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The Honourable Justice Kevin Coady
The Law Courts
1815 Upper Water Street
Halifax, Nova Scotia B3J 1S7

My Lord:

Re: *Trinity Western University and Brayden Volkenant v. Nova Scotia Barristers' Society*
Court File No.: 427840

Please accept this letter as the submissions by the Intervenors, The Evangelical Fellowship of Canada and Christian Higher Education Canada in the above-noted matter.

PART I – OVERVIEW

1. Can a lawyer who was trained at a Christian law school and who holds to a Biblical definition and understanding of the nature of marriage and sexuality be barred from the practice of law on the sole basis of his or her sincerely held religious beliefs?
2. Trinity Western University (“TWU”) applies for judicial review of the Nova Scotia Barristers’ Society’s (the “NSBS”) decision dated April 25, 2014 where it:
 - a. accepted that TWU’s proposed law school would meet the national requirement set by the Federation of Law Societies of Canada (“FLSC”) for law schools;
 - b. resolved that TWU’s Community Covenant is discriminatory;
 - c. concluded that it would not approve graduates of TWU’s proposed law school to practice law in Nova Scotia unless TWU exempts law students from signing the Community Covenant or amends the Community Covenant for law students in a way that, in the NSBS’ view, “ceases to discriminate”.
3. The NSBS’ decision not to approve TWU’s proposed law school is based on its view that TWU’s Community Covenant is discriminatory, not on TWU’s academic standards.
4. The question of whether individuals trained in a Christian university can be barred from engaging in a specific profession has already been adjudicated in Canada. In fact, the Supreme Court of Canada dealt with a case which mirrors the case at hand.

5. In *Trinity Western University v. British Columbia College of Teachers Association*¹, the Supreme Court of Canada dealt with an appeal arising out of an application for judicial review of the British Columbia College of Teachers Association's ("BCCTA") decision not to accredit TWU's proposed teachers' college because of TWU's Biblical understanding of marriage and sexuality. In that case, the Supreme Court of Canada concluded that the BCCTA's decision violated the religious freedom of TWU as an institution, as a community and of its graduates.

PART II – FACTS

6. The Evangelical Fellowship of Canada (the "EFC") and Christian Higher Education Canada ("CHEC") were granted leave to intervene in this application by Order of this Court on September 5, 2014.
7. The EFC and CHEC accept the facts as set out in the factum of the Applicants. The EFC and CHEC repeat and reiterate however, the following facts regarding TWU.
8. TWU is a private Christian university in Langley, British Columbia. TWU was founded in 1962 and is accredited to grant degrees by virtue of the *Trinity Junior College Act*² which mandated it to provide university education with "an underlying philosophy and viewpoint that is Christian". While the British Columbia Legislature has reviewed and amended the *Trinity Junior College Act*, it has not amended or changed TWU's statutory mandate.
9. TWU's staff, faculty and students voluntarily choose to join the TWU community. In voluntarily joining the TWU community, staff, faculty and students commit themselves to signing the Community Covenant.
10. The Community Covenant is not a regulation. Rather, the Community Covenant is a promise or a pledge which signatories make to each other.
11. The Community Covenant does not prohibit or ban any particular type of person or individual from working at or attending TWU, rather, it seeks to foster an environment where members all seek live their lives according to Christian teaching and principles.

¹ *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 SCR 772 ["*Trinity Western*"], **EFC and CHEC's Book of Authorities** ["**EFC/CHEC Authorities**"], **Tab 1**.

² *Trinity Junior College Act*, S.B.C. 1969, c. 44, **Exhibit "D" to the Affidavit of W. Robert Wood**, sworn August 29, 2014.

12. The NSBS' view that the Community Covenant is discriminatory is based on TWU's view of sexuality and marriage. Specifically, the Community Covenant states:

In keeping with biblical and TWU ideals, community members voluntarily abstain from the following actions: [...]

- sexual intimacy that violates the sacredness of marriage between a man and a woman³.

PART III – ISSUES

13. The EFC and CHEC make submissions on the following issues:

- a. Was the NSBS' decision within its jurisdiction?
- b. Is the NSBS bound by the *Canadian Charter of Rights and Freedom*⁴?
- c. Does the NSBS' decision violate section 15 of the *Charter*?
- d. What is the standard of review of the NSBS' decision as it relates to the *Charter*?
- e. Did the NSBS reasonably balance its mandate with the *Charter* rights of TWU?
 - i. Section 2(a) of the *Charter*
 - ii. Section 2(b) of the *Charter*
 - iii. Section 2(d) of the *Charter*
- f. What is the appropriate remedy?

