SUPREME COURT OF NOVA SCOTIA

Citation: Trinity Western University v. Nova Scotia Barristers' Society, 2015 NSSC 25

Date: 20150128
Docket: Hfx.No. 427840
Registry: Halifax

Between:

Trinity Western University and Brayden Volkenant

Applicants

v.

Nova Scotia Barristers' Society

Respondent

-and-

Justice Centre for Constitutional Freedoms
The Association for Reformed Political Action
The Evangelical Fellowship of Canada and Christian Higher Education Canada
The Attorney General of 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

Intervenors

Judge: The Honourable Justice Jamie S. Campbell

Heard: December 16th, 17th, 18th and 19th, 2014, in Halifax, Nova Scotia

Counsel: Brian Casey for the Applicant
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John Carpay for the Justice Centre for Constitutional Freedoms

André Marshall Schutten for the Asssociation for Reformed Political Action
A. Polizogopoulos for The Evangelical Fellowship of Canada and Christian Higher Education Canada
Jessica Harris for The Attorney General of Canada
Philip H. Horgan for The Catholic Civil Rights League and Faith and Freedom Alliance
David St. C. Bond for the The Christian Legal Fellowship
Barry W. Bussey for theThe Canadian Council of Christian Churches
Lisa Teryl for The Nova Scotia Human Rights Commission

By the Court:

[1] What one person sees as having the strength of moral convictions is just sanctimonious intolerance to another. As with a lot of things, it depends on perspective. Orthodoxies, secular or religious, can provide the comfort of certainty.

[2] The Nova Scotia Barristers' Society (the "NSBS") has said that it will recognize law degrees to be granted by the proposed law school at Trinity Western University ("TWU") only if the institution changes its policy on student conduct. That policy now prohibits sexual intimacy for students outside traditionally defined marriage. The NSBS sees it as a matter of equality. TWU sees it as a matter of religious freedom.

1. Summary

[3] This decision isn't about whether LGBT equality rights are more or less important that the religious freedoms of Evangelical Christians. It's not a value judgment in that sense at all. It is first about whether the NSBS had the authority to do what it did. It is also about whether, even if it had that authority, the NSBS reasonably considered the implications of its actions on the religious freedoms of TWU and its students in a way that was consistent with Canadian legal values of inclusiveness, pluralism and the respect for the rule of law. In that sense, it is a

value judgment. I have concluded that the NSBS did not have the authority to do what it did. I have also concluded that even if it did have that authority it did not exercise it in a way that reasonably considered the concerns for religious freedom and liberty of conscience.

[4] The NSBS can only legally do what it has been given the power to do by legislation. It acts under the authority of the *Legal Profession Act* [1] to regulate the practice of law in Nova Scotia. That act does not give the NSBS the power to require universities or law schools to change their policies. Its jurisdiction does not reach that far.

[5] The NSBS does have jurisdiction to deal with the educational and other qualifications of people who apply to practise law in Nova Scotia. If TWU graduates were not prepared by virtue of their education to practise law in Nova Scotia, or were inclined by virtue of their training at that institution to be intolerant, refusing them admission would not be regulating the law school. It would be regulating the competence of Nova Scotia lawyers.

[1] SNS 2004, c. 28

[6] The Federation of Canadian Law Societies decided to recognize TWU law degrees as suitable to prepare graduates for legal practice. It was agreed here that graduates from TWU's proposed law school would indeed be properly qualified. It was also agreed that they would be no more likely to discriminate than graduates of other law schools. So there is nothing wrong with TWU law degrees or TWU law graduates.

[7] There is, according to the NSBS, something wrong with TWU. That something is its mandatory Community Covenant which the NSBS says discriminates against LGBT students. Unless that Community Covenant is changed a TWU law degree is deemed not to be a law degree for purposes of the NSBS. An otherwise qualified person would be deemed not qualified. The reason would not relate in any way to the law degree, to that person's ability or to his or her suitability to practise law. It would not be because of anything other than the university policy to which the NSBS objects. That is no different than deeming a law degree not to be a law degree unless the university amended any number of other policies that are not reflected in the quality of the graduate. Those could include tuition policies, harassment policies, affirmative action admission quota policies or tenure policies.

[8] The legal authority of the NSBS cannot extended to a university because it is offended by those policies or considers those policies to contravene Nova Scotia law that in no way applies to it. The extent to which NSBS members or members of the community are outraged or suffer minority stress because of the law school's policies does not amount to a grant of jurisdiction over the university.

[9] The second issue is considered only if it is assumed that the NSBS had the authority to regulate in the manner that it did. The issue involves whether the NSBS reasonably considered the constitutional freedoms of TWU and its graduates. The issue is not whether it is right or fair or morally justified or even theologically sound to deny the right of equality to same-sex spouses in the context of life at a private religious university. The issue is about the action taken by the NSBS. The NSBS as a state actor has to comply with the *Charter*. TWU and its students are protected by the *Charter*.

[10] The NSBS has characterized TWU's Community Covenant as "unlawful discrimination". It is not unlawful. It may be offensive to many but it is not unlawful. TWU is not the government. Like churches and other private institutions it does not have to comply with the equality provisions of the *Charter*. It has not been found to be in breach of any human rights legislation that applies to it. Counsel for the NSBS described TWU's proposed law school as a "rogue" law

school. It would be so only in the sense that its policies are not consistent with the preferred moral values of the NSBS Council and doubtless many if not a majority of Canadians. The *Charter* is not a blueprint for moral conformity. Its purpose is to protect the citizen from the power of the state, not to enforce compliance by citizens or private institutions with the moral judgments of the state.

[11] People have the right to attend a private religious university that imposes a religiously based code of conduct. That is the case even if the effect of that code is to exclude others or offend others who will not or cannot comply with the code of conduct. Learning in an environment with people who promise to comply with the code is a religious practice and an expression of religious faith. There is nothing illegal or even rogue about that. That is a messy and uncomfortable fact of life in a pluralistic society. Requiring a person to give up that right in order to get his or her professional education recognized is an infringement of religious freedom. Private religious schools are not limited to training members of the clergy, theologians, missionaries or those who want professional degrees but do not want to practise. Those institutions already do produce nurses and teachers and grant any number of academic degrees that are widely accepted.

[12] Rights and freedoms are not absolute. Sometimes there has to be room for compromise. That involves deciding whether both the religious freedom and an

important legislative goal can co-exist. The NSBS argued that its decision was an effort to uphold the equality rights of LGBT people. It was not an exercise of anyone's equality rights. It was the decision of an entity acting on behalf of the state purporting to give force and voice to those rights. The NSBS is not the institutional embodiment of equality rights for LGBT people. To justify an infringement of religious liberty the NSBS action has to be directed at achieving something of significance. Refusing a TWU law degree will not address discrimination against anyone in Nova Scotia.

[13] The NSBS through its counsel has said that it hoped that its decision, along with decisions of other law societies, would prompt TWU to change its policy on same sex marriage. It is hardly a pressing objective for a representative of the state to use the power of the state to compel a legally functioning private institution in another province to change a legal policy in effect there because it reflects a legally held moral stance that offends the NSBS, its members or the public.

[14] The NSBS has argued that it would be wrong for it to countenance or condone what counsel described as the "homophobic" policies of TWU. Many people in Nova Scotia are offended by the TWU policy. For some, particularly LGBT people, living in the knowledge that an institution with policies such as TWU's would have its degree recognized in Nova Scotia, adds to the considerable

stress they already experience in their lives. There is an element of stress that is inherent in living in a multicultural society where beliefs and practices that offend majority values are not only on display, but are actively tolerated. Society does not seek to eradicate the practices or re-educate the believers but recognizes their rites and their organizations for state purposes such a solemnization of marriage, tax exemptions and charitable status.

[15] There is a difference between recognizing the degree and expressing approval of the moral, religious, or other positions of the institution. The refusal to accept the legitimacy of institutions because of a concern about the perception of the state endorsing their religiously informed moral positions would have a chilling effect on the liberty of conscience and freedom of religion. Only those institutions whose practices were not offensive to the state-approved moral consensus would be entitled to those considerations.

[16] The NSBS regulation and policy are in effect a statement of principle to stand in solidarity with LGBT people. The force or value of that statement has to be considered against the infringement of religious liberty that was the means by which it was made. The statement would not prevent TWU graduates from practising in Nova Scotia. A TWU graduate could article somewhere else and then apply to be admitted to practise in Nova Scotia. Individual TWU graduates could

make a special application to the Executive Director and perhaps be admitted, without knowing for sure what criteria would be applied. Those criteria could be academic, but there is no concern with academic qualifications. The criteria could be personal, but once again there is no concern that TWU would produce lawyers who discriminate. Yet it was argued that it should be assumed that the as yet undefined process would be reasonable. The statement is in the form of an obstacle, the special application, that is put before a TWU graduate that is not put before others. That statement has no connection to the equality rights of the LGBT community or the public interest in the practice of law in Nova Scotia. That's less a statement about equality than a statement about the futility of just making statements .

[17] The NSBS refuses a TWU law degree and puts that obstacle before the individual graduate even though he or she may not agree with the university's policies and may even be member of the LGBT community. Yet, quite properly, it does not prevent lawyers from practising law who may agree with the religious tenets that underlie TWU's policy or who belong to religions or private organizations that espouse those moral positions and impose similar restrictions on their members. Any rational distinction in principle between those lawyers and a TWU graduate would have to be very finely drawn.

[18] The value of the statement of principle made by refusing to recognize TWU law degrees is not proportional to the direct and substantial impact on freedom of religion. The NSBS acted unreasonably by failing to properly or adequately consider *Charter* rights in making the decision to refuse TWU law degrees and in passing the regulation that put that resolution into effect.

2. Introduction

[19] Canada is a "secular society"[2]. The state remains neutral on matters of religion. It does not favour one religion over another. And it does not favour either religion or the absence of it. While the society may be largely secular, in the sense that religion has lost its hold on social mores and individual conduct for many people, the state is not secular in the sense that it promotes the process of secularization. It remains neutral. It has not purged religiously informed moral

[2] That statement is potentially inflammatory. It is also a gross over simplification. Charles Taylor in *Dilemmas and Connections; Selected Essays* (The Belknap Press of Harvard University Press, Cambridge Mass. 2011), notes at page 306, that the history of the term "secular" in the West is both "complex and ambiguous". Elsewhere he has argued that there are three broad ways in which to view secularization. The first is that the modern Western state is free from the connection with a divine power as its basis, or guarantee. The second is that economic, political, cultural and professional norms generally do not refer to any religious beliefs. The third is that there has been a move away from a society where religious belief was unchallenged to one where it is but one choice among many and "frequently not the easiest to embrace." Taylor, Charles, *A Secular Age* (The Balknap Press of Harvard University Press, Cambridge Mass., 2007).

consciences from the public sphere nor does it accord them more weight than others. The society is secular, but the state does not have a secularizing mission.

[20] The issue of how a state that is neutral as to religion, a secular society and the religious groups within that society respond to their sometimes different value systems is not one that will be easily resolved. It is seen in how society deals with legal issues such as the wearing of a niqab by a witness in court[3], the wearing of a ceremonial dagger in school[4], the refusal to have a picture taken for purposes of a driver's licence[5] and the demand to be able to build a temporary religious structure on a condominium balcony for purposes of ceremonial holiday observance.[6]

[21] The pressure points are evident from the recent debate in Quebec about Bill 60 which proposed a *Quebec Charter of Values* intended to affirm the values of state secularism and religious neutrality as well as to confirm the equality of men and women and provide a framework for accommodation requests. That Charter would, among other things, have limited the wearing of conspicuous religious

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[3] *R. v. N.S.*, 2012 SCC 72

[4] *Multani v. Commission scolaire Marguerite- Bourgeoys,* 2006 SCC 6

[5] *Alberta v.Hutterian Brethren of Wilson Colony,* 2009 SCC 37

[6] *Syndicat Northcrest v. Amselem* 2004 SCC 47

symbols by public officials. While praised by some it was also criticized as an example of intolerance in the name of tolerance. [7]

[22] Who tolerates whom? Many of us no longer even speak of tolerance as it relates to the LGBT community. There has been a decisive shift in Canadian values. Mainstream values no longer stigmatize LGBT people. Those who do are now the dissident and dissonant voices.

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[7]Tolerance itself is an ambiguous concept with a paradox inherent in it. Samuel Taylor Coleridge called it a "species of pretentiousness" or "a poor trick that hypocrisy plays with the cards of nonsense". Condorcet wondered if only "the insolence of a dominating religion" could call tolerance, a "permission granted by men to other men," what should be seen as a respect for mutual freedom. (Comte- Sponville, Andre, *A Small Treatise on the Great Virtues,* (Henry Holt and Company: New York 1996*)* page 170*)* Others have noted that toleration connotes inequality and signifies the limits of what "foreign, erroneous, objectionable, or dangerous element can be allowed to cohabit with the host without destroying the host". (Brown, Wendy, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton, NJ: Princeton University Press, 2006) at 27, see also, Minow, Martha "Putting Up and Putting Down: Tolerance Reconsidered" (1990) 28 Osgoode Hall L.J. 409) Others would see tolerance and accommodation as outdated concepts that stand in the way of "deep equality" and a "cohesive society". (Beaman, Lori (ed.) *Reasonable Accommodation: Managing Diversity* (Vancouver: UBC Press 2012). The paradox as noted by Karl Popper is that when taken to an extreme tolerance ends up negating itself. If unlimited tolerance is extended to those who are intolerant and society does not defend itself against them, the tolerant will be destroyed and the tolerance with them. Popper, Karl *The Open Society and Its Enemies,(* Routledge & Kegan Paul, 1966), vol.1, p.265. Tolerance, even with its ambiguity and inherent paradox, is nothing if not resilient as a concept.

[23] On same sex marriage there is still a moral divide. For many Canadians, both religious and non-religious, it helps to define us as a progressive and open society. For many of us there is no "debate" left to be had about the morality of homosexuality. The idea of calling the expression of a person's sexual identity a "sin" is cringe-worthy or anachronistic at best. But not everyone agrees. They are not moral outliers with aberrant views requiring education at best, or coercion at worst, by more thoughtful and progressive government agencies.

[24] Tolerance then has to involve an element of respect if it is to go beyond passive aggressiveness or perhaps beyond moral relativism or hypocrisy. The respect is not for the sometimes apparently closed minded opinions and outdated beliefs of others. The respect is for the basic human dignity of those who hold those views and their rights as Canadian citizens to act according to them, within limits.

3. Evidence

[25] There are two kinds of evidence to be considered in this matter. The first involves adjudicative facts. Those are the facts that relate directly to the subject matter of the case. They are either agreed upon or proved through the usual adversarial process. That involves the application of the rules of evidence and testing by way of cross-examination. In this case there is no real dispute on the adjudicative facts.

[26] Litigation under the *Charter* has resulted in the more robust development of another kind of evidence. Legislative facts or social science evidence is important in providing a context within which to consider issues that relate to public policy. Courts do not consider those kinds of things in a vacuum. It is important to have access to information but the process can become bogged down by dealing with it in the more formal traditional way. Because of that parties are able to file materials and provide reports from experts that set out some of that information. The court has to consider how much weight to be given to it.

[27] Trial judges or application judges dealing with *Charter* matters are charged with the job of establishing the facts upon which eventual and in some cases inevitable appeals will be based. That is a notoriously tedious and time-consuming

process.[8] While adjudicative facts are limited by materiality and relevance, the boundaries of context for legislative and social science facts can be expansively broad. In this case, they range for example, from the interpretation of the Old Testament/ Tanakh Books of Genesis, Exodus and Leviticus and Paul's Letters to the Romans and to the Galatians in the New Testament to the work of Johann Friedrich Blumenbach, an 18th century German who developed theories of racial difference based on Biblical teachings, a review of the imperialistic racism of the 19th century, and an the interpretation of J.S. Woodsworth's 1909 book entitled *Strangers Within Our Gates,* described as a Christian defence of scientific racism. All of that information, and potentially very much more, is part of the historical and social context. Summarizing and commenting on all of it, as well as adding other perspectives on the historical and religious content would certainly be tedious and time consuming but also perhaps wasteful and self-indulgent. What has been summarized are the adjudicative facts and those legislative and social science facts that are broadly relevant to the legal determinations involved in the application.

[8] *Canada (Attorney General). v. Bedford,* 2013 SCC 72, para. 52.

a. Trinity Western University

[28] Trinity Western University ("TWU") is a private university located in Langley, British Columbia. It was founded as Trinity Junior College in 1962 by the Evangelical Free Church of America. It was founded as a religious community and primarily serves the evangelical Christian community in Canada. It was given the right to grant university degrees in 1979. Its name was changed to Trinity Western University in 1985. At that time it was granted authority to offer graduate degrees. The university is a member of the Association of Universities and Colleges of Canada ("AUCC") and has been since 1984.

[29] TWU now offers 42 undergraduate majors and has 17 graduate programs. It has a professional school of nursing and a school of education. TWU offers all of the facilities of a modern small university with about 4,000 students enrolled each year. There is no dispute about the academic quality of the institution.

