonable range of options.

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[49] *Trinity Western*, *supra* note 18 at para. 35, **ARPA BoA TAB 15**.
[50] William A. Galston, *The Practice of Liberal Pluralism* (New York: Cambridge University Press, 2005) at 20, **ARPA BoA TAB 20**.
[51] *Hutterian Brethren, supra* note 44 at para. 37, see also para. 53, **ARPA BoA TAB 1**.

60. Both in the affidavit of Darrel Pink and in the case of *Andrews*, significantly less impairing options are available to achieve the same objectives. In *Andrews*, Justice Wilson rejected the argument that lawyers must first be familiar with Canadian institutions and laws (thus excluding non-citizens from becoming lawyers) stating that, rather than an outright rejection of non-citizens from the practice of law, familiarity with Canadian institutions and laws "could be better achieved by an examination of the particular qualifications of the application, whether he is a Canadian citizen, a British subject, or something else [i.e. an Evangelical Christian]"[52]. Similarly, in the affidavit of Mr. Pink, minimally impairing measures of advancing this same objective are described including "cultural competence training and education", "raising awareness of the unique issues affecting all equity seeking groups [with a list that has a conspicuous absence of Christian groups]", regulations, legal ethics handbooks, Council policies and a "statement of values", and "continuing professional development".[53]

61. The State's role in admitting individuals to the practice of law is to ensure that a certain quality or competency is attained and maintained, in order to ensure that the practice of law remains above reproach. This is typically done at the outset through the academic accreditation of a law school, the articling program, the ethics modules and the Bar admissions course or exams. This is continued throughout the career of lawyers through mandatory continuing legal education programs and adherence to codified standards of practice. The religious beliefs of the individual lawyers applying to practice should not factor in to this determination. If and when they do, the effect is not minimally impairing.

62. The NSBS is interested in the ends (legal scholarship, ethics, competency, etc.), not the means to that end. NSBS does not have the constitutional authority to preclude or prevent a particular religious means to this end. Indeed, a competent law student should have the "the right to declare [his or her] religious beliefs openly and *without fear of hindrance or reprisal*…"[54] Barring such a graduate from the practice of law smacks of "hindrance or reprisal" for holding a particular religious conviction and identity. It is not minimally impairing in that it prevents that particular type of graduate from voicing his or her belief and/or prevents him or her from associating with like-minded individuals for the purpose of studying law.

[52] *Andrews*, *supra* note 8 at p. 156, **ARPA BoA TAB 2**.
[53] Pink Affidavit, supra note 35, at para. 18 – 25, 30 – 31.
[54] *Big M, supra* note 47 at p. 336 [emphasis added], **ARPA BoA TAB 11**.

iv – The effect of the NSBS decision on Evangelical Christian individuals is grossly disproportionate to the objective of the NSBS

63. The infringement on the equality rights of TWU graduates must be proportionate to the benefit received from the objective pursued by the State. The infringement is totally disproportionate to the benefit because the benefit is not being realized at all: the benefit is purportedly to reduce discrimination and promote diversity. The infringement on TWU graduates is to discriminate and enforce conformity. Because there is a total disconnect, no rational connection between the means and the end, there can be no proportionality.

64. The effect on TWU law graduates being barred from the practice of law also means being barred from meaningful employment in that province. Meaningful employment includes putting to practice the qualifications one earns through education. Whether there is a temporary or permanent block to putting their legal education to work, the effect on TWU law graduates disproportionately impairs their rights to seek employment and economic gain in their chosen field in the province of Nova Scotia.

65. Furthermore, the effect goes beyond just TWU graduates. The NSBS decision has already affected all Evangelical Christians; it was a shot across the bow. The decision sent the message, not only that it is *unfashionable* to hold a Biblical view of marriage and sexuality, but that it is also *totally intolerable* for a legal professional to hold such views. Evangelical and Reformed Christians have been marginalized, stereotyped and maligned by this decision.

v – The State is obligated to properly balance competing rights

66. The Applicants have dealt thoroughly with the question of balancing of rights, as has the intervenor EFC/CHEC. ARPA Canada concurs with those arguments and limits its submission here to the discussion on delineating rights with regards to the section 15(1) rights.

67. The proper first step is to delineate the allegedly competing rights to see if, in fact, there are rights in conflict. The delineation of rights for the TWU students should include an equality right on the basis of the enumerated ground of religion; this Court should resist the temptation to "hive off" section 15 as a "sexual orientation" right and put it up against the "religion right" in section 2(a). Rather, it is the section 2(a), 2(b), 2(d) and section 15(1) rights of TWU graduates that must be compared in the aggregate against some other interest.

68. In this case, there is no conflict because there is no other equality interest at stake. The NSBS does not have sexual orientation equality rights and even if it did, TWU does not discriminate against the NSBS, or anyone for that matter, on the basis of sexual orientation. Only where the State itself is infringing on two competing rights simultaneously can there actually be a requirement for balancing of rights interests. A true example of this would be the conflict between the right to a fair trial (section 7 an 11(d)) and religious freedom (section 2(a)) as found in *R. v. N.S.*[55] This is not the case here. By admitting TWU graduates to the practice of law in Nova Scotia, the NSBS would not somehow be discriminating against any individual or group. On the other hand, by not admitting TWU graduates to the practice of law on the sole basis of their moral and religious view of marriage and sexuality, the NSBS discriminates against TWU graduates. There are no competing rights here. In one scenario, no *Charter* rights are violated. In the second scenario, multiple *Charter* rights of TWU graduates are violated.