A. Was the NSBS' decision within its jurisdiction?

14. In making the decision at issue, the NSBS was acting pursuant to the authority delegated to it by the *Legal Profession Act*⁵ (“LPA”). The EFC and CHEC submit that the decision was not within the NSBS' jurisdiction.

The *Legal Profession Act* does not grant the NSBS authority to approve proposed law schools

15. The *LPA*, which created and governs the activities of the NSBS, clearly sets out the NSBS' purpose. The *LPA* further goes on to detail the activities the NSBS is authorized to engage in pursuing its purpose. The *LPA* reads:

³ Trinity Western University, Community Covenant, **Exhibit “C” to the Affidavit of W. Robert Wood**, sworn August 29, 2014.

⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11 [“*Charter*”], **EFC/CHEC Authorities, Tab 2**.

⁵ *Legal Profession Act*, S.N.S. 2004, c. 28 [“*LPA*”], **EFC/CHEC Authorities, Tab 3**.

4 (1) The purpose of the Society is to uphold and protect the public interest in the practice of law.

(2) In pursuing its purpose, the Society shall

(a) establish standards for the qualifications of those seeking the privilege of membership in the Society;

(b) establish standards for the professional responsibility and competence of members in the Society;

(c) regulate the practice of law in the Province; and

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

(i) regularly consulting with organizations and communities in the Province having an interest in the Society's purpose, including, but not limited to, organizations and communities reflecting the economic, ethnic, racial, sexual and linguistic diversity of the Province, and

(ii) engaging in such other relevant activities as approved by the Council⁶.

16. Nowhere in the *LPA* is the NSBS given the authority to approve or accredit law schools, regulate the personal religious and/or moral beliefs of those practicing law, or set speech parameters for law schools.

The NSBS cannot override the decision of the Federation of Law Societies of Canada to approve TWU's proposed law school

17. The FLSC is the coordinating body for Canada's 14 provincial and territorial law societies and is responsible, through its "Canadian Common Law Program Approval Committee" ("Approval Committee") for approving new law degree programs, which are assessed based on the knowledge and skills competencies set out in the FLSC's "National Requirement"⁷.

18. The FLSC'S National Requirement was approved by all of Canada's law societies, including the NSBS, in 2010. Following the approval of the National Requirement, the FLSC created the Approval Committee, the members of which are appointed by the Council of the FLSC, which is made up of representatives from all of Canada's law

⁶ *LPA, supra*, at s. 4, **EFC/CHEC Authorities, Tab 3.**

⁷ **Respondents, Nova Scotia Barristers' Society' Record**, 1387/33, 1387/4 , 1667/17-18.

societies. In December 2013, the Approval Committee issued a report granting TWU's proposed law school preliminary approval, subject to certain comments.

19. The version of the *Regulations made pursuant to the Legal Professions Act*⁸, that was in force at the time the NSBS made the decision at issue, read as follows:

3.1 (b) "law degree" means:

i) a Bachelor of Laws degree or a Juris Doctor degree from a faculty of common law at a Canadian university approved by the Federation of Law Societies of Canada for the granting of such degree or an equivalent qualification⁹.

20. As set out above, neither the *LPA* nor its regulations vest the NSBS with jurisdiction to approve or deny the creation of a proposed law school. On the contrary, the *Regulations* that were in force at the time of the NSBS' decision, define a law degree (one of the stated requirements for membership in the NSBS as per the *Regulations*), as one which has been obtained at a Canadian University approved by the FLSC.

21. Neither the *LPA* nor the regulations in force at the time of NSBS' decision grant the NSBS jurisdiction to override the FLSC's approval of a proposed law school at a Canadian University. The NSBS' decision is therefore *ultra vires* the NSBS and the powers granted to it under the *LPA*.

The NSBS attempts to regulate the personal religious and moral beliefs of those practicing law and set speech parameters for law schools

22. In making the decision at issue, the NSBS attempted to regulate the personal religious and moral beliefs of those practicing law. Further, by demanding that TWU remove the section of the Community Covenant which deals with sexuality and marriage, the NSBS overstepped the authority granted to it by the *LPA*.

23. By basing its decision to exclude TWU graduates from the practice of law on the sole basis of their view of marriage and sexuality, the NSBS is excluding TWU graduates on the basis of their religious beliefs.

⁸ *Regulations made pursuant to the Legal Professions Act* S.N.S. 2004, c. 28 ["Regulations"], **EFC/CHEC Authorities, Tab 4.**

⁹ *Regulations, supra*, at s. 3.1(b)(i), **EFC/CHEC Authorities, Tab 4.**

24. TWU and its students' view of marriage and sexuality is founded on their sincerely held religious beliefs. Their view of marriage and sexuality then, is a religious view.