[30] Faculty members at TWU receive funding for their research from the Tri-Council of Agencies (Canadian Institutes of Health Research, Natural Sciences and Engineering, Research Council of Canada and Social Sciences and Humanities Research Council) or through other foundations and grants. TWU has a policy on academic freedom and maintains that it is committed to maintaining a campus

environment in which faculty and students have intellectual freedom to explore and discuss all manner of contemporary social, political and religious issues.[9] The curriculum is developed and taught in a manner that is consistent with the religious world view of the university.

[31] The British Columbia legislation that chartered the university provides that it offers university education "with an underlying philosophy and viewpoint that is Christian."[10] The university community is rooted in the evangelical Protestant tradition and the mission, curriculum, core values and community life of the university are formed by a commitment to Biblical principles as they are interpreted within that particular tradition.

[32] TWU's law school would be the first law school in Canada at a private and privately funded university.[11] It describes itself as "an arm of the Church". There is no doubt that it is closely aligned with the evangelical Christian community in Canada. The university exists under the authority of the Evangelical Free Churches

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[9] Affidavit of Dr. W Robert Wood, Executive Director of the Evangelical Free Church of Canada, para. 52.

[10] *Trinity Western University Act* S.B.C. 1969, c.44 s. 3(2).

[11] For purposes of this matter the NSBS did not dispute the private character of TWU.

of Canada and the United States.[12] Its goal is to exist as an expression of the heritage and values of those churches. It is not merely an historical connection or a nominal one. The religious denominations involved very much control what happens at TWU. Funding for the university comes from the churches and from private donors.

b. The Community Covenant

[33] TWU does not require an affirmation of faith to attend the institution. A non-Christian or a Christian from another very different tradition would be welcome to attend. One of the distinguishing features of TWU, and at the heart of this matter, is what is referred to as the TWU Community Covenant. All students are required to sign that document. By signing it they agree to adhere to a code of behaviour that TWU says is in keeping with Christian principles as they are interpreted in the evangelical tradition. The Community Covenant is not just about sexual morality. It contains among other things a commitment to "Christian virtues" such a love, joy, peace, kindness, gentleness, self-control, humility, mercy

[12] The Evangelical Free Church of Canada ("EFCC") is an association of evangelical Christian churches, all of which use the term Evangelical Free Church as part of their names. The EFCC is affiliated with the Evangelical Free Church of America ("EFCA"). The EFCC has 163 member churches with formal membership of about 9,000 and regular Sunday attendance of 12,000.

and justice. It includes prohibitions on a broad range of activities some of which are well within the accepted norms of modern university student life in other institutions.

[34] The Community Covenant bans all sexual intimacy outside the traditional marriage between a woman and a man. In other words, TWU does not recognize same-sex marriage. TWU does not ban LGBT students. It does not limit the sexual activity of unmarried LGB students any more than it purports to regulate the sexual activity of unmarried non-LBG students. But, significantly, it does not recognize that LGB people can be sexually intimate even if they are legally married.

[35] Homophobic, disrespectful or discriminatory remarks or behaviour directed against LGBT people, or any harassment or bullying of students for whatever reason, including as a result of their sexual orientation is unacceptable and a violation of the Community Covenant.[13]

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[13] Wood affidavit, para. 118 Some will undoubtedly consider these statements to be incompatible with the evangelical Christian position on the sinfulness of homosexual behaviour. To call a person's expression of their sexual orientation a sin is, on that view, in and of itself, judgmental. As Justice L'Heureux-Dube stated in her dissenting opinion in *Trinity Western University v. British Columbia College of Teacher,s* which was cited with approval by Justice Rothstein in *Saskatchewan (Human Rights Commission) v. Whatcott*, it is no longer legally acceptable to use the justification of separating homosexual behaviour from homosexual orientation. "The status/conduct or identity/practice distinction for homosexuals and bisexuals should be soundly rejected". It is of course rejected for legal purposes not theological ones. It is very much a part of

[36] The EFCC teaches that marriage is a divinely sanctioned institution carrying significant theological implications. Marriage within the Evangelical Christian tradition has been defined as an exclusive, lifelong, covenantal union of male and female. It is shared between the spouses to the exclusion of all other persons. Portions of the Bible are interpreted as the foundation for that belief. Because Evangelical Christians understand marriage as divinely instituted it takes a central position in the theological understanding of the good life for human beings to live.[14]

[37] Those who are unmarried are expected to abstain from sexual relations, living chaste and celibate lives. As to "same sex intercourse" it is believed to be "contrary to biblical teaching and therefore morally unacceptable."[15]

Evangelical Christian belief and practice which asserts that homosexuality as an act is sinful but that there is no sin attached to one's sexual orientation.

[14] Affidavit of Dr. Jeffrey Greenman, Executive Vice President, Academic Dean and Associate Professor of Theology and Ethics at Regent College, Vancouver, British Columbia. para. 67

[15] Greenman affidavit, para. 82. I would not pretend to have the ability to critique Evangelical Christian theology nor is it appropriate for me to do so. Courts do not become involved in interpreting religious texts. As the trial judge I am obliged to not simply accept all legislative facts as they are put forward. There is an obligation to assess them if even in some limited way. I have applied a limited level of scrutiny to all of the facts provided for context. For that purpose I simply note that this interpretation is not held by all Christian denominations. There are those who interpret the holiness code in Leviticus, for example, as dealing with ritual cleanliness and separating the people of Israel from the "pagan" tribes surrounding them. The prohibitions are more about preserving a sense of Jewish identity than anything else. Some historical interpretations suggest that early Christians were not prepared to impose the levitical law on

[38] Those teachings about sexual morality are integral to Evangelical Christian faith. Their basis and source are said to be in the authoritative texts of Scripture. Evangelical Christians also believe that they are central to the Bible's moral account of proper conduct. The believe that "[t]he Bible's teaching from its first book, Genesis, to its last book, Revelation, is fully consistent and unwavering that sexual conduct is only morally appropriate within the boundaries of male-female marital union."[16] Sexual behaviour is viewed as an expression of one's "fundamental loyalty or disloyalty to God…which is of ultimate importance in Christian faith."[17]

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themselves. Similarly New Testament references are also subject to other interpretations. The New Testament itself contains no citations of the Old Testament strictures. Other Christians believe that those passages that could be interpreted as referring to homosexuality in the New Testament are a condemnation of first century pagan religious rituals that involved sex in various forms. They assert that the scriptural material has to be read bearing in mind the context in which it was written. There is a tension between text and context. There is no consensus among Christians as to whether homosexuality is a sin.

[16] Greenman affidavit para. 114

[17] Greenman affidavit para. 118. Once again, I carry no brief to question the basis of that faith. I must point out once again however, that this is not a view of Christianity that is held by all expressions of that faith. There are those who would note that definitions of sexual morality and the enforcement of traditional sexual morality founded on contestable interpretations of an Old Testament ritual holiness code are not central to a faith that stresses illimitable nature of Divine love. They point out that if strict obedience to Biblical authority is required, it might be better to start with those injunctions interpreted as having come directly from Christ. They include the requirement to sell one's possession and give to the poor. (Luke 12:33) I accept the important point however that within the Evangelical Christian expression of faith, the practice of faith cannot be separated from personal obedience to standards of sexual conduct.

[39] Codes of conduct such as the one in place at TWU are common within Christian universities and colleges.[18] Those codes address a range of issues from health, safety and legal issues to weapons on campus, verbal, sexual and physical harassmen, and privacy and security issues. Policies also address things like plagiarism and academic dishonesty more generally. Codes of Conduct in the context of Christian schools relate to moral standards and behavioural expectations. Those policies address the use of alcohol, tobacco and illegal drugs, chapel and church attendance, sexual morality and related expectations such as residence hall visitation and cohabitation policies, and policies on conflict management and violence.

[40] The role of the conduct code is to "clearly communicate the identity/ethos of the university to campus constituents."[19] Even students who disagree with the conduct code can see it as an expression of the university's identity. Codes of conduct are seen as establishing a community "conducive to spiritual growth in the

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[18] Report of Dr. Gerald Longjohn Jr, Vice President for Student Development at Cornerstone University in Grand Rapids, Michigan.

[19] Longjohn report p. 3.

context of Christian colleges and universities". The environments are intended to be protected from influences that are detrimental to personal spiritual growth.

[41] Attached to the affidavit of Janet Epp-Buckingham was a series of extracts from similar codes at other universities which have American Bar Association approved law schools.[20] They included the "Honor Code" from Brigham Young University, which among other things regulates dress and grooming standards of students who must be "modest, neat and clean". The Honor Code states that homosexual behaviour is inappropriate and violates the Honor Code. Homosexual behaviour includes not only sexual relations between members of the same sex but "all forms of physical intimacy that give expression to homosexual feelings."

[42] Boston College is a Jesuit and Catholic institution. Its code of conduct is described as reflecting the ethics, values and standards of the university community as a Jesuit, Catholic institution. Its Code of Student Conduct prohibits sexual intercourse "outside the bonds of matrimony". Another Roman Catholic institution, the University of Notre Dame has a clear statement that the university,

> embraces the Catholic Church's teaching that a genuine and complete expression of love through sex requires a commitment to a total living and sharing together of two persons

[20] Affidavit of Janet Epp-Buckingham (LL.D.), Director and Associate Professor, TWU.

> in marriage. Consequently, students who engage in sexual union outside of marriage may be subject to referral to the University Conduct Process.

[43] Pepperdine University in California is associated with the Churches of Christ. It also has a law school that has been approved by the American Bar Association. The institution requires that students comply with a code of conduct that it maintains is based on Christian philosophy. That includes the requirement to abstain from "sexual conduct outside of marriage".

[44] While some very highly regarded educational institutions in the United States do have codes of conduct that prohibit same-sex sexual intimacy, those codes in some instances are the subject of considerable debate. The recognition of LGBT equality rights in the American context is, howeve,r hardly an aspirational standard.

c. TWU Law School

[45] Some time ago TWU decided to create its own law school. After a process that involved consultation with lawyers, judges and legal academics TWU made a presentation to the Federation of Canadian Law Societies (the "Federation"). The Federation is the national coordinating body of the 14 law societies that govern lawyers and notaries across the country. One of its functions is to develop national

standards of regulation. Each law society in the common law provinces and territories requires applicants for bar admission to hold a Canadian common law degree or its equivalent. The Federation adopted a uniform national requirement for Canadian common law programs in 2010.The Approval Committee is the body responsible for making the determination as to whether a degree complied with those national standards.

[46] Canadian law societies had agreed to rely on the recommendations of the Approval Committee. That approval would be required for graduates of the school of law to be able to practise in Canada.

[47] By a letter dated 22 April 2013 the Federation advised TWU that it would be establishing a Special Advisory Committee to consider the effect of the Community Covenant on the Federation's decision whether or not to approve the proposal. That Special Advisory Committee had the mandate to consider what additional considerations should be taken into account in determining whether future graduates of TWU's proposed law school should be eligible for admission into any of Canada's law societies, given the requirement that students sign the Community Covenant. The Special Advisory Committee was to take into account all representations that had been received, the applicable law, including the *Charter* and the Supreme Court of Canada decision in *Trinity Western University*

v. British Columbia College of Teachers, and any other information that the committee decided was relevant.

[48] The Special Advisory Committee released its final report in December 2013. It found that there was no public interest reason for preventing graduates of the JD Program at TWU from practising law. The Special Advisory Committee acknowledged the arguments raising important issues of equality rights and freedom of religion. If the Approval Committee concluded that the TWU proposed law school met the national requirement there was no public interest bar to the approval of the school.

[49] The Approval Committee approved the law degree from TWU's proposed law school and in doing so referenced and relied on TWU's statements that it was fully committed to addressing ethics and professionalism, that it recognized its duty to teach equality and to promulgate non-discriminatory practices, and that it would ensure that students understood the full scope of protections from discrimination based on sexual orientation. That approval would be followed by an annual review.

[50] With the 16 December 2013 approval of the Federation in hand, TWU approached the NSBS.

d. NSBS Process

[51] The Council of the NSBS is responsible for the governance and regulation of the legal profession in the public interest according to the *Legal Profession Act.*[21] The Council has 21 members, including 3 officers, 13 elected lawyers, 3 public representatives, a representative of the Attorney General of Nova Scotia and the Dean of the Schulich School of Law. In April 2013, the Council was aware that TWU had made an application to the government of British Columbia for the approval of a law school and to the Federation for approval of the common law degree. At that time the NSBS Council decided to defer discussion about the matter until the Federation had issued its report, which it did in December of that year.

[52] In January 2014 the Council tasked the Executive Committee with receiving submissions and identifying the options with respect to the request of TWU for approval of its law degree. Public input was solicited and two public meetings

[21] S.N.S. 2004, c. 28.

were held. The Committee also received over 150 written submissions, and to the extent that they could be characterized as taking either "pro-TWU" or "anti-TWU" stance, about one third were in favour of TWU and two thirds against. The Executive Committee also heard from the President of TWU and received submissions from the intervenors in this case.

[53] At that time, section 3.3.1 of the NSBS regulations stated that an applicant for enrollment as an articled clerk must:

> be of good character;
>
> be a fit and proper person;
>
> be lawfully entitled to be employed in Canada;
>
> have a law degree;
>
> have an approved principal;
>
> provide the Executive Director with a completed application in the form prescribed by the Committee;
>
> provide the Executive Director with two letters of reference attesting to good character;
>
> provide the Executive Director an official transcript of the applicant's grades at each faculty of law at which the applicant studied;
>
> pay the prescribed application fee to the Executive Director;
>
> provide an Articling Agreement in the prescribed form executed by the applicant and an approved principal to the Executive Director;
>
> provide the Executive Director with a criminal record check…
>
> be proficient in the English language…

> provide such other information that may be required, at any time, by the Executive Director.

[54] NSBS regulation 3.1(b) defined "law degree" as including,

> a bachelor of laws degree or a juris doctor degree from a faculty of common law at a Canadian university approved by the Federation of Law Societies of Canada for granting of such a degree, or an equivalent qualification…

[55] According to the regulations in place until April 2014, TWU law school graduates who met the other qualifications would not be denied admission to the Nova Scotia bar based only on the fact that their degrees were from TWU. Once the degree was approved by the Federation it was, by definition, a law degree.

[56] NSBS Council was presented with three options for a vote on 25 April 2014. The first was for acceptance of the Federation Approval Committee report on the basis that the TWU proposal met the national requirement. The second was to not approve the law school at TWU because the "Community Covenant is discriminatory". There was a third option which was put forward as a motion. Council accepted that option by a vote of 10 to 9.

[57] The Resolution passed on 25 April 2014 provides:

> Council accepts the Report of the Federation Approval Committee that, subject to the concerns and comments as noted, the TWU program will meet the national requirement; Council resolves that the Community Covenant is discriminatory and therefore Council does not approve the proposed law school at Trinity Western unless TWU either ;
>
> exempts law students from signing the Community Covenant; or
>
> amends the Community Covenant for law students in a way that ceases to discriminate.
>
> Council directs the Executive Director to consider any regulatory amendments that may be required to give effect to this resolution and to bring them to Council for consideration at a future meeting.

[58] The reasoning attached to that option was that the appropriate balancing of competing values relating to freedom of religion and equality should be done by the NSBS and had not been done by TWU because of the Community Covenant. The covenant when viewed through the lens of the Nova Scotia *Human Rights Act*[22] is discriminatory and is not saved by any exceptions. By requiring prospective students to sign a contract that contains discriminatory statements and by threatening discipline in the event of a violation, TWU exceeded the bounds of religious freedom. A 2001 Supreme Court of Canada decision dealing with the accreditation of the teacher education program at TWU was said to be not

[22] R.S.N.S. 1989, c. 214.

determinative of the issue because of developments in the law and in society. The memorandum noted that there is a significant difference between teacher education and a law school, the latter of which is training individuals to balance competing *Charter* rights. The option did not condemn graduates as being unqualified to practice law but was said to address and reject the systemic discrimination of the institution.

[59] The resolution refers specifically to not approving the "proposed law school".

[60] On 23 July 2014 the NSBS amended the regulations to implement the Resolution. The regulation now reads;

> In this Part
>
> "Committee" means the Credentials Committee
>
> "law degree" means,
>
> a Bachelor of Laws degree or a Juris Doctor degree from a faculty of common law at a Canadian university approved by the Federation of Law Societies of Canada for granting of such degree, unless Council, acting in the public interest, determines that the university granting the degree unlawfully discriminates in its law student admissions or enrollment policies or requirements on grounds prohibited by either or both the Charter of Rights and freedoms or the Nova Scotia Human Rights Act.
>
> a degree in civil law…

> a Certificate of Qualification issued by the National Committee on Accreditation of the Federation of Canadian Law Societies.

[61] The Regulation and the Resolution are both challenged in this application. The application for judicial review was filed after the Resolution was passed but before the Regulation implementing it. The application has been agreed to be with respect to the validity of both. When the "decision" of the NSBS is referenced it is intended that it include both the Resolution and the Regulation. On its face, the resolution to not approve TWU's law school was not in compliance with the regulations in place at the time. So, the regulations were changed to reflect the resolution.

e. NSBS Institutional Responses to Racism and Discrimination

[62] The decision of the NSBS was made in the context of a troubled history of racism and discrimination. The NSBS has faced that history head on and has taken substantial steps to make the practice of law in Nova Scotia not only more sensitive to issues of equality but more inclusive.

