

SUBMISSIONS TO THE NOVA SCOTIA BARRISTERS' SOCIETY CONCERNING THE PROPOSED LAW SCHOOL AT TRINITY WESTERN UNIVERSITY

BENJAMIN PERRYMAN*

OVERVIEW

The Nova Scotia Barristers' Society (Society) is considering how to respond to the Federation of Law Societies of Canada's (Federation) preliminary approval of a faith-based law school at Trinity Western University (TWU). TWU has drawn controversy in the past for its requirement that all students must sign a community covenant that discriminates against LGBT persons. If this law school is accredited, a cohort of new Canadian lawyers will be trained in an institution that is explicitly anti-gay.

The Society has the jurisdiction and obligation to consider the public interest impact of recognizing law degrees granted by TWU. The principle of non-delegation prohibits the Society from relying on the Federation's public interest decision. The recent evolution of LGBT rights in Canada and globally calls for a reappraisal of the balancing between equality rights and religious rights. A proper balancing should find that the deleterious effects of recognizing law degrees from TWU outweigh any salutary benefits.

The Society should take the appropriate steps to refuse to recognize law degrees from TWU on the basis that recognition would create a separate and unequal society, condone institutionalized humiliation of LGBT persons, and harm the public interest in Nova Scotia.

THE SOCIETY'S PUBLIC INTEREST MANDATE INCLUDES CONCERN FOR ANTI-DISCRIMINATION

"The purpose of the Society is to uphold and protect the **public interest** in the practice of law."¹ The public interest, in this capacity, requires the Society to take two types of self-regulatory action: 1) efforts to regulate the lawyer-client relationship, and 2) efforts to regulate the impact of the legal profession and the administration of justice on society.

The first type of regulation—what one might call the “nuts and bolts” of legal regulation—concerns things like admissions standards² and professional responsibility.³ When the Society creates the modules for the Bar Admission Course or specifies the required number of Continuing Professional Development hours or audits a lawyer's trust account, it is protecting the public interest by carrying out the “nuts and bolts” of legal regulation.

The *Legal Profession Act* makes clear that the Society's obligation to protect the public interest is broader than just the “nuts and bolts” of legal regulation.⁴ This second type of regulation—what one might call the “broad, liberal and purposive” aspect of legal regulation—concerns

* Benjamin Perryman is a doctoral candidate at Yale Law School, where he holds the Canadian Bar Association Viscount Bennett Fellowship, a Humphrey Fellowship in International Human Rights Law, and a SSHRC Doctoral Fellowship. He is also a part-time instructor in International Law at Saint Mary's University, and a member of the Bars of Ontario (2010) and Nova Scotia (2011).

¹ *Legal Profession Act*, SNS 2004, c 28, s 4(1) (emphasis added).

² *Ibid*, s 4(2)(a).

³ *Ibid*, s 4(2)(b).

⁴ *See Legal Profession Act*, ss 4(2)(c)-(d).

things like how the practice of law⁵ is conducted, and how the administration of justice functions, in Nova Scotia.⁶ When the Society raises awareness of sexual harassment within law firms or monitors the number of aboriginal persons called to the bar or liaises with community organizations that represent vulnerable populations, it is protecting the public interest by carrying out a “broad, liberal and purposive” form of legal regulation.

Traditionally, law societies across Canada have concerned themselves primarily with regulation of the lawyer-client relationship. The *Legal Profession Act*, however, does not place priority on one type of regulation over the other. While it falls on the Society to determine the appropriate balance between the two types of regulation (especially given finite fiscal resources), if too much emphasis is placed on the “nuts and bolts” of legal regulation, the Society will not be upholding its legal obligation to protect the public interest.

In determining the proper balance between the two types of legal regulation, and the scope of the Society’s “broad, liberal and purposive” legal regulatory activities, it is important to recall some of the reasons why the Society must concern itself with more general concepts such as the practice of law and the administration of justice. This is particularly important given historical failures of the legal system in Nova Scotia.

More than forty years ago, Donald Marshall, Jr., a Mi’kmaq man, was wrongfully convicted of murder in Nova Scotia. He spent 11 years in jail before he was acquitted by the Nova Scotia Court of Appeal. The Royal Commission on the Donald Marshall Jr Prosecution that followed, concluded that it was not a single lawyer-client relationship that caused the wrongful conviction, rather, the entirety of “[t]he criminal justice system failed Donald Marshall, Jr. at virtually every turn....”