Can the NSBS exclude Christians from the practice of law because of their religious beliefs?

25. The NSBS suggests that its religious discrimination against TWU graduates is justified because it is necessary to protect the public interest in the practice of law.

26. Indeed, such conduct has already been rejected by the Supreme Court of Canada. It stated:

We would add that the continuing focus of the BCCT on the sectarian nature of TWU is disturbing. It should be clear that the focus on the sectarian nature of TWU is the same as the original focus on the alleged discriminatory practices. It is not open to the BCCT to consider the sectarian nature of TWU in determining whether its graduates will provide an appropriate learning environment for public school students as long as there is no evidence that the particularities of TWU pose a real risk to the public educational system¹⁰.

27. If the NSBS is right, and it is appropriate to exclude people from the practice of law on the basis of their sincerely held religious beliefs because the practice of law is a public function, then the rationale follows that it would be appropriate to exclude such people from any public function. Such a suggestion however, has been clearly rejected by the Supreme Court of Canada.

28. Indeed, in the *Reference Re: Same-Sex Marriage*¹¹, the Supreme Court of Canada was clear that simply holding to a Biblical understanding of marriage and sexuality cannot exclude individuals from engaging in the officiating of marriages. It stated:

The right to same-sex marriage conferred by the *Proposed Act* may conflict with the right to freedom of religion if the Act becomes law, as suggested by the hypothetical scenarios presented by several interveners. However, the jurisprudence confirms that many if not all such conflicts will be resolved within the *Charter*, by the delineation of rights prescribed by the cases relating to s. 2(a). Conflicts of rights do not imply conflict with the *Charter*; rather the resolution of such conflicts generally occurs within the ambit of the *Charter* itself by way of internal balancing and delineation.

The protection of freedom of religion afforded by s. 2(a) of the *Charter* is broad and jealously guarded in our *Charter* jurisprudence. We note that should

¹⁰ *Trinity Western, supra*, at para. 42, **EFC/CHEC Authorities, Tab 1.**

¹¹ *Reference re Same-Sex Marriage* [2004] 3 S.C.R. 698 [“*Re: Same-sex marriage*”], **EFC/CHEC Authorities, Tab 5.**

impermissible conflicts occur, the provision at issue will by definition fail the justification test under s. 1 of the *Charter* and will be of no force or effect under s. 52 of the *Constitution Act, 1982*. In this case the conflict will cease to exist¹².

29. In fact, the *Civil Marriage Act*¹³ (the “*CMA*”), which is the legislation under which access to same-sex marriage has been granted, also specifically recognizes the right of individuals to hold to a Biblical understanding of marriage and sexuality. It reads:

WHEREAS nothing in this Act affects the guarantee of freedom of conscience and religion and, in particular, the freedom of members of religious groups to hold and declare their religious beliefs and the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs;

WHEREAS it is not against the public interest to hold and publicly express diverse views on marriage¹⁴;

30. The *CMA* goes on to confirm these statements in the body of the *Act*:

Religious officials

3. It is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs.

Freedom of conscience and religion and expression of beliefs

3.1 For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms* or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom¹⁵.

31. Since individuals can be licensed to officiate marriages while holding to a Biblical understanding of marriage and sexuality, they can certainly practice law while doing so. The role of the NSBS in setting standards to qualify to practice law in Nova Scotia was never meant to include a litmus test dealing with religious or moral beliefs.

32. The rationale of the Supreme Court of Canada in *Trinity Western*, was in line with its rationale in *Re: Same-sex marriage* and with the rationale of Parliament in enacting the

¹² *Re: same-sex marriage, supra*, at paras. 52-53, **EFC/CHEC Authorities, Tab 5.**

¹³ *Civil Marriage Act*, S.C. 2005, c. 33 [“*CMA*”], **EFC/CHEC Authorities, Tab 6.**

¹⁴ *CMA*, at preamble [“*CMA*”], **EFC/CHEC Authorities, Tab 6.**

¹⁵ *CMA, supra*, at s. 3, **EFC/CHEC Authorities, Tab 6.**

CMA. The language used in the *CMA* makes it clear that Parliament, in modifying the civil definition of marriage, did not consider that holding a different view of marriage was contrary to the public interest or should cause those individuals holding a different view of marriage to forfeit state benefits, protection or opportunities.