[63] In December 1989 the Royal Commission on the Donald Marshall Jr. Prosecution released its report. The Marshall Inquiry found that racism and

discriminatory attitudes existed within the Province's justice system. Donald Marshall's status as a Mi'kmaq was held to have contributed to the miscarriage of justice. The Report recommended that Dalhousie Law School, the NSBS and the Judicial Councils support courses and programs dealing with legal issues facing visible minorities, and encourage sensitivity to minority concerns for law students, lawyers and judges.

[64] Even before the Report was released the NSBS established an *ad hoc* race relations committee that began to identify issues. In the immediate aftermath of the Marshall Commission Report the society focused its primary responsibility with regard to lawyers' behaviour by addressing the roles that lawyers had played in Donald Marshall's wrongful conviction and the subsequent events. In 1991, F.B. Wickwire, the President of the NSBS stated in a report to Council that the commitment of the NSBS was firm: to do all that it could to eliminate discrimination in the justice system.

[65] The NSBS made the Race Relations Committee a standing committee of the society and established a second standing committee, the Gender Equality Committee, in 1992. The Gender Equality Committee released a report in 1993 entitled *Gender Equality in the Nova Scotia Legal Profession: A Survey of Members of the Nova Scotia Legal Profession*. That work was triggered by female

lawyers leaving the profession in numbers disproportionate to men, rather than by complaints of discrimination. The committee undertook a broad-ranging investigation of the experience of women in the legal profession and documented widespread gender discrimination.

[66] In 1996 the Council of the NSBS approved the establishment of the Equity Office and the hiring of an Equity Officer. The Equity Officer's role was to establish relationships with the African Nova Scotian and Mi'kmaq Communities in order to better understand the justice issues in those communities and to advance the interests of members of those communities in becoming lawyers. The Equity Officer was also to address the issues of retention of women in the legal profession.

[67] Since its inception the Equity Office has actively addressed ways to make the profession more diverse and reflective of a full range of communities in the province with an emphasis on historically disadvantaged communities. It is responsible for a range of programs designed to increase lawyers' and law firms' understanding of issues related to human rights and all forms of harassment and discrimination. The Equity Officer and the two equality committees (Racial Equity Committee and Gender Equity Committee) have developed numerous policies to assist lawyers and law firms in relation to issues such as hiring practices,

accommodation, maternal and parental leaves, harassment and, more recently, in the development of greater cultural competence.

[68] In addition to initiatives on employment equity, cultural competence, disability and mental health, access to justice, gender equity issues, and racial equity community initiatives, the Equity Office has engaged directly with the lesbian, gay, bisexual and transgendered (LGBT) community. Beginning in 2003 the NSBS together with the Canadian Bar Association (Nova Scotia) has hosted a Pride Reception. The purpose of that reception has been to create a "safe and welcoming place for members of the LGBT community in the legal profession, to celebrate diversity in the profession and to show support for LGBT lawyers in Nova Scotia."[23] Each reception has had an educational component with speakers addressing a variety of equity issues.

[69] In 2010 the Equity Office, in collaboration with the CBA's Sexual Orientation and Gender Identity Section, introduced a mentorship program for LGBT law students and lawyers to provide a community of support. In the fall of that same year, the Equity Office began a research project with the Nova Scotia Rainbow Action Project to consider a range of legal issues which continued to

[23] Affidavit of Darrell Pink, Executive Director, para. 15.

impact on the LGBT community following the legislative changes that allowed for same-sex marriage in Nova Scotia. That project produced two research documents. One looked at Nova Scotia legislation that continued to refer to marriage in heterosexual terms. The second considered legislation, regulations and policies that apply to birth and adoptions in lesbian marriages and gay marriages and continuing discrimination contained in the current regime. Both papers were approved by the NSBS council for submission to government.

[70] Over the last several years the NSBS has developed and delivered cultural competence training and education inside the society and to lawyers and law firms. The focus of the work is to raise awareness of the "unique issues affecting all equity seeking groups, which include but are not limited to, African-Nova Scotians, all racialized communities, non-Christian religious communities, the LGBT community, those with physical and mental disabilities and new Canadians."[24]

[71] In 2013 the NSBS revised the mandate of the Equity Office to provide in part that it assist in fulfilling the Society's regulatory functions in maintaining public confidence in the regulation of the profession, upholding the public interest

[24] Pink affidavit para. 18. Evangelical Christians are by definition, not an equity seeking group.

in the practice of law and seeking to improve the administration of justice in relation to equity and diversity.

[72] In 1993 the NSBS underwent the first of what became a series of program reviews. In 1997 the Council approved Regulation 1A which set out the public interest role of the Society. In 1996 the NSBS implemented Chapter 24 of the Legal Ethics Handbook, which requires that lawyers respect the human dignity and worth of all persons and treat all persons with equality and without discrimination.

[73] In 2001 and 2002 the NSBS undertook a process that led to the repeal of the *Barristers and Solicitors Act*.[25] That involved extensive research and consultation on the role and purpose of the NSBS as the regulator of the legal profession in the province. The *Legal Profession Act* came into effect in 2004. Subsection 4(1) of the Act articulated the purpose of the NSBS to "uphold and protect the public interest in the practice of law."

[74] The new legislation caused the NSBS to address through regulations and policies how it would carry out its purpose. Several initiatives were undertaken and Council adopted a set of policies about how it would do its work. Included in those policies was a statement of "values" that would drive all society activity. The

[25] R.S.N.S. 1989, c.30.

values first adopted in 2008 are, fairness, respect, integrity, visionary leadership, diversity and accountability.

[75] A second way in which the new legislation directly impacted the activities of the NSBS was the establishment of a Strategic Plan. That Plan addressed how the NSBS would uphold the public interest. Each Strategic Plan has been accompanied by a detailed Activity Plan.

[76] Beginning in 2006 the NSBS has required each lawyer to complete an Annual Lawyer Report. In that document lawyers are asked to self-identify in equity seeking groups, one of which is LGBT. In 2011 the NSBS replaced the *Legal Ethics Handbook* with the *Code of Professional Conduct*. Section 6.3 was approved to carry out the principles underlying the previous Chapter 24 which dealt with equality and diversity.[26]

[77] Since 2012 the NSBS has required all members to complete a minimum of 12 hours of Continuing Professional Development of which 2 hours must be in the area of Professionalism. One of the acceptable topics is sexual orientation and gender identity and the law in Canada.

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[26] Pink affidavit, para. 29.

[78] One of the priorities of the Strategic Framework 2013-2016 is to enhance access to legal services and the justice system. The initiatives adopted to implement the priority are to advocate for enhanced access to legal services and the justice system for equity seeking groups.[27]

[79] In his affidavit Mr. Darrell Pink, Executive Director of the NSBS, cites information obtained from Professor Brent Cotter, a professor of law and former Dean at the College of Law, University of Saskatchewan. Professor Cotter is one of the originators of the system of collecting and analyzing admissions statistics from Canada's common law schools. Mr. Pink reported Professor Cotter's information and it is accepted as accurate.

[80] There are 24 law schools in Canada, 18 of which offer common law degrees. Professor Cotter had access to admissions statistics from 16 of those schools. The total number of applications to the 16 schools was 29,375 in 2011, 28,966 in 2012, and 27,583 in 2013. Most applicants apply to more than one law school and on average, each applicant applies to three. To fill first year law classes, the schools made 6508 offers to candidates in 2011, 6292 in 2012 and 6557 in 2013. The

[27] Pink affidavit, para. 3.

actual number of students enrolled in first year classes at the 16 common law schools in 2011 was 2715, 2720 in 2012 and 2782 in 2013. [28]

f. History of Discrimination Against Sexual Minorities

[81] Dr. Elise Chenier is an historian and an associate professor at Simon Fraser University. Her expertise is in the history of gays, lesbians and other sexual minorities. It also includes the harm done by discrimination viewed from an historical perspective. Dr. Chenier teaches courses in the history of the gay and lesbian experience. That has required that she remain aware of contemporary literature in political science and sociology in order to understand and convey a proper historical approach to discrimination. Dr. Chenier is eminently qualified to provide an opinion as an historian.

[82] Her opinion contains some highly informative historical analysis. Informative does not necessarily translate into relevant for the purposes of resolving this case. The information that relates to the effects of discrimination against LGBT people does not address whether the actions by the NSBS will reduce the amount of that discrimination or ameliorate its effects. When Dr.

[28] Pink affidavit para. 33.

Chenier expresses a firmly held belief that the NSBS was legally right to do what it did, she is expressing a view on the very matter before the court and draws legal conclusions that are not within her area of expertise.

[83] Dr. Chenier's report provides an outline of the historical discrimination against gays and lesbians but goes well beyond that. She notes that from the moment of European colonization many groups in Canada have been excluded by virtue of a colonial, imperial and nation-building vision. She provides comments on and historical examples of discrimination against indigenous people, French people, people of African descent, Chinese people and Jewish people. She asserts that the values and practices underlying much of the discrimination were based on Christian theological teachings buttressed by scientific racism. Dr. Chenier sets the discriminated groups apart from a dominant white Protestant middle class culture, of which it may be inferred Evangelical Christians are a part. The opinion relates racism and discrimination against LGBT people to Christian theology. This case does not turn on whether Christians have historically oppressed others and whether Christian theology has been used to justify racism, sexism, bigotry and homophobia. There are issues with which one might quibble.[29]

[29] Those issues include what has sometimes been referred to as the subtraction narrative by which religion is replaced by progressive enlightenment humanism. That has been called into some

[84] Dr. Chenier notes the racism of historical Christian leaders. It is not reasonably disputable that Christian churches were racist and supported their racist beliefs with a mixture of theology and science. The science was bad. So was the theology. It might be said, paraphrasing Richard Niebuhr, that religion has the capacity to make good people better and bad people worse.

[85] It is entirely and abundantly clear that LGBT people have been the subject of discrimination at all levels. Up until the 19th century the sexual activity of most

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question by the intensely violent history of the 20th century. Gillespie, Michael Allen, *The Theological Origins of Modernity* (The University of Chicago Press, Chicago, 2009), p. 284. The suggestion that scientific racism became an affirmation of religious belief is an historically legitimate view put forth by Dr. Chenier. It might also be noted that scientific racism was opposed by some Christian groups on religious grounds. Creationists and social progressives like William Jennings Bryan of the Scopes trial and Bishop Samuel Wilberforce of the 1860 Oxford Debate with Thomas Henry Huxley were influenced by their distaste for scientific racism which they associated with Darwinian evolution and Hebert Spencer's social Darwinism. Christianity has been and still is used to support the views of racists and segregationists but that does not prove that Christianity is either host or the cause of racism. Religion cannot always be seen as a socially conservative force and that may not have been Dr. Chenier's suggestion in any event. The abolition of the slave trade in the British Empire could be argued to have been brought about through the advocacy of predominantly religiously motivated Christian activists such as William Wilberforce, the father of Samuel Wilberforce. The 1960's civil rights movement in the United States was the work to some substantial degree of African American Christians.

Dr. Chenier deals with J.S. Woodsworth's 1909 book, *Strangers Within Our Gates* and refers to it as the most well-known Christian defence of scientific racism. While the book is neither germane to the issue of this case nor particularly compelling reading, it is a stark reminder of how ingrained some racist ideas were among even the most socially and politically progressive people of that time. Woodsworth was of course a Christian activist who advocated for better social welfare programs and was one of the founders of the CCF and later the New Democratic Party.

concern to Christians was adultery. Homosexuality was not then an issue. By the early 1900s homosexuality as a condition and the homosexual "type" became an issue. How one obtained pleasure became an object of study. Medical scientists created categories of sexual types. The homosexual was just one among many but it was homosexuality that came to occupy the public imagination as the opposite of heterosexuality. Just as non-whites were seen as a threat to the social order so too homosexuals were seen as a threat to heterosexuality.

[86] The notion that the homosexual was a particular type of person became further entrenched in North American culture during World War II. For the first time recruits were screened for signs of homosexuality. Internal campaigns were undertaken to expose and eliminate anyone believed to be homosexual.

[87] A major contributing factor to the moral panic over homosexuality in the 1950s and 1960s can be traced to McCarthyism. Senator McCarthy accused the Democrats of having homosexual men working for them. McCarthy claimed that as homosexuals they were susceptible to blackmail by Soviet agents. In addition to being associated with pedophilia they were now associated with Communism and political instability. The American government pushed to drive out homosexuals. Canada followed in the American footsteps.

[88] Thousands of gays and lesbians were pushed out of the civil service. The campaign continued until well into the 1970s. The same attitude also shaped the educational system of the time. Official and unofficial polices to bar people suspected of being gay or lesbian were put into place. They remained in place until they were challenged in the 1980s and 1990s.

[89] The attack on racism in the 1960s emboldened and empowered the civil rights movement in the United States. In the 1970s lesbians and gays adopted similar political strategies. They have successfully argued that they were similar to ethnic and racial minorities. They remained different in one important respect. The American Psychiatric Association labelled homosexuality as a mental illness. It was not delisted until 1974. After that, gays and lesbians sought protection from discrimination at all levels of government.

[90] Dr. Chenier states that based on decades of historical research it is clear that a policy that prohibits people who engage in same-sex sexual activity from membership, employment or participation has two principal effects on gays and lesbians. They will either be deterred from seeking employment, membership or participation or they will pursue the opportunity and hide their sexual orientation. In both instances the individual is harmed; in the first, by exclusion and lost opportunity and in the second by being forced to hide a part of oneself, through

limited disclosure and various concealment strategies. Both cause considerable stress with adverse psychological, health and job-related outcomes.

[91] Over the past 40 years the Canadian state has played a leading role in reshaping discriminatory and prejudicial attitudes. Sexual orientation has been held to be a prohibited ground of discrimination since 1995. More and more lesbians and gay men came out and the increased contact with heterosexuals diminished stigmatization. The state can both perpetuate and combat discrimination and prejudice. States do not end racism or prejudice but they play a pivotal part in doing that. Dr. Chenier states that sanctioning discriminatory policies legitimatizes them. Over the course of the last century and a half all levels of government have played a role in shaping society, including social attitudes. "By legitimizing acts of discrimination, it sends a clear signal to its citizens that discrimination is acceptable and justifiable, and will be defended" [30]Dr. Chenier says.

[92] While Dr. Chenier is entirely qualified to provide an opinion on historical matters and the manner in which those historical trends have had contemporary implications, the last statement is not about history, historical trends or how those trends have shaped current Canadian society. The statement that "legitimizing"

[30] Chenier affidavit para. 84.

acts of discrimination sends a clear message that it is acceptable, is a value statement. It expresses Dr. Chenier's view that allowing an act of discrimination means that the government is condoning discrimination. Things are a lot more legally complicated than that view permits.

[93] Dr. Chenier says that the TWU Law School Admission Policy does not bar gays and lesbians from admission. She says that one can say that it discriminates against lesbians and gays as a group. Others whose behaviours are banned, such as those who masturbate or use pornography, are also discriminated against but they are not the same as gay and lesbian people. They are not a distinct social type and do not exist in political society as a group. They are not a politically vulnerable population or group. Gays and lesbians are. It is clear that TWU does not recognize same-sex marriage. It treats gay and lesbian people in a way that is different from others. Gay and lesbian people are a group who have historically been the subject of discrimination.

[94] Dr. Chenier notes that because gays and lesbians are the only minority group who must look beyond their families to find support, they are distinct from other minority groups. Support is found in lesbian and gay support groups, in the gay and lesbian media and in lesbian and gay culture. Participating in those activities is not sex, but she notes that by seeking out those opportunities a person would be

risking being discovered as gay. "Because homosexuality violates the admissions policy, to be discovered as gay could result in expulsion."[31] She goes on to state that they would suffer financial loss and the shame of expulsion. "Each of these increases the likelihood of suffering stress, anxiety, depression, and may even lead to suicidal ideation, attempts, and death."

[95] Dr. Chenier notes that choosing not to attend a school such as TWU would protect an individual from the damaging effects of living on the closet and the possible trauma of being expelled. She suggests that a public health campaign would be a partial solution. If TWU bars non-celibate gays and lesbians from accessing seats at the law school she says it could be compared to the cap on Jewish students at Queen's University in the 1950s. She notes that the policy of TWU is entirely out of step with government policies. She says that TWU is instituting policies that existed for a short time but have long since been ruled a violation of the rights of Canadian citizens.[32] Those comments are beyond Dr. Chenier's area of expertise. Codes of conduct in private religious institutions have not "long since" been ruled a violation of the rights of Canadian citizens.

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[31] Chenier affidavit para. 87.

[32] Chenier affidavit, para. 90.

[96] Dr. Chenier says that as long as there have been exclusionary policies members of minority and dominant groups have protested against them. As long as the majority remained indifferent those policies and practices remained in place. Advocacy and activism have been important in prompting change. Dr. Chenier points out that in the mid-1960s Christian clerics vociferously advocated for gay and lesbian equality. Yet, today those opposed to gay and lesbian equality draw on Christian ideology to justify their position. "Christian attitudes still [sic] to play a role in public policy and public conversations about who should be included and who should be excluded, and their positions vary".[33]

[97] She says that from an historical point of view it makes sense that present day Christians who oppose homosexuality and equality for lesbians and gays occupy a minority position. There is no empirical research cited to support the statement but no reason to doubt it either.