69. There is no evidence that admission of TWU graduates to the practice of law in Nova Scotia violates the *Charter* rights of anyone. Similarly, there is no evidence that TWU graduates would discriminate against anyone on the basis of sexual orientation. Indeed, the Supreme Court has stated that absent evidence, no such conclusion should be drawn on the basis of TWU and its graduates' view on marriage and sexuality.[56]

C – Human Rights Legislation

70. Finally, the NSBS' decision violates Nova Scotia's *Human Rights Act.*[57]

i – The actions of the NSBS are discriminatory under the Nova Scotia Human Rights Act

71. Section 21 of the *Human Rights Act* ("the *Act*") binds "Her Majesty in right of the Province and every servant and agent of Her Majesty"[58] and thus applies to the actions of the NSBS as an agent of Her Majesty.

72. Section 5(1) of the *Act* prohibits discrimination "against an individual or class of individuals on account of… religion"[59] in respect of, *inter alia*, "membership in a professional association"[60].

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[55] *R. v. N.S.*, [2012] 3 S.C.R. 726, especially para. 30-33, **ARPA BoA TAB 13**.
[56] *Trinity Western, supra* note 18 at para. 32, 35-36, **ARPA BoA TAB 15**.
[57] *Human Rights Act*, R.S., c.214 ["*Human Rights Act*"], **ARPA BoA TAB 18**.
[58] *Human Rights Act*, *supra* note 50 at s. 21, **ARPA BoA TAB 18**.
[59] *Human Rights Act*, *supra* note 50 at s. 5(1)(k), **ARPA BoA TAB 18**.
[60] *Human Rights Act*, *supra* note 50 at s. 5(1)(g), **ARPA BoA TAB 18**.

The only exception available to the NSBS is found in section 6(f)(ii) which allows for an exception "where a denial, refusal or other form of alleged discrimination is… a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society". However, as discussed above, the discrimination cannot be justified according to the section 1 *Charter* analysis and so this exception is not available to the NSBS. Thus, the NSBS' decision violates the *Act* by unjustly discriminating against religious law students on the basis of their religious beliefs, convictions and associations.

ii – The actions of Trinity Western are not discriminatory under the Nova Scotia Human Rights Act

73. The *Act* has no application on TWU. However, in principle, the *Act* would permit TWU's Community Covenant. The *Act* allows for certain exemptions for religious communities to come together for a common purpose along associational lines. The *Act* bans employment discrimination in section 5(1)[61], but allows an exemption in section 6.[62] What some consider "discrimination" is not discrimination in law, but rather "association. While there is a difference between employment and enrolment, nevertheless, the principles underlying the exemption for the one can inform the other. The *Act* contemplates and protects religious communities made up of religious individuals.

74. The Supreme Court of Canada explained the purpose of these types of exceptions:

> …the courts should not … consider it merely as a limiting section deserving of a narrow construction. ***This section***, while indeed imposing a limitation on rights in cases where it applies, ***also confers and protects rights***. I agree with Seaton J.A. …:
>
> > This is the only section in the Act that specifically preserves the right to associate… In a negative sense [this section] is a limitation on the rights referred to in other parts of the Code. But in another sense ***it is a protection of the right to associate***.[63]

75. The Supreme Court later reinforced this purposive approach in a case examining the same clause from another jurisdiction. The clause was designed to allow

> certain non-profit institutions to create distinctions, exclusions or preferences which would otherwise violate the *Charter* if those distinctions, exclusions or preferences are justified by the … religious … nature of the institution in question. …[It] was ***designed to promote the fundamental right of individuals to freely associate in groups for the purpose of expressing particular views or engaging in particular pursuits***.[64]

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[61] *Human Rights Act*, *supra* note 50 at s. 5(1), **ARPA BoA TAB 18**.
[62] *Human Rights Act, supra* note 50 at s. 6(c)(ii) & (iii) , 6(d), **ARPA BoA TAB 18**.
[63] *Caldwell v. Saint Thomas Aquinas High School*, [1984] 2 S.C.R. 603 at 626 [emphasis added], **ARPA BoA TAB 4**.
[64] *Brossard v. Québec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279 at p. 324 [emphasis added], **ARPA BoA TAB 3**.

76. Though TWU is not subject to Nova Scotia's *Human Rights Act* (for the reasons set out by the Applicants), even if it was subject, it must be interpreted and applied in a manner that is consistent with the *Charter*. The *Act* cannot and should not be used to undermine *Charter* rights recognized by the Supreme Court of Canada in *Trinity Western*.

Conclusion

77. TWU is a community of 4,000 individuals who see value in associating with each other, studying together and governing themselves according to Christian morals. There is no harm in that. To refuse to recognize a qualified law school simply because its students voluntarily hold themselves to a Christian moral code is to discriminate against those very students on the basis of religion and/or conscience.

78. As the Supreme Court suggested in *Trinity Western* (2001), "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."[65] ARPA Canada agrees. Therefore, in order for justice to be done for all religious individuals in Canada, and to protect their place in our public square, ARPA submits that the NSBS' decision ought to be set aside.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

this ____ day of October 2014.

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[65] *Trinity Western*, *supra* note 18 at para. 33, **ARPA BoA TAB 15**.