33. What is contrary to the public interest and what could cause individuals to lose or forfeit state benefits, protection or opportunities is engaging in activities or conduct which violate the law or go against the public interest. Simply holding a contrary view does not constitute discrimination and of course, there is no evidence to suggest that Christian lawyers are unable to practice law without discriminating. Indeed, the Supreme Court of Canada stated:

Instead, the proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them. Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected. The BCCT, rightfully, does not require public universities with teacher education programs to screen out applicants who hold sexist, racist or homophobic beliefs. For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society¹⁶.

34. In the case at hand it is the NSBS who is attempting to exclude or discriminate against individuals, not the TWU community or future TWU graduates.

35. In going into the realm of religion, the NSBS's decision is therefore *ultra vires* the NSBS and the powers granted to it under the *LPA*.

B. Is the NSBS' bound by the *Charter*?

36. In determining whether and how the *Charter* applies to the NSBS' decisions, we must first consider the statutory framework which grants the NSBS its authority to do so. As set out above, the NSBS was created and derives its authority to regulate the practice of law in Nova Scotia from *LPA*.

37. The *Charter* applies to organizations such as the NSBS which are part of the apparatus of government or are delegates of statutory authority. Even though the NSBS is not directly linked to or controlled by government and is therefore not a government body, the *Charter*

¹⁶ *Trinity Western, supra*, at para. 36, **EFC/CHEC Authorities, Tab 1**.

applies to the NSBS when it exercises its statutory discretion to regulate the practice of law in Nova Scotia pursuant to the *LPA* either by creating policies, disciplining members or setting standards to qualify to practice law in Nova Scotia. The NSBS is therefore required, in these instances, to make decisions that are consistent with the *Charter*.

38. All state action which violates the *Charter* is of no force or effect. The *Charter* also applies to public bodies acting pursuant to legislative authority delegated to it by the provincial or federal Crown. The *Charter* therefore clearly applies to the NSBS¹⁷.
39. The practical outworking of the *Charter*'s application to the NSBS is that that the NSBS must consider the *Charter* when exercising its statutory discretion under the *LPA* in preparing, implementing and enforcing policies. This issue was dealt with by the Supreme Court of Canada in its recent decision, *Doré v. Barreau du Québec*¹⁸.
40. In *Doré*, the Supreme Court examined how *Charter* guarantees and *Charter* values are to be protected in the exercise of administrative decisions of regulatory bodies made pursuant to statutory authority¹⁹. The Supreme Court concluded that administrative decision-makers are required to consider the *Charter* in their exercise of statutory authority:

How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives.

[...]

Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the *Oakes* context. [Emphasis added]²⁰

41. In its setting standards to qualify for the practice of law in Nova Scotia then, and in considering the application by TWU, the NSBS was required to consider, and must be guided by, the values and principles of the *Charter*.

¹⁷ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 36, **EFC/CHEC Authorities, Tab 7.**

¹⁸ *Doré v. Barreau du Québec*, [2012] 1 SCR 395 [“*Doré*”], **Joint Book of Authorities [“JBOA”], Tab 6.**

¹⁹ *Doré, supra*, at para. 3, **JBOA, Tab 6.**

²⁰ *Doré, supra*, at paras. 55, 56, **JBOA, Tab 6.**

C. Does the NSBS' decision violate section 15 of the Charter?

42. In addition to benefiting from freedom of religion as guaranteed by section 2(a) of the *Charter*, as set out below, TWU as an institution and a community, and TWU graduates are entitled to equal treatment under the law. Indeed, section 15(1) of the *Charter* guarantees that “every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination” based on religion²¹.
43. As set out above, the NSBS' decision was discriminatory in that it was based solely on the religious beliefs of TWU's future graduates. As such, it treats TWU's future graduates, and any individual who is otherwise qualified to practice law in Nova Scotia but who holds to a Biblical understanding of marriage and sexuality, unequally.
44. In the alternative, if the NSBS' decision was not based on the sincerely held religious beliefs of the TWU community and its future graduates, then the decision was based on TWU's future graduates' association with each other and the TWU community.
45. In either case, the decision results in unequal and discriminatory treatment based on TWU's future graduates' religion or association with a religious community. On this basis alone, the NSBS' decision should be quashed.

D. What is the standard of review of the NSBS' decision as it relates to the Charter?

The two standards of review

46. In *Dunsmuir v. New Brunswick*²² the Supreme Court narrowed the standard of review in judicial reviews to the reasonableness and correctness standards. A Court conducting a review of reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law²³.