[98] Dr. Chenier goes on to say that just as the majority of Christians no longer believe in scientific racism, they no longer believe that the sole purpose of sex is procreation nor do they hold that homosexuality is sinful or abhorrent. That may well be true. She goes on to say that shifting views about race and sexuality show

[33] Chenier affidavit, para. 93.

that Christian ideology changes in response to the worldview of those in positions of power.

[99] In summary, I am prepared to accept many of Dr. Chenier's comments as part of the social context. They provide an historical perspective on racial and other discrimination. They provide a valuable historical analysis of how homosexuality came to be treated in the last 150 years. Dr. Chenier is able to speak powerfully about the need for gay and lesbian people to be able to associate freely and to be out of the closet. She provides a stinging indictment of Canadian law and society in its past treatment of sexual minorities. When she directs her attention to the result in this case, I am more skeptical. She is an advocate for a position. It appears to be a position of a form of deep equality that would give equality presumptive priority over freedom of conscience and freedom of religion which are part of a pluralistic and multicultural society. She takes strong views on matters that are not matters for historical analysis. On matters of legal interpretation and value judgments I have not accepted the opinions she has offered.

g. Gender and Sexuality in the Context of Education

[100] Dr. Mary Bryson is a Full Professor of Sexuality and Gender Studies in the Department of Language and Literacy Education in the Faculty of Education at the University of British Columbia. She is jointly appointed as a Full Professor in the institute for Gender, Race, Sexuality and Social Justice in the Faculty of Arts. Dr. Bryson has been employed as the Director of the Institute for Gender, Race, Sexuality and Social Justice. Her Ph. D. is in Education from the Department of Educational Psychology at the University of Toronto. Her expertise spans two interdisciplinary areas. The first involves critical studies in gender and sexuality and the second is the role of education and educational contexts in the democratization of knowledge access and citizenship, and in the consideration of related human rights for sexual and or gender minority individuals and communities. Dr. Bryson is thoroughly qualified to provide expert opinion in those areas.

[101] Dr. Bryson was asked whether sexual minorities would be excluded from the TWU law school as a result of the covenant. Her answer, in short is yes. Signatories to the covenant pledge that sexual intimacy cannot be expressed

outside the bonds of "an arbitrarily restricted state of marriage."[34] The covenant excludes currently and prospectively married gay, lesbian and bisexual people.

[102] Dr. Bryson was asked whether the admissions policy of TWU required sexual minority students to lie if they wish to attend. Her response is that the requirement to sign the covenant "obligates currently or prospectively married LGB people…to practice dishonesty and concealment in relation to their marital status…" The requirement to lie to conceal marital status implicates the person in practices of "systematically distorted communications", that form part of lifelong negative consequences.

[103] Dr. Bryson was asked whether the admissions policy at TWU contributes to the perpetuation of stigma. Dr. Bryson says that the policy effectively prevents LGB TWU students from having and expressing the very "healthy sexuality" that the covenant appears to confirm.

[104] Dr. Bryson goes on to say that the policy perpetuates and exacerbates already existing stigmatization and marginalization of LGB people beyond TWU, "in its insistence on the right to practice forms of discrimination against LGB people that (i) have been reversed in the Canadian legal system in other contexts

[34] Bryson affidavit, para. 8.

and that (ii) continue to cause harm elsewhere, such as the exclusion of LGB people from the right to marriage."[35] The suggestion appears to be that the TWU policy or covenant, in Dr. Bryson's view, will affect not only TWU students but LGB people elsewhere because it continues to stigmatize them as a group.

[105] According to Dr. Bryson, whenever an institution or group is legally permitted to treat LGB people in ways that do not respect their fundamental rights to equality it is a reminder of the stigmatization that takes place. While that is true, it should be noted that such reminders are not limited to the university context. Many religious or cultural groups practice forms of discrimination.

[106] Dr. Bryson notes that there is an extensive body of research that documents the specific and persistent harms caused by discrimination, particularly against LGB students. It results in physical, psychological and social harms. There can really be little question that LGB students exposed to an environment of discrimination suffer long term and very significant negative outcomes in education, health and others areas of life.

[107] Dr. Bryson says that the harm to an LGB person in being required to sign a covenant like the one at TWU would be a systematic deprivation of the "Rights to

[35] Bryson affidavit para. 11

Health" and "Rights to Recognition". In other words, it is a systematic deprivation of the LGB students' rights to count themselves "within that group for whom a democratic society includes the Right to Marriage as a key milestone in the trajectory of healthy sexuality and the formation of families."[36] Dr. Bryson notes that sexual and gender minorities experience chronic stress as a result of their stigmatization. The systemic and lifelong harms to LGB people are very serious.

[108] Dr. Bryson goes on to deal with the effects of discrimination on the larger community. Harms caused by practices of LGB exclusion negatively impact the wider campus climate. The pressure to conceal LGB orientation creates a stressful campus climate for sexual minority members of certain Catholic secondary schools and districts where LGT students' rights are restricted, abrogated or curtailed. The LGB stigma has direct impacts on sexual minority members' academic and professional wellbeing.

[109] Dr. Bryson states that the TWU Community Covenant systematically prohibits LGB students and faculty from access to the Right to Health, meaning healthy identity, sexuality and intimacy, and the Right to Marriage and thus creates a "hostile climate for sexual minority students, teachers and other members of the

[36] Bryson affidavit, para. 15.

community. It is my opinion that the TWU Community Covenant is discriminatory."[37] I accept Dr. Bryson's opinion that the TWU covenant prohibits LGB students from engaging in healthy sexual intimacy. LGB students will feel excluded and it is reasonable to conclude that they would not feel equally valued or respected

[110] Dr. Bryson says that in her opinion the TWU Community Covenant is discriminatory. I am prepared to accept that as indicating that it does treat LGB people differently. I will not accept it as a legal conclusion. There has been no finding that TWU's policies are contrary to any human rights legislation that applies to it.

[111] Dr. Bryson was asked whether sexual minorities appear to be under-represented in the legal profession in Nova Scotia. She was provided with data by the NSBS that indicated that in 2014 2.1% of lawyers surveyed self-identified as LGBT. Statistics Canada information shows the percentage of adult Canadians who identify as homosexual to be 1.3% and adult bisexuals to be 1.1% which results in a total of 2.4%. The 2009 numbers were similar and the numbers in the

[37] Bryson affidavit, para. 18.

United States are 3.4%. Canadian data from The Forum poll, an interactive telephone response survey showed that 5.4% of Canadian self-identify as LGBT.

[112] Dr. Bryson notes that the challenge to interpretation of the NSBS data is that Canadian census data are collected by means of a random sample intended to represent the full diversity of Canadian society, while the NSBS data are collected by questions posed to a purposive sample. It targets members of a profession who are not representative of society as a whole. To compare the percentage of NSBS members who identify as LGBT to the number in the larger population is "likely invalid".[38]

[113] A more meaningful strategy would involve a comparison of LGB lawyers and the prevalence of LBG people in surveys that disaggregate the total sample into clusters. Research that looks at the distribution of self-identified LGB people in groups of respondents that are clustered by socio-economic status (SES) and education and that are in the same age group and generational cohort has consistently shown that within a demographic sample that is similar in SES with the overall population of lawyers in Nova Scotia, which is to say 4+ years of post-secondary education, and an occupation with considerable social status, the

[38] Bryson affidavit, para. 19.

prevalent of LGB respondents is from 2% to 8%. Therefore it is Dr. Bryson's opinion that " it is probable that sexual minorities are underrepresented in the legal profession in Nova Scotia."[39]

[114] In reaching that conclusion Dr. Bryson sets out the empirical studies and the methodology used to interpret them. While she is not a statistician or an expert in the interpretation of polling data, the issue of diversity and how it is measured is within the scope of her expertise. Her conclusion should be given considerable weight.

[115] Dr. Bryson was asked whether or not prevalence is an effective indicator for assessing the climate of the legal profession concerning sexual minorities. Public reports have addressed the lack of awareness and protection concerning the wellbeing of underrepresented groups, including sexual and gender minorities. Disclosure of gender identity and sexual orientation is perceived as a significant hindrance in professional development. "Climate based discrimination" in the legal profession perpetuates LGB stigma and the related stress of concealment. Dr. Bryson was not asked to comment on the relevance of significant steps taken by the NSBS to make the profession in Nova Scotia more inclusive and more

[39] Bryson affidavit, para. 19.

welcoming to sexual minorities. She does not consider whether there has been an increase or decrease in the amount of climate based discrimination in the legal profession in Nova Scotia. Dr. Bryson's opinion is that there is an ongoing need for coordinated enactment of non-discriminatory policies and education in legal education and professional development and the implementation of "Cultural Safety" workplace protection policies by provincial and federal law societies concerning minority professionals including LGB people. There is no question that meaningful efforts must continue to address the issues of equality for LGBT people within the practice of law.

[116] Dr. Bryson was asked to comment on the effects on recruiting sexual minorities to the profession that sanctioning TWU's community covenant might have. Dr. Bryson notes that studies have provided evidence of the significant and negative health impacts of living in states where there are state-imposed amendments that ban same-sex marriage. Within both Canada and the United States there is "significant evidence of systemic and widespread effects of regulatory authority's sanction of discrimination in institutional settings (e.g., school district, University) against LGB people."[40] Dr. Bryson goes on to reference

[40] Bryson affidavit para. 20

the research on the effects of institutionalized discrimination in regulated professions other than the legal profession. She notes the extensive research on LGBT issues in education and a study that finds that the regulatory authority's enactment of or support for discrimination against LGBT teachers caused negative impacts that ranged from mental health to professional development. LBG stigma and the impacts of discrimination are felt in the medical and health care professions as well. Where authorities sanction discrimination there are serious detrimental consequences for the wellbeing and professional development of workers.

[117] What this means is that in environments where LGB people are discriminated against and actions are not taken by the authorities to prevent it, they suffer personally and professionally. The research in the area is set out and Dr. Bryson adopts and endorses the conclusions. There is no reason to question her expert assessment.

[118] She then takes it a step much further. She says that "Such systemic and life-long harms that represent the effects of the failure of a regulatory authority to sanction TWU's Community Covenant by recognizing the legitimacy of TWU's

law degree are very serious."[41] Dr. Bryson has taken research that deals with regulatory authorities that have control over an educational institution or a professional workplace and extrapolated it to the circumstances of this case. It can be said that the failure to provide a non-discriminatory environment leads to substantial harm. There is nothing to support the conclusion that the NSBS would be failing to provide a non-discriminatory environment by recognizing a degree from TWU. Recognizing that degree would not result in any discriminatory action, however broadly defined, taking place in Nova Scotia. The research cited does not allow one to conclude that accepting educational qualifications from a religious school would have any effect on the LGBT community.

[119] Dr. Bryson goes on to say that it is "reasonable to conclude" that the effect of the "freedom to discriminate" provided by the state to TWU by recognizing its degrees will impact the larger gay, lesbian and bisexual community. It is certainly reasonable to assume that LGB people would take note of TWU's policy and would be aware of the stigmatization of them by that policy. It would be reasonable to conclude that they would also be aware of the NSBS or state recognition of those degrees. It is not clear what the impact would be beyond that.

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[41] Bryson affidavit, para. 23.

It would be reasonable to conclude that they would be aware that discrimination against LGBT people is strictly prohibited in the legal profession in Nova Scotia, that TWU graduates would be no more likely to discriminate than anyone else, that the NSBS had made substantial efforts to open the profession to members of the LGBT community, that TWU's policy on LGBT rights is the same as or similar to those of numerous religious groups that function within Nova Scotia and that the religious tenets that underlie the policy are and have been held by at least some lawyers.

[120] Dr. Bryson fully endorses the position taken by the NSBS. The last paragraph of her affidavit reads in part as follows;

> The fact that the Nova Scotia Barrister's [sic] Society, as an institutional body has voted to refuse to provide accreditation to Trinity Western University Law School, knowing full well of the existence of a discriminatory Community Covenant, appropriately and productively anticipates the need to address fairly and proactively the recruitment of sexual minorities into the legal profession and importantly, represents a constructive refusal to add to, or to condone, the deleterious impacts of minority stress already experienced by LGB people in the larger community.[42]

[42] Bryson affidavit, para. 24.

[121] That sentence does make reference to the issue of recruitment. It concludes that the NSBS has addressed the issue of recruitment fairly and proactively. That conclusion is found within a statement that amounts not so much to a legal argument as a legal conclusion unsupported by an argument. The statement about recruitment is, once again a conclusion. It does not state how recruitment would be addressed by the refusal to accept a TWU law degree as a law degree.

h. Religious Subcultures

[122] Dr. Samuel Reimer is a sociologist and sociology professor at Crandall University (formerly Atlantic Baptist College) in Moncton. He received his Ph. D. from Notre Dame in 1997. He was asked to provide an opinion on religious subcultures.

[123] Dr. Reimer defines a subculture as a group within a larger society that is distinctive in beliefs, behaviours, customs, language or other factors. A religious subculture is usually delineated by its religious beliefs, rituals and/or devotional practices, identity and/or moral and ideological boundaries. He says that evangelical Christians are a religious subculture in Canada. He notes that other leading scholars of evangelicalism have made similar arguments. Evangelicals

hold distinctive beliefs, including the authority of the Bible, the unique salvific work of Jesus Christ, the importance of the conversion experience and the importance of active faith expressed through church attendance, Bible reading, prayer and evangelism.[43]

[124] Dr. Reimer states that evangelicals commonly establish and hold codes of conduct within their subculture. Those kinds of codes are common in subcultures whether they are religious or not. Sexual moral purity is a behavioural expectation and includes abstaining from sexual intimacy outside of traditional marriage, as well as certain behaviours thought to lead to sexual impurity. Dr. Reimer suggests that when codes of conduct are distinctive they increase the strength and commitment to the subculture.

[125] Evangelicalism is an engaged subculture in that it doesn't physically remove itself from the broader culture. Members get a greater sense of their distinctiveness through interaction with non-evangelicals. That also strengthens their identity. When behaviours are different, the religious convictions that give rise to them stand out and that enhances the importance of those convictions. A religious group can be in too much tension with society if it is too distinctive. Religious groups

[43] Reimer affidavit, para. 48.

will be stronger when they create both distinction and engagement. According to Dr. Reimer, Evangelicalism has maintained that tension which is why it is thriving.[44]

[126] He says that the "literature agrees that distinctive and demanding religious groups have greater strength and vitality because they are distinctive and demanding."[45] Dr. Reimer's opinion is within his area of expertise. It is supported by literature in that area. His opinion should be given considerable weight and I accept the opinion as stated.

[127] In conclusion Dr. Reimer says that TWU is clearly within the evangelical subculture. He says that "It is not fundamentalist".[46]

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[44] Reimer affidavit, para. 86.

[45] Reimer affidavit, para. 91.

[46] Fundamentalism and evangelicalism are not the same though they are sometimes confused.

4. The Legal Issues

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

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

[130] Before those issues can be addressed, the standard of review has to be established.

5. Standard of Review

[131] The standard of review means how much deference reviewing judges have to give to the body that made the original decision, here the NSBS. Judges on judicial review sometimes cannot overturn a decision just because they believe that

the decision was wrong or that if faced with the same issue they might have decided differently. In those cases, the concern is with the existence of a reasonable justification for the decision, and with transparency and intelligibility. The decision has to be "within a range of possible and acceptable outcomes which are defensible in respect of the law and the facts."[47] It is sometimes said that in those cases, administrative decision makers have the "right to be wrong". Judges don't have very much scope for interference.

[132] As Justice Fichaud noted in in *Egg Films Inc. v. Nova Scotia (Labour Board)*, reasonableness is neither "the mechanical acclamation of the tribunal's conclusion nor a euphemism for the reviewing court to impose its own view."[48] Reasonableness is not the judge's "quest for truth with a margin of error around the judge's ideal outcome."[49] It requires respectful attention to the tribunal's analytical path to decide whether the outcome was reasonable. If there are several reasonable

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[47] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, para. 11.

[48] 2014 NSCA 33, para. 26.

[49] *Egg Films*. para. 30

permissible outcomes the tribunal, not the court, chooses among them. "If there is only one, and the tribunal's conclusion isn't it, the decision is set aside."[50]

[133] When the standard of review is correctness, judges can substitute their own views if they believe that the decision was wrong. That is what makes the standard of review an important issue even if it does seem at times to be of interest only to a subset of a subset of lawyers, who might be called judicial review aficionados or judicial review enthusiasts.

[134] There has been some concern by those less infatuated with the process about the inordinate amount of attention given to the issue:

> Our objective should be to get the parties away from arguing about standard of review to arguing about the substance of the case.[51]

[135] However, it seems that human nature and legal ingenuity create a process of ebb and flow by which rules are simplified, the simplified rules are applied to individual cases justifying an array of exceptions, and in the process interpreted to become complicated again. The Supreme Court of Canada decision in *Dunsmuir*

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[50] *Egg Films*, para. 26

[51] Binnie J. cited in *Alberta v. Alberta Teachers' Association*, 2011 S.C.C. 61, para. 38.

v. New Brunswick[52] was intended to be a re-examining of the "foundations of judicial review and the standards of review applicable in various situations" [53] and the beginning of a "simpler test"[54] based on a more principled approach. That simpler test has been explained into becoming a bit more complicated.

a. Standard of Review Based on Precedent

[136] Rather than requiring reviewing courts to reinvent the wheel, the Supreme Court of Canada has said that where the case law has already worked out a standard of review, that is the standard that should be applied.[55] For example, the correctness standard has already been found to apply to constitutional questions about the division of powers between Parliament and the provinces. There is no need to go through all that again.