²¹ *Charter, supra*, at s. 15, **EFC/CHEC Authorities, Tab 2.**

²² *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paras. 44 and 45 [“*Dunsmuir*”], **JBOA, Tab 7.**

²³ *Dunsmuir, supra*, at para. 47, **JBOA, Tab 7.**

47. The Supreme Court of Canada was clear however, that the reasonableness standard does not mean that the Courts will stop deferring to administrative decision makers. Rather, deference in the context of the reasonableness standard requires Courts to give due consideration to the determinations of decision makers²⁴.
48. While the reasonableness standard may require deference from the Court to the specialized nature of an administrative tribunal or body, the standard of correctness remains crucial in respect of questions of law so that a Court may undertake their own analysis:

As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct²⁵.

Which standard applies?

49. Generally, questions of fact, discretion and policy, as well as questions where the legal issues cannot be easily separated from the factual issues attract a standard of reasonableness. Legal issues on the other hand, generally attract a standard of correctness although some legal issues may attract a standard of reasonableness²⁶.
50. Since 2012 in the Supreme Court's decision in *Doré*, the standard of review on the question of balancing the *Charter* has been reasonableness. Courts reviewing an administrative decision which implicates *Charter* rights must consider whether the administrative decision maker(s) properly and proportionately balanced the relevant *Charter* value or right with the statutory objectives of the statute at issue. If so, the decision will be reasonable²⁷.
51. In the decision under review, the issues before the NSBS' were grounded in its interpretation of its mandate to approve law schools and the application of the *Charter*. The

²⁴ *Dunsmuir, supra*, at paras. 48, 49, **JBOA, Tab 7**.

²⁵ *Dunsmuir, supra*, at para. 50, **JBOA, Tab 7**.

²⁶ *Dunsmuir, supra*, at para. 51, **JBOA, Tab 7**.

²⁷ *Doré, supra*, at paras. 57, 58, **JBOA, Tab 6**.

NSBS' balancing of TWU's *Charter* rights, *Charter* values and the statutory objectives of the *LPA* are therefore subject to review on the reasonableness standard.

E. Did the NSBS reasonably balance its mandate with the *Charter* rights of TWU?

52. As set out above, the Supreme Court of Canada's recent decision in *Doré* has provided guidance on the manner in which administrative decision makers are to apply *Charter* values in the exercise of their statutory discretion.
53. In short, they are to balance *Charter* values and *Charter* rights with the statutory objectives of any particular statute. In doing so, the Supreme Court of Canada provides a two-step process requiring the administrative decision maker to first identify and consider the statutory objectives, and then consider how the *Charter* value is best protected in view of the statutory objectives, as is set out above²⁸.
54. In considering the *Charter* rights of TWU as an institution and a community and of TWU's future graduates, the *Charter* rights engaged by the NSBS' decision and *Charter* values, the NSBS was required to first identify and consider its objectives. As set out above, the *LPA* clearly sets out the purpose of the NSBS as being to "uphold and protect the public interest in the practice of law".
55. The NSBS' attempts to meet its objective of upholding and protecting the public interest in the practice of law in four specific regards, including the establishment of standards for the qualification for the practice of law. That was the NSBS' purpose and mandate in evaluating TWU's proposal. The first step the NSBS was required to take then, was to determine whether graduates of TWU's proposed law school met the standards developed by the NSBS for the qualification to practice law.
56. The second step the NSBS was required to take was to consider how the *Charter* values at issue, which are of freedom of religion, freedom of expression and freedom of association, are best protected in view of its objectives.
57. Because there are several *Charter* rights and values at play here, we must consider each one individually.

²⁸ *Doré, supra*, at paras. 55, 56, **JBOA, Tab 6**.

Section 2(a) of the Charter – Freedom of Religion and Conscience

58. There is no meaningful difference between the religious freedom of the individuals that establish, operate and attend a faith-based university community and that of the university community itself.
59. Faith-based universities are, by their very nature, religious. They are confessional. They are founded on religious principles by religious individuals, leaders or organizations for expressly religious purposes. Faith-based universities such as TWU and those represented by CHEC and the EFC are extensions of the Church and manifestations of a religious community.
60. Religion is by definition and in practice, a personal commitment manifest in and through community. In the Christian tradition, for example, this communal dimension of belief is manifest in the very concepts of being members of the body of Christ, being brothers and sisters, one with another, and the concept of church. Other world religions also manifest their beliefs in and through communal ways of life.
61. The Supreme Court’s jurisprudence is clear that freedom of religion has individual as well as collective aspects to it. In *R. v. Edwards Books and Art Limited*²⁹, Dickson C.J., stated:

In this context, I note that freedom of religion, perhaps unlike freedom of conscience, has both individual and collective aspects. Legislatures are justified in being conscious of the effects of legislation on religious groups as a whole, as well as on individuals³⁰.

62. In *Edwards Books*, Wilson J. argued that an interpretation of s. 2a) that protects the religious freedoms of individuals but not the groups they belong to is precluded by s. 27:

Yet it seems to me that when the *Charter* protects group rights such as freedom of religion, it protects the rights of all members of the group. It does not make fish of some and fowl of the others. For, quite apart from considerations of equality, to do so is to introduce an invidious distinction into the group and sever the religious and cultural tie that binds them together. It is, in my opinion, an interpretation of the *Charter* expressly precluded by s. 27 which requires the *Charter* to be

²⁹ *R. v. Edwards Books and Art Limited*, [1986] 2 S.C.R. 713, at 781 [“*Edwards Books*”], **EFC/CHEC Authorities, Tab 8.**

³⁰ *Edwards Books, supra*, at 781, **EFC/CHEC Authorities, Tab 8.**

interpreted "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians"³¹.

63. In *Alberta v. Hutterian Brethren of Wilson Colony*³², the Supreme Court of Canada further recognized that freedom of religion has collective aspects³³.

64. While TWU is an accredited university, it is much more than that. It is a religious community through which:

- a. TWU the institution, carries-out its religious mission;
- b. TWU faculty and staff carry-out their ministry;
- c. TWU faculty and staff worship and practice their faith in community; and,
- d. TWU students worship and practice their faith in community.

65. Faith-based universities are made up of a community of individuals who all share the same religious beliefs for the purpose of either providing or receiving a faith-based education as part of their mission and religious worship. Indeed, TWU's mission is:

As an arm of the Church, to develop godly Christian leaders: positive, goal-oriented university graduates with thoroughly Christian minds; growing disciples of Christ who glorify God through fulfilling the Great Commission, serving God and people in the various marketplaces of life³⁴.

66. TWU then, while an institution, is also a religious community. Indeed, in *Trinity Western*, the Supreme Court of Canada recognized TWU as a religious community³⁵. TWU as a community then, benefits from freedom of religion.

67. For a Christian, and a Christian university, the provision of education and the shaping of individuals who follow Christ is a religious calling and a form of worship. The Christian university then, is the mechanism through which some Christian individuals carry-out their faith and benefit from their s. 2(a) *Charter* right to freedom of religion.

³¹ *Edwards Books, supra*, at 808 and 809, **EFC/CHEC Authorities, Tab 8.**

³² *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567 [*"Hutterian Brethren"*], **EFC/CHEC Authorities, Tab 9.**

³³ *Hutterian Brethren, supra*, at paras. 31, 32, 130, 131 and 182, **EFC/CHEC Authorities, Tab 9.**

³⁴ Trinity Western University Mission, **Exhibit "K" to the Affidavit of W. Robert Wood**, sworn August 29, 2014.

³⁵ *Trinity Western, supra*, at paras. 3, 23, 24, 73 **EFC/CHEC Authorities, Tab 1.**

68. Indeed, Bastarache J., recognized the need for communities (or in this case, faith-based universities), to permit individuals to exercise their fundamental freedoms:

In interpreting *Charter* provisions, this Court has firmly endorsed a purposive approach. [...] there is no contradiction between protecting individual liberty and personal dignity and the wider objective of recognizing the rights of official language communities. The objective of protecting official language minorities, as set out in s. 2 of the *Official Languages Act*, is realized by the possibility for all members of the minority to exercise independent, individual rights which are justified by the existence of the community. Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided. This is consistent with the notion favoured in the area of international law that the freedom to choose is meaningless in the absence of a duty of the State to take positive steps to implement language guarantees;³⁶

69. Similarly, the EFC and CHEC submit that the existence of the Christian university is the means through which religious individuals, such as Christian professors and other individuals who work in or administer Christian universities, carry-out their faith and worship God by providing Christian education.

70. For Christians, the operation of a Christian university is the manifestation of their faith, a mechanism through which to minister to God's people and a means to worship God.

Religious communities, such as TWU, have the right to maintain their religious identity

71. The Supreme Court of Canada's jurisprudence recognizes the right of a religious community, such as the religious community that makes up TWU, to determine their own religious and moral identities. Indeed, in *Caldwell v. Stuart*³⁷, the Supreme Court of Canada recognized that faith-based institutions (in that case a Catholic school), had the right to insist that its employees (in that case a teacher), adhere to the religious teachings and principles of the institution.

72. In *Trinity Western*, the Supreme Court recognized that religious communities and institutions have the right to set behavioural standards of for its members (in that case, students, staff and faculty of a university)³⁸. Indeed, the Supreme Court confirmed that the mere prescription of conduct by a religious community does not constitute discrimination:

³⁶ *R. v. Beaulac*, [1999] 1 S.C.R. 768, at paras. 16 and 20, **EFC/CHEC Authorities, Tab 10**.