[137] In this case it has been argued that the test has already been established in *Trinity Western University v. British Columbia College of Teachers* [56]*(" TWU v.*

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[52] 2008 SCC 9

[53] *Dunsmuir*, para. 24

[54] *Dunsmuir*, para. 43

[55] *Dunsmuir*, paras. 57 and 62

[56] 2001 SCC 14

BCCT"). That case will be considered in detail in terms of the principles that are said to apply to the merits of the case. In that case the Supreme Court evaluated the expertise of the College of Teachers in relation to the issue and relative to the expertise of the court itself. The Court concluded that the existence of discriminatory practices was based on the interpretation of TWU documents and human rights values and principles. "This is a question of law that is concerned with human rights and not essentially educational matters."[57] The perception of the public regarding religious beliefs of TWU graduates and the inference that those beliefs would produce an unhealthy school environment had little to do with the expertise of the college. That was distinguished from situations in which the college was dealing with discriminatory conduct by an individual teacher.

[138] The issues in this case are not so identical that the same standard of review can be assumed to apply. It is a different administrative decision maker, making a different kind of decision. In *TWU v. BCCT* the case was about speculative assumptions regarding how teachers might behave in the classroom based on the education they received from TWU. Here, the matter involves a decision of the NSBS that explicitly makes no assumptions about potential TWU law graduates

[57] *TWU v. BCCT,* para. 18.

and deals with a statement of principle about discrimination. The issue of standard of review cannot be determined by the application of the *TWU v. BCCT* precedent.

b. Standard of Review Based on Legislation

[139] When there has been no standard of review already established, the judge should first ask whether there is a provision in the legislation that sets out the standard to be applied, a privative clause barring any judicial review, or an absolute right to appeal. In this case there is no privative clause in the *Legal Profession Act* that would limit judicial review of decisions of the NSBS council. There is no direction in the legislation as to the standard of judicial review.

c. The Nature of the Tribunal as a Factor

[140] The question then turns to the expertise of the tribunal in question.[58] Securities Commissions for example, are seen as being expert in a highly specialized area. They are seen as having more expertise than the courts in dealing with the regulation of capital markets.[59] Human Rights tribunals, on the other hand, are seen as having no more expertise than courts in dealing with the interpretation of human rights legislation.[60]

[141] The purpose of the NSBS as stated in the *Legal Profession Act*, is to "uphold and protect the public interest in the practice of law". The NSBS is the governing body of a self-regulating profession. Law societies and self-governing professions in general are given considerable deference. In *Pearlman v. Manitoba Law Society Judicial Committee*[61] the Court noted the legislative rationale behind making the profession of law self-governing. It is a matter of public policy. Governments must respect the self-governing status of these bodies. The professions themselves have particular expertise and sensitivity to the conditions of practice in their professions.

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[58] *Dunsmui*r, supra., para. 54-55

[59] *Cartaway Resources Corp. (Re),* [2004] 1 S.C.R. 672.

[60] *Cooper v. Canada (Human Rights Commission),* [1996] 3 S.C.R. 854.

[61] [1991] 2 S.C.R. 869.

An autonomous legal profession is particularly important to a free and democratic society. Judicial intervention should take place only when it is clearly warranted.

d. The Purpose of the Legislation as a Factor

[142] The next issue is the purpose of the legislation and the provision under which the tribunal made its decision. When a tribunal is required to develop broad issues of public policy and apply those policies the courts should be hesitant to intervene.

[143] An example of that kind of administrative action can be found in *Sobeys West Inc. v. College of Pharmacists of British Columbia*[62]. The college passed regulations that were intended to limit the customer incentive programs that could be provided by pharmacies. Sobeys argued that there was no evidence of actual harm, the regulations went beyond what would be required to address any harms and the net effect of the regulations was to harm the public interest. Because what was being challenged was essentially the wisdom of the regulations, the standard of review was reasonableness.

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[62] 2014 BCSC 1414

[144] The purpose of the *Legal Profession Act* is to establish the parameters within which the self-governing profession of law will function. Some NSBS decisions could be of a strictly policy nature, such as establishing ethical obligations for lawyers or setting out the educational requirements for admission to the practice of law. In making those decisions it should have broad discretion. Courts do not intervene on the basis that other decisions might have better reflected the public interest in the practice of law. The NSBS has the legal right to made bad policy decisions about the practice of law.

e. The Nature of the Question as a Factor

[145] The court has to consider the nature or the kind of question before the administrative body. That has traditionally been where any hope of simplifying the process has been lost. How the question has been characterized has sometimes been determinative of the issue.

[146] Where issues of legal interpretation are involved the correctness standard applies to constitutional questions, questions of law that are both of "central importance to the legal system as a whole and outside the adjudicator's specialized

area of expertise,"[63] questions regarding the jurisdictional lines between specialized tribunals and the now exceptional category of questions of *vires* or true jurisdiction.[64]

[147] Constitutional questions are those that deal with the division of powers between Parliament and the provinces in the *Constitution Act, 1867*. Constitutional issues are necessarily subject to a correctness review because of the "unique role of s. 96 courts as interpreters of the constitution."[65] That test also applies to decisions of administrative tribunals determining the constitutionality of a law.[66] The issues involved here do involve constitutional considerations but are not division of powers issues or determinations as to whether a law that the NSBS has been called upon to apply is or is not constitutionally valid.

[148] A question of law that is of central importance to the legal system and outside the adjudicator's specialized area of expertise attracts review on the

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[63] *Dunsmuir*, para. 55

[64] *Canadian National Railway Co. v. Canada (Attorney General*, 2014 SCC 40 para 55; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General*), 2011 SCC 53, para. 18; *Alberta v. Alberta Teachers' Association*, 2011 SCC 61, para. 30

[65] *Dunsmuir*, para. 58

[66] *Dore v. Barreau du Quebec*, 2012 SCC 12, para. 43

standard of correctness. The purpose is to safeguard consistency in the fundamental legal order. What matters is whether the case involves an interpretation that is limited to the specific administrative or statutory scheme or has precedential value outside that regime. [67]

[149] It is difficult to deny that there are potentially far-reaching legal implications that will arise from the eventual resolution of this matter on appeal. Counsel for the Nova Scotia Human Rights Commission, intervening in support of the NSBS, confirmed at the very beginning of her argument that the issues here are of fundamental importance. She noted that this was probably the "most significant issue that has come since the Charter". The issues will in her view, determine the "very texture and fabric and the way we knit Canadian society together." A number of the seven intervenors appearing in support of TWU seemed to have agreed with her on that point, though perhaps only on that point. They expressed the view that the eventual decision in the case will affect the rights of religious schools and other religious institutions not only in Nova Scotia but elsewhere. While there are indeed greater social and political forces at work in determining

[67] *Canadian National Railway Co. v. Canada,* para. 60.

the nature of the Canadian social fabric, when viewed as a whole, the significance of this case is greater than a dispute between these parties.

[150] The manner in which a self-governing profession has to balance the implications of its decisions on the *Charter* rights of those affected by them is broadly significant. Whether, or the extent to which, the governing body of any self-regulating profession, in any province, can pass regulations that are directly aimed at the policies or practices of professional schools generally, or institutions in other Canadian jurisdictions is broadly significant. But, stating the question that way, turns it into what sounds like a jurisdictional question.

[151] That leads to jurisdictional considerations. Where the matter involves defining the jurisdictional borders between specialized tribunals or true questions of jurisdiction the correctness standard applies. There are no other specialized tribunals whose jurisdiction is claimed to overlap with that of the NSBS in this case. Jurisdiction is meant in the narrow sense of whether or not the tribunal had the "authority to make the inquiry".[68] True issues of jurisdiction arise when a tribunal must ask whether its statutory grant of power even gives it the authority to decide the matter in question.

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[68] *Dunsmui*r, para. 59

[152] Traditionally, judicial review focused on the issue of whether a question was one of jurisdiction. A decision could be quashed when the tribunal exceeded its jurisdiction. That amounted almost to a throwing down of the gauntlet for lawyers and judges to define jurisdiction in ever broader ways. It came to mean not only acting without statutory authority but asking the wrong question, making findings of fact without an evidentiary basis and other errors which were considered to justify intervention. Jurisdiction came to mean more than "true jurisdiction". That phrase now addresses the issue of whether the tribunal or decision maker was authorized to even be considering the issue that is decided.

[153] The "category of true questions of jurisdiction is narrow indeed."[69] As Justice Rothstein noted in *Alberta v. Alberta Teachers' Federation*[70], anything that a tribunal does involves a determination of whether it has the authority or jurisdiction to do what is being challenged. Unless the situation is exceptional the interpretation by a tribunal of its own statute or ones closely connected with it, with which it will have particular familiarity, are presumed now to be questions of statutory interpretation subject to a reasonableness standard.

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[69] *Alberta v. Alberta Teachers' Federation*, 2011 SCC. 61, para. 33.

[70] *Ibid.*,

[154] The issue then is what if anything is left of jurisdictional issues. There is some question as to whether questions of "true jurisdiction or *vires* have any currency"[71] at all anymore. Justice Rothstein said that he was unable to provide a definition of what might constitute a true question of jurisdiction. The idea is to eliminate the need for the old debate about whether something is jurisdictional or not. It appears safest to assume, for now, that getting into whether the decision was "jurisdictional" for purposes of the standard of review is not going to get anyone very far. That does not mean that administrative decision makers have unlimited authority to regulate beyond their ordinary scope. They simply have to be reasonable when making the decision to regulate, the same way that they have to be reasonable about how to regulate.

[71] *Canadian National Railway Company v. Canada (Attorney General)*, 2014 SCC 40.

1. The Standard of Review on the Issue of Whether the NSBS Acted Outside its Statutory Authority.

[155] The issue of whether in refusing the accept the TWU law degree the NSBS was in effect regulating a law school as opposed to defining a law degree would traditionally have been interpreted as an issue of *vires*. It deals with the question of whether an administrative body has attempted to indirectly exert influence on an institution to achieve what it could not do directly or has merely acted within its statutorily-defined jurisdiction. If the jurisdictional lines between specialized bodies are a question subject to a correctness standard of review, then the precise issue of whether what was done here amounted to extra-provincial regulation impinging on the authority of another province, might also be subject to a review based on that same correctness standard. It is not merely a question of whether the NSBS acted outside the authority granted by the provincial statute but whether it acted outside the province itself.

[156] However, the NSBS is in that situation interpreting its home statute with the presumption of a reasonableness standard of review. The shrinking of the scope of review on jurisdictional matters does not mean that every administrative actor has jurisdiction based on whim. Of course, the NSBS could not regulate doctors in Nova Scotia or lawyers in Nunavut. Administrative bodies still have to act within

their mandates. They are now seen as having more scope within which they can determine their mandates without court interference. The scope is defined by reasonableness.

[157] The NSBS is not a specialized tribunal but it is the governing body of a self-regulating profession, entitled to deference from the courts. The decision that was made did not involve an individual disciplinary case but did involve a policy decision. The NSBS cannot make policies about law schools but in determining whether what it is doing is regulating a law school or regulating the practice of law, it should be allowed some room.

[158] That precise issue, whether the decision by the NSBS was one that it had the authority to make, is not a question that is of broad application beyond the parties to this case. It is a matter of interpretation of the *Legal Profession Act* and does not implicate the kinds of matters that have the potential to affect the general law much less the very fabric of Canadian society. It is not an issue of law that is central to the legal system.

[159] On that first issue, the standard of review is the more deferential one of reasonableness.

2. The Standard of Review on the Issue of Whether Charter Values Were Properly Balanced

[160] The second issue is the matter of the balancing of *Charter* considerations. Whenever the *Charter* is being interpreted there is the potential for broader implications and on that point the observations about the importance of the case are apt. It could be argued that every time the *Charter* is interpreted or applied the matter is a question of law that is fundamental to the legal system.

[161] In *Dore v. Barreau du Quebec*[72] the Supreme Court confirmed that administrative decisions have to comply with the *Charter*. The issue was the standard of review with respect to discretionary decisions of administrative bodies that implicate *Charter* values. The problem is in drawing the distinction between a discretionary decision where *Charter* values are implicated and *Charter* matters themselves. Clearly, when a tribunal is considering the constitutionality of a law, the standard of review is correctness. But when deciding whether a decision maker has taken sufficient account of *Charter* values in making a discretionary decision, that test is too stringent.

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[72] 2012 SCC 12, para. 56.

[162] The choice was between saying that every time *Charter* values are implicated in a decision the usual reasonableness standard was transformed into a correctness one and saying that tribunals and courts both have specialized expertise when *Charter* values are being balanced. Administrative decision makers exercising discretionary powers under their home statutes have particular familiarity with the competing interests at play in weighing *Charter* values.[73]

[163] Reasonableness has to be assessed in the context of the kind of decision making involved. It is once again, a contextual inquiry.[74] That means that while deference is still justified on the basis of the decision maker's expertise and proximity to the facts of the case,[75] and administrative decision-makers are best positioned to consider the impact of the *Charter* on the facts of a given case, both the decision-maker and reviewing court have to be aware of the fundamental importance of the *Charter*.

[164] The question on judicial review is whether in assessing the impact of the *Charter* protection, and given the "nature of the decision and the statutory and

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[73] *Dore,* para. 47

[74] *Catalyst Paper Corp. v. North Cowichan (District)* 2012 SCC 2, para. 18.

[75] *Dore*, para. 54.

factual contexts", the decision "reflects a proportionate balancing of the *Charter* protections at play."[76] The issue is one of proportionality. The question is whether in the relevant context, the decision maker "properly balanced" the relevant *Charter* values with the statutory objectives within a "margin of appreciation". If the decision maker has properly balanced the *Charter* values and statutory objectives the decision is reasonable. It may be assumed, conversely that , if the decision-maker has not properly balanced the *Charter* values, within that scope of deference or margin of appreciation, the decision is unreasonable.

[165] Here, the decision of the NSBS is not a disciplinary matter within which *Charter* values have to be balanced. It is not a matter that involves the interpretation of the details of *Legal Profession Act* or the internal governance of the NSBS. It is not a technical review of the curriculum appropriate for law students or about the specifics of professional training that they will receive. It is directly about how the profession in Nova Scotia will respond to the tension between freedom of religion and equality rights. In applying a reasonableness standard, if the NSBS properly balanced the *Charter* considerations, within a

[76] *Dore*, para. 57

"margin of appreciation", its decision will be found to be reasonable. If it failed to do so, it is not reasonable.

6. Does the NSBS have the Authority to Regulate?

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

[167] There are three aspects of the proposed TWU law school to which regulation could conceivably be aimed or directed. The first is the graduate of the university

who actually seeks admission to the bar of Nova Scotia. Graduates who do not seek admission here could have no impact on the practice of law here. The second is the quality of the law degree granted to a person seeking admission to practice in Nova Scotia. The third is the institution itself and its policies.

[168] Once the graduate applies for an articling position in Nova Scotia the NSBS can determine whether or not he or she should be permitted to article. The profession of law is no place for the bigoted or the intolerant. The NSBS has agreed that TWU graduates will be no less willing and capable to comply with ethical requirements to respect LGBT equality rights than anyone else. TWU graduates receive proper training in the ethical issues regarding non-discrimination and equality. There is no reason to place any additional burden on TWU graduates to make sure that they are willing to comply with their ethical obligations. Refusing to accept a TWU law degree has nothing to do with weeding out bigoted or intolerant lawyers.

[169] The NSBS has an obligation make sure that students have the appropriate legal education in order to equip them to practice law in Nova Scotia. The NSBS has the authority to establish qualifications for those seeking admission to the profession. Under that authority it has passed regulations that allow the NSBS to define what law degrees it will accept. The NSBS of course does not have the

authority to define what is or is not a "law degree" in Nova Scotia or anywhere else. That is an academic degree and a matter over which the NSBS has no legal authority. Its definition of the degree is for its own regulatory purposes only.

[170] If the law degree does not prepare a person to practice, the NSBS can certainly prevent that person from practising in Nova Scotia. The degree to be granted by the proposed TWU law school was approved by the Federation of Canadian Law Societies. That was, until this action was taken, enough to establish that it was a law degree, in the sense that it properly educationally equipped students to practise law. The NSBS then determined that a TWU law degree was not a law degree for its purposes until TWU stopped discriminating, at which point the TWU law degree, which would otherwise be exactly the same law degree that it was before, would become, once again, a law degree. If by that the NSBS is defining a law degree, or more generally defining academic qualifications, it is doing so in a way that is passing strange. It has been acknowledged that there is in fact nothing about a TWU law degree that makes it something less than or other than a law degree. Deeming it to not be a law degree unless something unrelated to the law degree is changed is perhaps a clever way to extend the reach of the NSBS. But for the NSBS to say that it is just defining a law degree would mean that its definition of law degree would have to be an entirely arbitrary turning on and off

of the definition based on considerations entirely unrelated to the definition. That's not regulating a law degree. It's using the law degree to get at something else.