³⁷ *Caldwell v. Stuart*, [1984] 2 SCR 603, **EFC/CHEC Authorities, Tab 11**.

³⁸ *Trinity Western, supra*, at paras. 33-35, **EFC/CHEC Authorities, Tab 1**.

[...] if TWU's Community Standards could be sufficient in themselves to justify denying accreditation, it is difficult to see how the same logic would not result in the denial of accreditation to members of a particular church. The diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected³⁹.

73. On this basis, the educational institutions the EFC and CHEC represent implement policies on teaching, materials and behaviour of their staff and/or students. For example, a Christian university such as TWU will not hold examinations on Sundays.

Section 2(b) of the *Charter* – Freedom of Thought, Belief, Opinion and Expression

74. The NSBS' decision violates the section 2(b) *Charter* right to freedom of thought, belief, opinion and expression of the TWU community.

75. As a religious community, TWU also benefits from the freedom of thought, belief, opinion and expression. The TWU community is made-up of students, staff and faculty who come together with other Christian individuals so that they can teach, work, live, study and learn in community. As part of the manifestation of the TWU community's religious practice, each member of the TWU community make a public declaration of faith by signing the Community Covenant.

76. Signing the Community Covenant is a religious practice for the TWU community, but it is much more than that. The Community Covenant permits and allows the TWU community to define itself and to set out its religious and moral identity. The Community Covenant is also a tool for members of the TWU community to confirm their thoughts, beliefs and opinions and express those thoughts, beliefs and opinions publicly and in community.

77. By demanding that the TWU community amend its Community Covenant, the NSBS stepped out of the role of setting professional and academic standards to qualify for the practice of law in Nova Scotia, and into the role of setting moral, social, political and religious standards to qualify for the practice of law in Nova Scotia.

78. By demanding that the TWU community amend its Community Covenant, the NSBS violated the freedom of thought, freedom of belief, freedom of opinion and freedom of

³⁹ *Trinity Western, supra*, at para. 33, **EFC/CHEC Authorities, Tab 1**.

expression of TWU as an institution and a religious community and of each member of the TWU community.

Section 2(d) of the Charter – Freedom of Association

79. In making its decision not to allow graduates of TWU to practice law in Nova Scotia, the NSBS also violated TWU's community's, as well as each TWU graduate's, right to freedom of association as guaranteed by section 2(d) of the *Charter*. As set out above, in many ways freedom of religion is exercised in community.

80. In *Reference Re Public Service Employee Relations Act (Alta.)*⁴⁰, the Supreme Court recognized the importance of freedom of association to freedom of religion. It stated:

It is, I believe, equally clear that, in accordance with the second approach, freedom of association should guarantee the collective exercise of constitutional rights. Individual rights protected by the Constitution do not lose that protection when exercised in common with others. People must be free to engage collectively in those activities which are constitutionally protected for each individual. [...] Furthermore, religious groups would receive protection if their activities constituted the collective exercise of freedom of religion. Thus, the principal purposes or values of freedom of association would be realized by interpreting s. 2(d) as protecting the collective exercise of the rights enumerated in the *Charter*⁴¹.

81. As such, since teaching and studying in a Christian University in community with others under a common faith and belief system is considered to be a form of exercise of freedom of religion, and since the existence of a Christian University by definition implies the "association", or gathering of many individuals, then it follows that teaching and studying in such a university would constitute a collective exercise of freedom of religion.

82. EFC and CHEC therefore submit that those teaching and studying at TWU's proposed law school are exercising their freedom of religion in association with one another.

83. The NSBS' decision then, failed to reasonably balance the purpose of the NSBS with the right to freedom of association of the TWU community, including all TWU graduates.

84. Furthermore, by insisting that TWU amend its Community Covenant in order for its

⁴⁰ *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313, 1987 ["*Re: Public Service*"], **EFC/CHEC Authorities, Tab 12.**

⁴¹ *Re : Public Service, supra*, at 187, **EFC/CHEC Authorities, Tab 12.**

graduates to be able to practice law in the province of Nova Scotia, the NSBS is in effect attempting to constrain TWU's freedom of religion and freedom of association, and coercing would-be members of that community to either attend a different law school, or be barred from practicing law in Nova Scotia⁴².

Did the NSBS reasonably balance its mandate with the Charter rights and values at play?

85. The EFC and CHEC submit that the best and only way to protect the *Charter* values and TWU's *Charter* rights to freedom of religion and conscience, freedom of thought, belief, opinion and expression, and freedom of association, in view of the NSBS' objectives, would have been to approve graduates of TWU for the practice of law in Nova Scotia.

86. Indeed, in *Trinity Western*, the Supreme Court of Canada concluded that the British Columbia College of Teachers had failed to balance the alleged discrimination resulting from TWU's Community Covenant with the freedom of religion of the TWU community:

The BCCT did not weigh the various rights involved in its assessment of the alleged discriminatory practices of TWU by not taking into account the impact of its decision on the right to freedom of religion of the members of TWU. Accordingly, this Court must⁴³.

87. The Supreme Court of Canada's further guidance in *Doré* requires the NSBS to have properly and proportionately balanced TWU's *Charter* rights to and the *Charter* values of freedom of religion, freedom of expression and freedom of association with the statutory objectives of the NSBS. Indeed, the Supreme Court stated:

[57] On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play. As LeBel J. noted in *Multani*, when a court is faced with reviewing an administrative decision that implicates *Charter* rights, "[t]he issue becomes one of proportionality" (para. 155), and calls for integrating the spirit of s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a "margin of appreciation", or

⁴² *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at 95, **EFC/CHEC Authorities, Tab 13**.

⁴³ *Trinity Western*, *supra*, at para. 33, **EFC/CHEC Authorities, Tab 1**.

deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives⁴⁴.

88. The NSBS was required to properly and proportionately balance TWU's *Charter* rights and the *Charter* values of freedom of religion, freedom of expression and freedom of association with its statutory objectives. Indeed, the NSBS failed to balance them at all.
89. The NSBS not only failed to *balance* TWU's *Charter* rights to and the *Charter* values of freedom of religion, freedom of expression and freedom of association with the NSBS' objectives, it flat-out refused to even consider TWU's *Charter* rights.
90. The NSBS' failure to even consider TWU's *Charter* rights to and the *Charter* values of freedom of religion, freedom of expression and freedom of association, let alone balance them with the NSBS' objectives, constitutes an error in its exercise of its statutory discretion and is therefore unreasonable. Indeed, the Supreme Court of Canada stated that the only way an administrative decision involving *Charter* values will be reasonable is:

[58] If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable⁴⁵.

91. In *Doré*, the Supreme Court of Canada dealt with a decision by the Barreau du Québec which disciplined a lawyer for writing a judge an aggressive and uncivil letter. The Supreme Court concluded that disciplinary bodies must not only consider and balance the expressive rights at issue, but must demonstrate that they did so. The Court stated:

[66] We are, in other words, balancing the fundamental importance of open, and even forceful, criticism of our public institutions with the need to ensure civility in the profession. Disciplinary bodies must therefore demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer's right to expression and the public's interest in open discussion. As with all disciplinary decisions, this balancing is a fact-dependent and discretionary exercise. [emphasis added]⁴⁶

92. In this case, the NSBS not only failed to properly and proportionately balance TWU's *Charter* rights to and the *Charter* values of freedom of religion, freedom of expression and freedom of association with the NSBS' objectives, it flat out refused to consider them. In

⁴⁴ *Doré, supra*, at para. 57, **JBOA, Tab 6**.

⁴⁵ *Doré, supra*, at para. 58, **JBOA, Tab 6**.

⁴⁶ *Doré, supra*, at para. 66, **JBOA, Tab 6**.

refusing to even consider TWU's *Charter* rights to and the *Charter* values of freedom of religion, freedom of expression and freedom of association, the NSBS failed to demonstrate that it gave due regard to the importance of rights at issue, both in light of TWU's rights to freedom of religion, freedom of expression and freedom of association, as well as TWU's individual members' *Charter* rights.

93. This Court is being asked to consider whether the NSBS' conclusion that holding to a Biblical understanding of marriage and sexuality is a bar to the practice of law in Nova Scotia was a reasonable one. To make that assessment, this Court must consider whether this result reflects a proportionate application of the NSBS' statutory mandate of establishing standards for the qualification to practice law in Nova Scotia⁴⁷.

94. The EFC and CHEC submit that the NSBS' decision was not reasonable in that its failure and refusal to even consider the *Charter* values and *Charter* rights at issue do not constitute a proportionate balance of *Charter* values with the NSBS' objectives. As such, the NSBS' decision is not reasonable.

F. What is the appropriate remedy?

95. As it was in the Supreme Court of Canada's decision in *Trinity Western*, so it should be here. This Court should not send TWU's application back to the NSBS to be reconsidered, but rather, should supplement the NSBS' decision with its own.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of October, 2014.

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⁴⁷ *Doré, supra*, at para. 67, **JBOA, Tab 6**.