[171] The NSBS was not regulating the graduate and was not regulating the law degree. On its face it seems to be purporting to regulate the law school itself. The resolution passed by the NSBS refuses to recognize Trinity Western University's proposed law school. The resolution says nothing about the qualifications of law students but is directed at the law school.

[172] The regulation passed to implement the resolution focuses on whether the university that grants the law degree, in the opinion of the Council, discriminates in its policies. Once again, though couched in terms of approving the law degree, the action is directed toward the institution of the law school and not the quality of the law degree, or the qualification or lack of qualification of the student or potential lawyer in Nova Scotia.

[173] The NSBS of course has no statutory authority to regulate a law school or university outside Nova Scotia or inside Nova Scotia for that matter. There are other regulators in Nova Scotia and in other provinces who have the authority to determine how degree-granting institutions function, including whether they comply with human rights legislation, workplace safety regulations, employment

standards regulations, charitable status reporting requirements, and the entire intricate legal web of obligations that apply to post-secondary educational institutions. Legal practice and legal education are now quite different things. Many people receive a legal education and never practice or intend to practice law. An interpretation of the *Legal Profession Act* that supported NSBS general regulatory power over every law school in Canada would undoubtedly prompt a deluge of articles in learned legal journals in support of the traditional independence of those institutions.

[174] The NSBS has no authority whatsoever to dictate directly what a university does or does not do. It could not pass a regulation requiring TWU to change its Community Covenant any more than it could pass a regulation purporting to dictate what professors should be granted tenure at the Schulich School of Law at Dalhousie University, what fees should be charged by the University of Toronto Law School, or the admissions policies of McGill. The legislation, quite sensibly, does not contain any mechanism for recognition or enforcement of NSBS regulations purporting to control how university law schools operate because it was never intended that they would be subject to its control. If it did, the operations of every law school in the country would be subject to the varying requirements of, potentially, 14 law societies. Each could require, for its purposes, that harassment

policies reflect its protocols and the human rights legislation in its own jurisdiction, or require admission policies that prefer the equity-seeking group that each law society determines has been most historically disadvantaged.

[175] The NSBS cannot do indirectly what it has no authority to do directly. TWU or any other law school can do whatever it wants. It need not worry about a NSBS regulation that requires it to do anything. But the NSBS has used the arbitrary on-off definition of "law degree" to impose a penalty on the graduate. When a body purporting to act under legislative authority imposes a sanction in response to non-compliance with its directives, that's regulation. The NSBS is attempting to regulate TWU and its policies.

[176] Recognizing a degree from a law school that "unlawfully discriminates" is argued to be not in the public interest. The public interest in the practice of law does not extend to how law schools function. Neither the degree of moral outrage directed toward the policy, nor the extent to which it is deemed to be in the public interest to attack it, change that. It does not expand the NSBS authority into areas where it would otherwise not have jurisdiction. It does not act as a self-standing grant of jurisdiction.

[177] There is of course a presumption that regulations are valid and, where possible, a regulation should be construed in a way that makes it *intra vires*. [77] The inquiry is not into the relevant political, social or economic considerations and it is not a matter of the court considering whether regulations will indeed achieve the statutory objectives as broadly interpreted. They must be "irrelevant", "extraneous" or "completely unrelated" to the statutory purpose to be found to be outside the statutory mandate.[78] While it is possible to strike down regulations on this basis, it takes "an egregious case to warrant such action."[79]

[178] The Community Covenant, a non-academic policy at a university that is subject to the regulatory regime in British Columbia, is unrelated to, irrelevant to and extraneous to the practice of law in Nova Scotia. The fact that people in Nova Scotia are troubled by it does not make directing a regulation to it any less the regulation of university policy. If the public interest in the practice of law in Nova Scotia can be interpreted to include issues at universities that grant law degrees but do not affect the quality of their graduates it would justify expansively broad NSBS regulatory involvement. In argument, counsel for the NSBS said that the

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[77] *Katz Group Inc. V. Ontario (Health and Long-Term Care,* 2013 SCC 64, para. 25.

[78] *Ibid.* para. 28

[79] *Thorne's Hardware Ltd. v. The Queen,* [1983] 1 S.C.R. 106, p.111, cited in *Katz* at para. 28.

NSBS just would not use that public interest jurisdiction to intervene in matters that were "incidents", such as invitations to politically or morally offensive guest speakers or, presumably, to things like the resolution of individual human rights complaints, the hiring and dismissal of teaching staff or the granting of tenure. But it could potentially intervene in dealing with "systemic" issues. Presumably that would mean that a university policy on harassment that was considered weak or ineffective could come under NSBS scrutiny, as could personnel or human resources policies, insufficiently robust affirmative action admission or hiring policies and even policies on who may or may not be invited to speak at the law school. It would permit the NSBS to require universities in other Canadian jurisdictions to comply with Nova Scotia law, even if that law conflicted with the law of their own province.

[179] Counsel agreed that the NSBS could become engaged if a law school's tuition were considered too high so that low income Nova Scotians were further disadvantaged with regard to admissions. Law schools might be required to admit a certain percentage of Nova Scotians. While the NSBS would have to consider the many implications of those actions, not least the constitutional ones, in counsel's view, it would not be deterred by want of jurisdiction. All that would be accomplished by simply deeming what would otherwise be a law degree to not be

a law degree for purposes of the NSBS. If the public interest jurisdiction of the NSBS extends to university policies, and it is not entirely clear why if that were the case it would not apply to "incidents" as well, the NSBS would have the authority to compel any law school in the country to follow its directives on a wide range of matters that engage the public interest, in order to have its graduates eligible for admission to the practice of law in Nova Scotia.

[180] The NSBS action is not directed toward preventing discrimination against anyone in Nova Scotia. It is not intended to prevent anyone from being treated unequally in Nova Scotia. It is not directed toward the academic qualifications of the graduate. It is not directed toward any lack ethical training with respect to equality rights. It is directed squarely toward a university policy. The policy is the subject of the regulation. The outrage, sense of emotional pain, minority stress or hurt feelings that some Nova Scotians experience from knowing that a person trained at a university in British Columbia that does not recognize same sex marriage can still potentially become a lawyer in Nova Scotia, does not change the fact that what the NSBS is purporting to regulate is a university policy.

[181] The NSBS did not act reasonably in interpreting *the Legal Profession Act* to grant it the statutory authority to refuse to accept a law degree from TWU unless

TWU changed it Community Covenant. It had no authority to pass the resolution or the regulation.

7. The Charter Issue

[182] TWU argues that the NSBS did not properly consider the rights to freedom of religion and freedom of conscience when it made its decision. NSBS says that it did not infringe on any *Charter* rights and if it did, it reasonably balanced equality rights and the rights to freedom of religion and freedom of conscience.

a. British Columbia College of Teachers v. Trinity Western University

[183] TWU argues that the *Charter* issue has already been decided by the Supreme Court of Canada. The case involved not only issues that are similar but the very same university and its school of education.

[184] In *British Columbia College of Teachers v. Trinity Western University*[80] *(TWU v. BCCT),* the Supreme Court dealt with the issue of whether the British Columbia College of Teachers ("BCCT") could refuse to certify teachers from TWU because of the discriminatory nature of its Community Standards policy. The BCCT had, as one of its statutory objects, to establish standards for public teaching, "having regard to the public interest". At that time, there were three academic criteria and there was no evidence that the TWU program would not meet them. The rejection of TWU was based on the discriminatory practices which the BCCT found to be contrary to the public interest and public policy. The Community Standards document in 2001 was more sharply worded than the current Community Covenant. It required students to refrain from practices that are "biblically condemned" including the "sexual sins" of premarital sex, adultery, homosexual behaviour and viewing pornography.

[185] The BCCT refused to recognize the TWU program and TWU sought judicial review. Its first argument was that the college did not have jurisdiction to even consider its discriminatory practices. That argument did not really get out of the gate. The reason for that is important. The Court held that because teachers were a

[80] 2001 SCC 31

medium for the transmission of values it was important for teachers to understand issues of diversity. It was entirely appropriate for the college to consider all features of the education program and not limit itself to a determination of skills and knowledge. The college after all had a public interest aspect to consider and even though it was not applying the *Charter* or human rights legislation directly, it was entitled to consider those issues:

> It is obvious that the pluralistic nature of society and the extent of diversity in Canada are important elements that must be understood by future teachers because they are the fabric of the society within which teachers operate and the reason why there is a need to respect and promote minority rights. The suitability for entrance into the profession of teaching must therefore take into account all features of the education program…Schools are meant to develop civic virtue and responsible citizenship, to educate in an environment free of bias, prejudice and intolerance. It would not be correct, in this context, to limit the scope of s. 4 to a determination of skills and knowledge. [81]

[186] The Court noted that the college was required to consider equality concerns and the protection against discrimination based on sexual orientation. It was also required to consider issues of religious freedom. The issue as described by the Court was how to "reconcile the religious freedoms of individuals wishing to

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[81] *Ibid*. para. 13

attend TWU with the equality concerns of students in B.C.'s public school system."[82]

[187] The Court said that the potential conflict should be resolved through the proper delineation of the rights and values involved. Neither freedom of religion nor the guarantee against discrimination is absolute. One right is not privileged at the expense of another. There is no hierarchy of rights.

[188] The Court concluded that the decision of the college placed a burden on the members of the religious group who wished to associate with each other. If the university refused to abandon its standards, students would not have the opportunity to affirm their beliefs by attending TWU and hope to be certified as teachers. The Community Standards, the predecessor to the Community Covenant, was found to prescribe conduct of members while at TWU, but was not sufficient to support the conclusion that the college should anticipate intolerant behaviour by TWU trained teachers in public schools. If that document would be enough to justify denying accreditation, the same then could be said of membership in a particular church. In other words, attendance at TWU and adherence to its

[82] *Ibid.* para. 28

standards was not sufficient evidence to base a concern that the person will be intolerant or will not be able to teach tolerance.

[189] Maintaining the conscientious belief that homosexual behaviour is a sin does not necessarily lead to intolerant behaviour. In this case, the NSBS is not saying that it would. The BCCT claimed that TWU graduates would be intolerant toward LGBT people, in effect tainting them with their association with the university. The NSBS does not make that claim.

[190] The Court went on to state that the consideration of human rights values encompasses consideration of the place of private institutions and reconciling competing rights and values. There was nothing in the Community Standards document to indicate that graduates of TWU would not treat homosexuals fairly and respectfully. Freedom of religion was not accommodated if the consequence of its exercise was the inability to obtain a teaching certificate.

> Clearly, the restriction on freedom of religion must be justified by evidence that the exercise of this freedom of religion will, in the circumstances of this case, have a detrimental impact on the school system. Instead, the proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them.[83]

[83] *Ibid*. para. 35, 36.

[191] The Court went on to say that the college did not impose a test on applicants from other universities to screen out those who held sexist, racist or homophobic beliefs. People are entitled to those beliefs. They just are not entitled to act on them. There was no specific evidence to support a concern about teachers educated at TWU. Concerns should go to risk not general perceptions. [84]

[192] It has been argued that the *TWU v. BCCT* case is not binding authority. The law relating to freedom of religion and sexual orientation has evolved considerably since 2001. The social facts before the court are different in this case. Decisions of the Supreme Court of Canada are binding authority. If they aren't, the whole concept of *stare decisis* would have been rendered pretty much meaningless. The Court itself however has acknowledged that precedents do not have an indefinite shelf life. Decisions can be revisited, though the threshold is not easily reached. There has to be a new legal issue raised, or a significant change in the circumstances or evidence.[85]

[193] On its face, the *TWU v. BCCT* decision is very much on point. That is not merely because the case involves the same university. Both in this case and in the

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[84] *Ibid.* para. 38.

[85] *Canada (Attorney General) v. Bedford* 2013 SCC72, para. 44.

TWU v.BCCT case the bodies that were required to make a decision about accreditation or approval had a mandate to act in the public interest. In both cases a form of document, whether it be a covenant or community standard, required students to abstain from behaviour that amounted to imposing restrictions on LGBT students. In both cases, there was no specific evidence to allow the reasonable inference to be made that a graduate of TWU would act in a way that was intolerant or discriminatory.

[194] While the *TWU v. BCCT* case was concerned about the direct impact on public schooling in the province, the NSBS position is somewhat more subtle. It is not saying that TWU lawyers will be bigots or that they will not uphold ethical standards respect, equality and non-discrimination. The NSBS is asserting that while TWU law graduates will be no more likely to act in ways that are discriminatory, accepting a law degree from the institution would amount to condoning discrimination. In that sense the approach and the issues are different from that of the *TWU v. BCCT* case. The earlier case was dealing with a misplaced concern regarding the ability of TWU trained teachers to respect equality and diversity. In this case, that concern has specifically removed from consideration. It is about the public perception of accepting an otherwise acceptable law degree from TWU.

[195] It cannot be denied that considerable progress has been made in the last 14 years on issues of gay and lesbian rights, particularly in terms of widespread public acceptance. At the same time however, the decision in *TWU v. BCCT* is not out of step with current legal thought or social values. It does not reflect a less respectful view of the position of LGBT people in society than would be the case today. It acknowledges the fundamental importance of equality values as they relate to the LGBT community. It is not just about those values though. It is about how those values and the values of freedom of conscience and freedom of religion relate.

[196] The conversation between equality and freedom of conscience has not become old fashioned or irrelevant over the last 14 years, and the Supreme Court's treatment of it can hardly now be seen as archaic or anachronistic. Equality rights have not jumped the queue to now trump religious freedom. That delineation of rights is still a relevant concept. Religious freedom has not been relegated to a judicial nod to the toleration of cultural eccentricities that don't offend the dominant social consensus.

[197] In *Syndicat Northcrest v. Anselem*[86] the Supreme Court of Canada said that freedom of religion was to be interpreted to be "broad and expansive" and should

[86] 2004 SCC 47

not be prematurely narrowly construed.[87] In 2006 the court in *Multani v. Commission scolaire Marguerite-Bourgeoys*[88] confirmed that in the *BCCT* case there had been "no conflict of fundamental rights" and thus no need to "prefer" one over the other.[89] That case involved the religious right of a Sikh student to wear a ceremonial dagger to school.

[198] In *S.L. v. Commission scolaire des Chenes* [90] parents sought to have their children excluded from the Ethics and Religious Culture program which had been set up by the Quebec government to replace the Roman Catholic and Protestant programs of religious and moral instruction. The parents said that it would infringe on their ability to provide religious instruction to their children by exposing them to what the parents considered to be religious relativism. The Supreme Court of Canada concluded that the course was not a form of indoctrination but simply exposed children to various religions. Justice Deschamps noted that the place of religion in civil society had been a source of public debate "since the dawn of civilization". Governments remain neutral on religion and while the concept of

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[87] *Ibid.* para. 62.

[88] 2006 SCC 6.

[89] *Ibid.* para. 28.

[90] 2012 SCC 7.

state neutrality of religion has developed it has done so alongside a "growing sensitivity to the multicultural makeup of Canada and the protection of minorities."[91] Trying to have religious neutrality in the public sphere is a major challenge for the state. Justice Deschamps cites Richard Moon, in "Government Support for Religious Practice" in *Law and Religious Pluralism in Canada:*[92]

> Ironically then, as the exclusion of religion from public life, in the name of religious freedom and equality, has become more complete, the secular has begun to appear less neutral and more partisan. With the growth of agnosticism and atheism, religious neutrality in the public sphere may have become impossible. What for some is neutral ground on which freedom of religion and conscience depends is for others a partisan and anti-spiritual perspective.[93]

[199] Justice Deschamps suggests that we might have to accept that from a philosophical standpoint absolute neutrality does not really exist, but absolutes hardly have any place in law in any event. A realistic and non-absolutist approach to assure state neutrality in religion involves the state neither favouring nor hindering a particular belief. It must show respect for all postures toward religion,

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[91] *Ibid*. para. 21

[92] Vancouver: UBC Press (2008) 217.

[93] Moon,p. 231, cited in *S.L. v. Commission scolaire des Chenes,* at para 30.

including no religion, while taking into account the competing constitutional rights. That is not inconsistent with the approach taken in *TWU v. BCCT*.

[200] In *R. v. N.S.*[94] the court dealt with the issue of whether a witness should be permitted to wear a niqab that covered her face while testifying in court. The issue of trial fairness is of course of fundamental importance but the "need to accommodate and balance sincerely held religious beliefs against other interests is deeply entrenched in Canadian law." Religious rights should not be limited in situations where there is no good reason for the limitation. [95] Religious rights have not been marginalized or in any way required to give way to a presumption that equality rights will always prevail.

[201] More recently, in *Saskatchewan (Human Rights Commission) v. Whatcott*,[96] the court again rejected the hierarchical approach to rights. The case involved the balancing of freedom of conscience, religion and expression with equality rights. Whatcott distributed flyers that were alleged to constitute hate speech on the basis of sexual orientation. There is an important distinction between "the expression of

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[94] 2012 SCC 72.

[95] *Ibid.* para. 56.

[96] 2013 SCC 11.

repugnant ideas and expression which exposes groups to hatred. "[97] Hate speech legislation does not prohibit the expression of repugnant or offensive ideas or even that which advocates the reduction of the rights of vulnerable members of society. It does not target the ideas but the mode of their expression in public.

[202] Justice Rothstien confirmed that courts are required to balance the

> fundamental values underlying freedom of expression (and later freedom of religion) in the context in which they are invoked, with competing Charter rights and other values essential to a free and democratic society, in this case, a commitment to equality and respect for group identity and the inherent dignity owed to all human beings.[98]

[203] The position of the court is again not substantially different in *Whatcott* from *TWU v. BCCT*. The same kind of balancing has to take place and equality rights are not privileged over freedom of conscience or freedom of religious expression.

> Expression criticizing or creating humour at the expense of others can be derogatory to the extent of being repugnant. Representations belittling a minority group or attacking its dignity through jokes, ridicule or insults may be hurtful and offensive. However for the reasons discussed above, offensive ideas are not sufficient to ground a justification for infringing on freedom of expression. While such expression may inspire feelings of distain or superiority, it does not expose the targeted group to hatred. [99]

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[97] *Ibid.* para. 52.

[98] *Ibid.* para. 66.

[99] *Ibid.* para. 90.

[204] People are not protected from being offended or suffering minority stress by the exercise of another person's freedoms, even if that expression is objectively offensive. Justice Rothstein went on the say with regard to religious freedom that "the protection provided under s. 2(a) should extend broadly."[100] Two of Whatcott's flyers were photocopies of classified advertisements from a publication called *Perceptions*. Printed in hand at the top, were the words, "Saskatchewan's largest gay magazine allows ads for men seeking boys". He added a biblical reference, "'If you cause one of these little ones stumble it would be better that a millstone was tied around your neck and you were cast into the sea,' Jesus Christ". Whatcott also added, "[t]he ads with men advertising as bottoms are men who want to get sodomized. This shouldn't be legal in Saskatchewan."

[205] The court held that while the expressions were offensive, that is not enough. There is no legal protection from offense. With respect to the excerpt from the Bible the court agreed with comments of Richards J.A. in *Owens v. Human Rights Commission (Sask.)*[101] urging care in dealing with whether the foundational

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[100] *Ibid.* para. 154.

[101] 2002 SKQB 506, rev'd 2006 SKCA 41.

documents of a religion violate human rights legislation.[102] Even if Mr. Whatcott's words were interpreted as urging that homosexuality should be made illegal, the flyers were "potentially offensive but lawful contributions to the public debate on the morality of homosexuality."[103]

[206] With respect, some might wonder at the use of the word, "potentially." They might also ask, "Public debate? What public debate?" Many people consider that any debate about the morality of homosexuality is over. The only people talking about it are seen by many as being out of touch with modern mainstream society and those who have not realized that the issue just is not relevant to most people anymore. But Justice Rothstein's point is that there are large sections of society that have different views. Those views for some are based on interpretations of sacred texts and religious traditions. The freedom to hold those views is protected. How those views are expressed and made part of public debate and how those views are put into practice must be considered as part of the delineation and balancing process. But a person has a constitutional right to express religiously

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[102] *Ibid.* para. 78.

[103] *Whatcott*, para. 200.

based views that ridicule, belittle, or affront the dignity of other people, including sexual or other minorities.

[207] That all appears to be quite a far cry from the kind of development by which secular concerns and equality rights have expanded so that there is little or no room for religious freedom and freedom of religious expression that offends those values. The decision in *TWU v. BCCT* has not been overtaken by other developments and is not an expression of outdated concepts involving the intersection of rights.

[208] The facts of the case are not identical and the arguments are different. It is not determinative of this case but the principles still apply.

b. Carving Out a Space

[209] The application of those principles to the issue of the proposed school of law is not simply a matter of noting the similarities. The issue for decision in this matter includes considerations beyond those involved in the *TWU v. BCCT* case. The NSBS has made its decision based not at all upon the concern about an influx

of potentially intolerant law students from TWU. It is more with the concern that as a province and a profession that has a history of systemic racism and inequality that it has over the last number of years made great efforts to overcome, there is a public interest in not countenancing discrimination in any form. The approval of a law school which openly discriminates against LGBT students could be seen as a significant step back. It is not about anyone being discriminated against in Nova Scotia but about the profound sense of hurt that people feel when witnessing discrimination elsewhere and the compounding of that hurt by the NSBS being seen as approving of it.

[210] The issue is how that response to a troubled history of racism and inequality intersects with the values that underlie freedom of conscience.

[211] In a 2004 article entitled "Freedom of Religion and the Rule of Law: A Canadian Perspective,"[104] Chief Justice McLachlin commented on what she referred to as the "seemingly paradoxical task" faced by the law in asserting its own authority while at the same time "carving out a space within itself" in which communities can manifest alternate and often competing sets of ultimate

[104] McLachlin, Rt Hon Beverley, in *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion and Public Policy* (Quebec City: McGill-Queen's University Press, 2004)

commitments.[105] Both law and religion make comprehensive claims. For society to function it has to be able to depend on a general consensus with respect to certain norms. On the other hand, in society there is a value placed on multiculturalism and diversity, which includes a commitment to freedom of religion. The beliefs and actions manifested when that freedom is granted can collide with conventional legal norms:

> What is good true and just in religion will not always comport with the law's view of the matter, nor will society at large always properly respect conscientious adherence to authorities and divergent normative or ethical commitments. Where this is so, two comprehensive world views collide.[106]

[212] The issue of how to honour the comprehensive nature of religion's claim on a person's life while recognizing the rule of law involves a tension that the Chief Justice calls the "dialectic of normative commitments".[107] The dialectic has to be resolved by reaching synthesis. The role of the courts is to reconcile competing cultural values to "carve out" a space within the rule of law within which those

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[105] *Ibid*. page 16.

[106] *Ibid*. page 21.

[107] *Ibid*. page 21.

religious claims to authority can operate, "manifest and flourish".[108] The language of carving out may to some carry the negative connotation of the state granting permission for a reserve within which religion may function, but the point is that religious claims are seen as legitimate expressions. That dialectic does not suggest that those who hold religious views should be educated by the state in more appropriate secular values to create a moral melting pot.

[213] From *TWU v. BCCT* to *Whatcott* the Supreme Court has dealt with those competing normative commitments. Equality rights are of fundamental importance. The court has made clear that freedom of conscience and expressions of religious freedom are also fundamental. The synthesis between them involves delineating the rights themselves. In the case of equality rights they do not extend to the protection of vulnerable groups from hurtful statements or from statements that do not respect dignity and equality. Freedom of religion does not extend to hate speech nor does it provide a cover for other intolerable behaviour.

[108] *Ibid.* page 29.

c. Decision or Regulation?

[214] In these cases the process, or perhaps the way the dialectic is expressed, seems to depend on whether what is being considered is an administrative decision or a regulation. Another way to define the two types of analysis is to describe one as applying to cases where there are *Charter* rights or considerations involved on both sides and the other applying to cases in which there are statutory or public interests that intersect with *Charter* rights. In each case *Charter* considerations are involved but the analysis is driven by the context.

[215] Here, the NSBS passed a resolution by which it refused to "approve" the proposed law school at TWU. That on its face is an administrative action. That action was followed by the passing of a regulation which gave effect to the resolution by stating that Federation-approved law degrees would be accepted unless the NSBS Council "determines that the university granting the degree unlawfully discriminates in its law student admission or enrollment policies on grounds prohibited by either or both the *Charter of Rights and Freedoms* and the *Nova Scotia Human Rights Act*." That of course is a regulation which would be reviewed having regard to a somewhat different test to determine whether *Charter* rights were properly considered.

[216] The two kinds of analysis are certainly not inconsistent and both are aimed at achieving a reconciliation that is both principled and at the same time, contextual. There is little value in considering each matter separately. The regulation was passed to implement the resolution and the same considerations applied.

[217] When dealing with the balancing and delineation of rights the analysis is as set by the Supreme Court of Canada in *R. v. N.S.*[109]. In that case the Court applied an approach based on *Dagenais v. Canadian Broadcasting Corp*.[110] and *R. v. Mentuck*[111]. In *R. v. N.S.* the Court was dealing with how freedom of religion as manifested in the right to wear a niqab intersected with the right to a fair trial of a person accused of a crime by a person who wished to wear a niqab in court. The first question is whether there has been an infringement of a right and if so, whether it was more than trivial and insubstantial. The second question is whether there is also a competing *Charter* right on the other side of the case. If there are competing rights the issue is whether there are alternative measures by which both rights can be accommodated. Finally, the court has to consider the salutary effects

[109] 2012 SCC 72.

[110] [1994] 3 SCR 835.

[111] [2001] 3 SCR 442.

of the administrative action on one right or set of rights and the deleterious effect on the other. That involves a consideration of whether one right has been disproportionately affected or the other disproportionately privileged.

[218] When considering whether an administrative actor properly considered the *Charter* implication of a regulation the process is somewhat different but the effect is essentially the same. It is the same kind of analysis applied to any legislation that is the subject of a Charter challenge. The Supreme Court of Canada decision in *Alberta v. Hutterian Brethren of Wilson Colony* [112] is an example of that. In that case the Wilson Colony challenged the requirements imposed by Alberta legislation that a driver's licence must have on it a picture of the licence holder. The Hutterites of the colony practised a religion that forbade their having their photographs taken. The province agreed to lessen the impact by issuing licences without the photographs but still required that the pictures be taken and kept in a data bank. The universal photo requirement was held to constitute a limit on freedom of religion and thus an infringement of the colony members' s. 2(a) *Charter* rights. An infringement is made out when the claimant sincerely maintains a belief or practice that has a nexus with religion, and the impugned measure

[112] 2009 SCC 37.

interferes with the claimant's ability to act in accordance with those beliefs in a way that is more than trivial or insubstantial.[113] Trivial or insubstantial interference is interference that does not threaten the belief or conduct.

[219] If an infringement has been found, the issue is whether the regulation can be justified under s. 1 of the *Charter* as a reasonable limit in a free and democratic society. That involves the application of the test in *R. v. Oakes*[114] which is essentially a proportionality test. The first step is to determine whether the limit is one that has been prescribed by law. It does not matter whether the impugned measure was passed into law by statute or regulation. The next question is whether the purpose for which the limit is imposed is pressing and substantial. In other words, rights should not be infringed at all for purposes that just are not that important. If the goal of the regulation is pressing and substantial it must be asked whether this regulation is rationally connected to that goal. The government, or in this case, the NSBS, must "show a causal connection between the infringement and the benefit sought on the basis of reason or logic."[115] So, here, there has to be a causal link between the regulation and what was being sought to be achieved by it.

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[113] *Syndicat Northcrest v*. Amselem 2004 SCC 47.

[114] [1986] 1 S.C.R. 103.

[115] *RJR- MacDonald Inc. v*. *Canada*, [1995] 3 S.C.R. 199.

The next issue is whether the limit imposed by the regulation was a minimal impairment of the right. In other words, the question is whether the limit on the right was reasonably tailored to the pressing and substantial goal put forward so as to justify the limitation of the right. Was there a less harmful means of achieving the legislative goal? The legislature is accorded considerable deference dealing with complex social issues where the it is better positioned to choose among a range of alternatives.

[220] Finally the court has to assess the proportionality of the effects of the legislative action. At this stage the question is whether the overall effects of the regulation are disproportionate to the objective. Is the limit on the right proportionate in effect to the public benefit conferred by the limit? The more severe the deleterious effects of the measure the more important the objective has to be to be reasonable and demonstrably justified.

[221] The reason for setting out two well-known tests is to draw attention to similarities but also to the differences. While both involve considerations of proportionality, one focuses on a balancing of rights while the other focuses on the balancing of rights and the public objectives of legislation. With respect to the NSBS action, neither the resolution nor the regulation are expressions of the rights

of LGBT people. It is an expression of public policy by a state actor, the NSBS. The NSBS asserts that the action is in furtherance of those rights.

[222] The NSBS says that its actions here were mandated by the *Charter*. The *Charter* does not apply to TWU as a private institution.[116] But the NSBS argues that in deciding to accept a law degree from TWU the NSBS, as a state actor must comply with the *Charter* and that indirectly implicates TWU in *Charter* compliance considerations. That would have potentially very significant implications. Most directly it would apply the *Charter* to private religious institutions that sought any government recognition of their actions. It would transform it into a tool in the hands of the state to enforce moral conformity with approved values.

i. Was there an infringement?

[223] The first issue in any event is whether there has been an infringement of a right. NSBS has argued first that its decision does not infringe any *Charter* right.

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[116] "It is important to note that this is a private institution that is exempted in part from the British Columbia Human Rights legislation and to which the Charter does not apply." *TWU v. BCCT* para. 25

Freedom of religion protects a person's right to "hold and to manifest whatever beliefs and opinions his or her conscience dictates" free from any coercion or restraint."[117] It is about "freely and deeply held personal convictions or beliefs connected to a person's spiritual faith and integrally linked to one's self-definition and spiritual fulfillment."[118] It includes practices that allow a person to foster a connection with the subject of that faith. The purpose of that freedom was set out by Justice Dickson in *R. v. Big M Drug Mart Ltd*. Every individual is free to hold and manifest whatever beliefs his or her conscience dictates provided that those beliefs do not injure his neighbours or their rights.[119]

[224] What are protected are profoundly held beliefs and the freedom to express them and act in accordance with them. The activity must be religious, and must be grounded in such a sincerely held belief. The infringement has to be non-trivial.

[225] The NSBS argues that when those principles are applied to this case, there is no infringement. The refusal to approve a law school degree without the removal of the mandatory aspect of the covenant for law students does not affect a

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

[118] *Syndicat Northcrest v. Amselem*, 2004 SCC 47, para. 39.

[119] *R. v. Big M Drug Mart Ltd*., p. 346.

religious activity or the sincerely held religious beliefs of Evangelical Christians. A law school is not a church.

[226] The NSBS argues that there is no evidence to suggest that it is a tenet of belief that the study of law must be done in the company only of those who will comply with a code of conduct. Evangelical Christians must be willing to "share the air" with others. Removing the requirement that all law students sign the covenant would at most be a trivial and non-substantial infringement of the right. Evangelical Christian students could sign whatever covenant their religious convictions might require. Their religious rights are not infringed simply by having others with different beliefs in their midst.

[227] In the *TWU v. BCCT* decision the court found that a school of education at TWU was an exercise of religious expression.

> 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 in practice.[120]

[228] However, in that case, there was no option given to students to opt into signing a voluntary covenant, which is what the NSBS is suggesting here. The

[120] *TWU v. BCCT* para. 32.

NSBS says that it really should not matter to Evangelical Christians whether another person in their class has signed the covenant as long as they do so themselves.

[229] Of course, in the experience of most people, the study of law is a purely secular activity. In that view a religious person can attend a law school and govern himself or herself by whatever religiously informed code of conduct he or she decides to adopt. What others do is up to them. Some will follow those rules and some will not. From the point of view of those who are not Evangelical Christians that just makes sense.

[230] To Evangelical Christians it does not. Their religious faith governs every aspect of their lives. When they study law, whether at a Christian law school or elsewhere, they are studying law first as Christians. Part of their religious faith involves being in the company of other Christians, not only for the purpose of worship. They gain spiritual strength from communing in that way. They seek out opportunities to do that. Being part of institutions that are defined as Christian in character is not an insignificant part of who they are. Being Christian in character does not mean excluding those of other faiths but does require that everyone adhere to the code that the religion mandates. Going to such an institution is an

expression of their religious faith. That is a sincerely held believe and it is not for the court or for the NSBS to tell them that it just isn't that important.

[231] The affidavit of Dr. Robert Wood, the Provost of TWU, states that the Community Covenant is a code of conduct that embodies TWU's evangelical religious values. He states that "people reach their fullest potential in a community mutually committed to the observation of Biblical ethics and morality."[121]

[232] Dr. Wood goes on to state that the Community Covenant is a significant means of ensuring that TWU "maintains its religious character, achieves its mission and continues to attract students, faculty and staff that share its evangelical religious beliefs".[122] The mandatory covenant is part of what makes TWU a distinctly Evangelical Christian institution. It is easy for outsiders to point out aspects of a faith and practises of that that do not seem that important. We don't get to make that call.

[233] TWU of course is not a church. It defines itself as an arm of the church. It is directly run by Evangelical Christian churches on principles that those churches see as a reflection of their faith.

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[121] Wood affidavit, para. 88.

[122] Wood affidavit, para. 95.

[234] There is no real doubt here about the sincerity of the belief of those involved with TWU. It is a sincerely held belief not only that homosexual "behaviour" is sinful but that being at an institution with others who share their beliefs or who are committed a shared Christian life style, is important to their spiritual development. Courts do not engage in the process of determining what or is not a part of a religion's core beliefs. The state is in no position to be the arbiter of religious dogma and should avoid

> judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", "precept", "commandment", custom or ritual. Secular judicial determinations of theological or religious disputes or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion… That said, while the court is not qualified to rule on the validity or veracity of any given religious practices or belief, or to choose among various interpretations of belief, it is qualified to inquire into the sincerity of a claimant's belief, where sincerity is in fact an issue.[123]

[235] There is no doubt that the beliefs held by Evangelical Christians are sincere. They include the belief in the sanctity of the traditional marriage between a man and a woman. They include the belief in the importance of being in an institution with others who either share that belief or are prepared to honour it in their conduct. They have a right to hold those beliefs and the right to act upon them.

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[123] *Amselem*, para. 50, 51.

The state through the NSBS does not have the authority to try to coerce them into changing those beliefs so that they conform to those of mainstream society. If the state seeks to coerce them to change their actions that give effect to those beliefs it had better have a compelling reason.

[236] The court does not inquire into the details of sincerely held religious beliefs but does make the inquiry as to whether the infringement is trivial or insubstantial. If it is a sincerely held religious belief that learning in an environment where religiously motivated codes of conduct are uniformly enforced, making the code optional, essentially renders it no longer a code of conduct. That is not trivial or insubstantial.

[237] Requiring that TWU amend the Community Covenant in order to have its degrees accepted in Nova Scotia is an infringement of religious freedom and not a trivial matter.

ii. Was there a Pressing and Substantial Purpose?

[238] The second part of the analysis gets more complicated. Are the equality rights of LGBT people implicated at all? On one analysis the task is to delineate the rights on the other side of the equation. When legislative objectives are

involved on the other side it is a matter of determining whether they are pressing and substantial. In any event, it requires a determination of what there is that is supposed to justify infringement of the right asserted.

[239] The NSBS actions were taken in support of the rights of LGBT people but at the same time, this is not a situation in which there even are conflicting rights. The passing of the resolution and the regulation by the NSBS were not in themselves the exercise of equality rights. They were aimed at supporting equality rights but not in and of themselves manifestations of the exercise of those rights. The analysis then shifts, somewhat, to a consideration of the purpose of the NSBS actions.

[240] What then was the purpose? Why did the NSBS do what it did? It is described as having been because the TWU Community Covenant was discriminatory, so that failing to act as it did would be endorsing discrimination. The existence of the covenant would add to the stress felt by LGBT members of the bar if the NSBS accepted TWU law degrees, it would be an attempt to bring about a change in TWU's policies, and the action was to promote diversity and prevent barriers to entry to the legal profession.

[241] There is absolutely no doubt that dealing effectively with diversity in the legal profession is a pressing and substantial purpose. Actions have to be taken to insure that the history of discrimination is met head on with effective measures to make sure that groups that reflect the diversity of the province's population are properly represented within the legal profession.

[242] To the extent that the purpose can be said to be dealing with discrimination, that is a pressing and substantial objective in a general sense for the purpose of this analysis.

iii. Was the Means by Which the Goal Is Furthered Proportionate?

[243] At this point the issue becomes proportionality in one form or another. Has one right or the legislative objective been disproportionately privileged over the other right involved? The issue of proportionality is assessed first by considering whether the NSBS action was even rationally connected to the objectives of dealing with discrimination, directly or indirectly.

a. Rational Connection

[244] There has to be a connection between the infringement and the benefit sought on the basis of reason or logic. If the resolution and the regulation do not address the pressing and substantial objectives, or do not implicate other rights, the NSBS cannot rely on those pressing and substantial objectives to justify an infringement of rights. What the NSBS has done does not rationally relate to the important objective of dealing with discrimination.

[245] TWU operates in British Columbia. It has produced graduates for almost 50 years, with various forms of the Community Covenant. It has never been found to be in breach of British Columbia's human rights legislation and has had the Supreme Court of Canada consider the issue. It would be the height of provincial arrogance, in both senses of the word "provincial", to suggest that British Columbia has a less genuine respect for human rights values than Nova Scotia. It is a private university. The *Charter* does not apply to TWU. TWU is not engaging in unlawful discrimination. The fact that the NSBS and the Nova Scotia Human Rights Commission do not like it does not make it unlawful.

[246] Another concern is that that the approval would result in the perpetuation of the under-representation of LGBT people at the Nova Scotia Bar. It amounts to reserving 60 "scarce" law school positions in British Columbia for heterosexual people. LGBT people, according to the NSBS evidence, are already underrepresented in the profession of law. TWU and its still not operating law school had nothing to do with that state of affairs. But if 60 new spaces are opened up, there will be spaces for 60 people that are much more likely to be filled by heterosexuals. Of those 60 students, some may want to practice in Nova Scotia. That could increase the proportion of heterosexual lawyers.

[247] TWU's law school would add 60 students to a total class of about 2500 in Canadian common-law law schools. That is an increase of about 2.4%. Of that 2.4% some percentage may make their way to Nova Scotia. It is a stretch to speculate that requiring that group or individual to make special application for admission on as yet unknown criteria will help to improve the proportion of LGBT lawyers. Even if it did, placing a barrier before Evangelical Christians or those willing to associate with them, so that the proportion of LGBT lawyers is increased would be so inappropriate and wrongheaded that it could not possibly be what was intended. It amounts to a quota system by which TWU graduates who are more likely to be Evangelical Christians are discouraged from applying so that the

proportion of LGBT lawyers is raised. A more direct approach would be to directly limit the number of heterosexual articled clerks to reduce the disparity. That is every bit as strange as it sounds. That is not how social progress is achieved in a liberal democracy.

[248] Another concern, summarized very briefly, is that members of the LGBT community suffer stress whenever they become aware of discrimination against other LGBT people. The NSBS is concerned that by condoning discrimination through accepting TWU law degrees it is causing more stress in the lives of LGBT people.

[249] Dr. Mary Bryson has expressed an opinion with respect to the effects of TWU's Community Covenant on the wider community. Within the university, there is no doubt that LGBT staff and students would experience stigma and minority stress. They feel pressure to conceal sexual orientation. What is relevant at this stage of the inquiry is the effect that the Community Covenant might have on people who have never been to TWU or perhaps have never even been to British Columbia and have no intention to go there. She notes that research on the health impacts of living in states in the United States where the state has enacted laws that ban same-sex marriage provides "compelling evidence" to support the view that institutionalization by a regulatory authority, such as the NSBS, of

discrimination has deleterious effects on the larger LGB community. Where states do not recognize same-sex marriage there are higher rates of psychiatric disorders among LGB people.[124]

[250] Similarly, in professions where there remain forms of institutionalized discrimination against LGBT people significant deleterious effects have been found. Where a profession fails to implement an anti-discrimination policy, for example, there are negative effects that range from mental health issues to professional development.[125] Where professions sanction or lack a policy against discrimination that has serious detrimental consequences for LGBT people. Dr. Bryson goes on to state:

> Therefore, it is reasonable to conclude that the effects of the "freedom to discriminate" that has been provided to Trinity Western University – a freedom sanctioned by the state by means of its sanction of the TWU Community Covenant by recognizing its law education [sic] and degrees – these harmful effects stretch far beyond the bounds of any individual education setting and thus impact the larger lesbian, gay and bisexual community.[126]

[251] I accept the evidence that TWU's Community Covenant does indeed treat LGBT people in a way that would have profoundly negative effects of their lives.

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[124] Bryson affidavit, para. 20.

[125] Bryson affidavit, para. 21.

[126] Bryson affidavit, para. 23.

For many or most LGBT people the experience of attending such a place would be traumatic and potentially damaging.

[252] It is very clear that there are systemic and widespread effects of regulatory authorities' permitting or approving discrimination in institutional settings. Where discrimination is allowed to take place there are of course damaging effects. It is also not surprising that LGBT people suffer when they live in states where they are made to feel unvalued by the formal refusal to recognize equality rights through same-sex marriage.

[253] None of that has application here. The NSBS has taken active efforts to deal with discrimination against the LGBT community. It is simply not allowed within the legal profession in Nova Scotia. This is not in the least analogous to a profession that has failed to take steps to have appropriate policies or a state that has failed to recognize equality rights. Permitting TWU graduates to article in Nova Scotia will not open the door to discrimination in Nova Scotia.

[254] There is an important difference between the failure to regulate against discrimination in the profession and the failure to sanction someone else, somewhere else, for legally exercising a religious freedom. In other words, there is no evidence to support the claim that LGBT people or anyone else in Nova Scotia

will suffer psychologically or otherwise if they are aware that TWU students, subject to the same ethical requirements as others, can be admitted to the practice of law in Nova Scotia. That is particularly the case of LGBT people who are reasonably well informed about the relevance of the requirement to respect religious views and practices. There is no evidence beyond speculation that LBGT people in Nova Scotia are harmed in any way, however slight, by living in the knowledge that an institution in Langley British Columbia, which like any number of religious institutions in Nova Scotia, does not recognize same sex marriage but which properly educates lawyers who can practice law in Nova Scotia, where discrimination within the profession is strictly forbidden.

[255] More fundamentally the decision of the NSBS is about public confidence. Put more starkly perhaps, it is motivated by the question, "What will people think?" If the NSBS allows students from a law school that discriminates against LGB people it will appear hypocritical in light of its strong advocacy for equality rights. That will have the indirect impact, perhaps, of making LGBT people less likely to want to practice in Nova Scotia. They would in effect be saying, that despite all of the positive work that the NSBS has done the profession in Nova Scotia is no place for LBGT people because it accepts as a law degree a law degree from an institution that discriminates.

[256] This is about a point of principle. It has been made in the context of a history of systemic inequality in the Nova Scotia justice system. Inequality will no longer be tolerated by the bar in Nova Scotia. Human dignity matters. Some would say that it is a matter about which there should be no nuance.

[257] But what doesn't the statement say? It doesn't say that the Nova Scotia bar will not accept people who act in ways that fail to respect the equality rights of the LBGT community. It doesn't need to. The *Code of Professional Conduct* says that. Lawyers from any law school have to comply. Not accepting a TWU degree will not prevent any more bigoted lawyers from practising here than refusing the accept law degrees from other universities. It is not about what actually happens in Nova Scotia.

[258] It doesn't keep out lawyers who hold views that are exactly the same as those expressed by the TWU Community Covenant. There is no test for "aberrant" attitudes or "correct thinking". Lawyers are entitled to believe what they want. They are entitled to form associations of like-minded lawyers. There is no requirement to disaffirm religious or other beliefs that are out of step with equality values. There is no requirement to leave those beliefs at the door of the church, synagogue, temple, mosque or meeting hall, even if those beliefs result in discrimination being systemically practised by the institution of which the lawyer

is a member. But if the issue is about perception, what would the public think of a profession that permits lawyers to practice who sincerely believe that same sex marriage is morally wrong, who join organizations that advocate that belief and who form organizations of like-minded lawyers?

[259] The refusal to recognize the TWU law degree doesn't say that people associated with other organizations that may have a fundamental call on their consciences, such as churches, that teach that same-sex sexual intimacy is a sin and do not endorse same sex marriage, will not be permitted to practice law here because their association or membership might send the wrong message. Roman Catholics, to note but one example, belong to a worldwide communion of faith that does not permit women or married men to be members of the clergy. It teaches that homosexuality is a sin. It does not recognize same-sex marriage. Many or at least some members of that faith who are lawyers presumably believe those things. There is no question whatsoever that they are able to practise as lawyers who respect the equality and dignity of LGBT people. More significantly though, it is inconceivable that Roman Catholics would be banned from practice because of their association with a church that actively teaches those beliefs and what having them in the profession says about the value of equality rights. And it could be said that being an active member of a religious denomination connotes more of an

acceptance of the tenets of that faith than attending a university that imposes religious based behavioural restrictions on students. But again, what would people think of a profession that allows such people to practise law?

[260] The same presumably holds true for those who hold positions of responsibility for the governance of the profession. What does it say about equality within the profession if the President of the NSBS were a Roman Catholic, or Mormon or Evangelical Christian or Muslim who publically endorsed the belief system of that religious faith? What would it say to the LGBT community about the profession's commitment to equality? It is difficult to see that as being less significant than an articling student who may have chosen to attend a law school that may or may not reflect his or her beliefs. If the test becomes, "What does it say about equality if….?", then a hierarchy of rights has been established, with religious liberty relegated to vastly diminished status.

[261] The NSBS policy and regulation do not say that those who attend international universities where discrimination is practised and who have been admitted to the bar elsewhere will not be permitted to practise here. They do not say that someone who got another degree at TWU and who fervently and vocally agrees with its practises but who gets a law degree elsewhere cannot practise here.

[262] They don't even say that a person who obtains a law degree from TWU and practises in another province cannot transfer to Nova Scotia. They are prevented from doing that. A TWU law degree is a law degree then if the person who has it passes through another province first. In fact, the NSBS has maintained that an individual TWU law graduate may apply and may be admitted in Nova Scotia without being admitted elsewhere based on individual consideration of his or her TWU law degree. In other words, a TWU law degree is not a law degree, unless the student asks, in which case it might be a law degree for some and perhaps not for others on criteria that have not yet been established.

[263] The NSBS has made serious and meaningful efforts to deal with discrimination and particularly discrimination against LGBT people. This just isn't one of them.

[264] The NSBS is making a statement about equality and its refusal to allow the cloven hoof of discrimination in the door once again, but as a statement it does nothing to protect the equality interests of LGBT people. It is not rationally connected to the objective or purpose that is pressing and substantial which is redressing systemic discrimination in the profession. If it addresses only the need to make a statement of principle so as to not appear to be hypocritical, that is hardly a pressing and substantial purpose justifying the infringement of a *Charter*

right. If however making such a statement is indeed important, the statement made is hardly clear and unequivocal.

b. Minimal Impairment

[265] The issue of whether there has been minimal impairment is close to the issue of whether there can be some kind of accommodation of the rights. Was there another way that the objective could have been achieved that impaired the right less drastically? Could there have been an accommodation?

[266] The issue is then whether the NSBS could have made such a statement without infringing to the extent it did on the right to religious freedom. The NSBS action was not designed to minimally impair the freedom of religion and freedom of conscience. It made a passing nod to minimal impairment by applying its requirements only to law students. It did not require the removal of the Community Covenant, only its amendment so that discriminatory effects did not apply to law students.

[267] Rather than minimally impairing the right, that effort only points to the illogic of the position. Even if the NSBS concern is with avoiding hypocrisy it

would only forbid discrimination against law students but would have no issue with their being taught by professors, surrounded by other students, and subject to administrators, who would be subject to what it considers to be unlawfully discriminatory treatment. The problem with responding to the exercise of religious rights by making a point of principal is that an attempt at minimal impairment itself can lead to the perception of hypocrisy. If the concern is with how it looks, there isn't much choice but to go all the way.

c. Proportionate Effects

[268] On one side is a statement of principle. On the other a right to religious expression that is directly impaired.

[269] The action by the NSBS does nothing to prevent a single person in Nova Scotia from being the subject of any discriminatory action in relation to the legal profession. No lawyer will be less likely to discriminate and no person will be less likely to be discriminated against because of it. There is no evidence to support the contention that reasonably informed LGBT people will be more or less likely to find the profession a welcoming one as a result of this particular action. It will not

prevent the NSBS from being perceived as hypocritical. It will do nothing whatsoever to improve the status of LGBT people in this province.

[270] The impact on the religious expression would be to require it to be undertaken in a way that significantly diminishes its value. TWU's character as an Evangelical Christian University where behavioural standards are required to be observed by everyone would be changed. Replacing a mandatory code with a voluntary one would mean that students who wanted to be assured that they could study in a strictly Evangelical Christian environment would have to look elsewhere if they want to practice in Nova Scotia. That impact is direct.

The NSBS resolution and regulation infringe on the freedom of religion of TWU and its students in a way that cannot be justified. The rights, *Charter* values and regulatory objectives were reasonably balanced within a margin of appreciation.

8. Conclusion

[271] For many people in a secular society religious freedom is worse than inconsequential. It actually gets in the way. It's the dead hand of the superstitious past reaching out to restrain more important secular values like equality from becoming real equality. A more progressive society, on that view, would not permit any incursions by religion into public life or would at least limit those

incursions to those by religions that have belief systems and practices that are more consonant with mainstream morality. The discomforting truth is that religions with views that many Canadians find incomprehensible or offensive abound in a liberal and multicultural society. The law protects them and must carve out a place not only where they can exist but flourish.

[272] The NSBS position speaks on one level about equality as a value. It is a reflection of a moral matrix that privileges that value. It speaks in the language of that value. And it makes it entirely possible to say, "A law school that discriminates is just wrong. There is nothing to debate here."

[273] The other moral matrix speaks in the language of sanctity and privileges that value. It makes it entirely possible to say, "Homosexual acts are a sin. That is the word of God. There is nothing to debate here."

[274] Both are moral judgments. It has been said that morality binds groups together. It also blinds.[127] The values of the other are easily seen as merely prejudices.

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[127] Haidt, Jonathan, *The Righteous Mind; Why Good People are Divided by Politics and Religion* (Pantheon Books: New York, 2012).

[275] Tolerance, the ambiguous and paradoxical concept that it is, acts not so much as a boundary as the synthesis of the dialectic of competing values referenced by Chief Justice McLachlin. Unless tolerance engages the incomprehensible, the contemptible or the detestable, it is nothing much more than indifference. It isn't a line. It's a process. And it's one that invites and almost requires a level of discomfort.

[276] If the parties are unable to agree on costs I will hear them on that matter.

Campbell, J.