The Marshall case teaches us an important lesson about legal regulation: A failure to adopt a broad, liberal and purposive approach, beyond concern for the lawyer-client relationship, has the potential to cause significant harm to the public interest, especially for vulnerable populations. Recognizing this lesson, the Royal Commission made a number of recommendations to the Society to broaden its public interest mandate.⁷ All of these Society-specific recommendations concerned either equality within the legal profession and/or the impact of the legal profession and the administration of justice on historically disadvantaged populations, that is to say, equality within society.

The Royal Commission report was a clarion call for the Society to focus more acutely on equality. The Society responded by accepting the Royal Commission’s recommendations and establishing the Equity Office. In creating the Equity Office, the Society accepted that it has a public interest role in promoting equality.

⁵ *Ibid*, s 4(2)(c).

⁶ *Ibid*, s 4(2)(d).

⁷ See Royal Commission on the Donald Marshall, Jr. Prosecution: Digest of Findings and Recommendations (1989), pp 26, 28-29 (where the Royal Commission makes three recommendations to the Society: Recommendation 11, calling on the Society to support a minority admissions program at Dalhousie Law School; Recommendation 21, calling on the Society to work with the Provincial and Federal Governments to better serve the legal information needs of aboriginal people; and Recommendation 27, calling on the Society to organize and facilitate the liaison between the bar and aboriginal people and to educate the bar regarding the special needs of aboriginal clients).

The Mandate of the Equity Office is as follows:

The Equity Office assists fulfilling the Society's regulatory functions of...upholding the public interest in the practice of law and seeking to improve the administration of justice in relation to equity and diversity.⁸

One element of this mandate is to promote the interests of equity-seeking groups, such as LGBT persons, by “[a]ddressing issues...of discrimination in the legal profession.”⁹

Based on the foregoing, the Society clearly has a public interest regulatory authority and obligation to concern itself with equality; this includes consideration of whether to accredit discriminatory educational institutions that are involved in training persons who could potentially seek membership in the Society.

THE SOCIETY MAY NOT RELY ON THE FEDERATION'S PUBLIC INTEREST DETERMINATION

The Society may not rely on the Federation's Special Advisory Committee's public interest determination because of the maxim *delegatus non potest delegare* (a delegate may not re-delegate). The administrative law prohibition against delegation does not mean that a statutory authority can never delegate, but the starting point is that the statutory authority alone must make the decision unless contrary indication can be “found in the language, scope or object of the statute.”¹⁰

In interpreting the authorizing statute “one has to consider the nature of the duty and the character of the [statutory authority].”¹¹ If the scope and object of the legislation envisions that the statutory authority's duty will be carried out by delegation, then the principle of non-delegation will not apply.¹² However, in quasi-judicial circumstances, express statutory language will be needed before a statutory authority may delegate its functions.¹³

The *Legal Profession Act* confers on the Society the sole responsibility “to uphold and protect the public interest in the practice of law” in Nova Scotia.¹⁴ In explicating what the Society shall do to fulfill this purpose, the *Legal Profession Act* does not mention any other actor.¹⁵ Section 6 of the *Legal Profession Act* confers on Council a broad discretion to manage the Society's affairs and to promulgate regulations as it sees fit, but it does not expressly grant Council the authority to delegate its responsibilities.

What the *Legal Profession Act* does do is go to great lengths to detail the precise composition of Council, including provisions that ensure representation from across Nova Scotia.¹⁶ This is a sign that the Legislature intended the Society's decisions to be made by and for Nova Scotians, not delegated to a federal entity.

⁸ NSBS, Mandate of Equity Office, Approved by Council May 24, 2013, p 1

⁹ *Ibid* (note that sexual orientation is explicitly included as an “equity-seeking group” in footnote 2 of the Mandate).

¹⁰ John Willis, “Delegatus Non Potest Delegare,” (1943) 21 Can Bar Rev 257-261, 259.

¹¹ *Vine v National Dock Labour Board*, [1957] AC 488 (UK HL).

¹² *Morgan v Acadia University* (1985), 15 Admin LR 61 (NSSC).

¹³ *King v Institute of Chartered Accountants (Nova Scotia)* (1993), 99 DLR (4th) 425 (NS SCTD).

¹⁴ *Legal Profession Act*, SNS 2004, c 28, s 4(1).

¹⁵ *Ibid*, s 4(2).

¹⁶ *Ibid*, s 7.

When the *Legal Profession Act* does permit delegation, it uses express language. For example, in the adjudication of complaints made to the Society, the *Legal Profession Act* requires Council to appoint “a Hearing Committee made up of lawyers and persons who are not members of the Society...”¹⁷ Had the Legislature intended for the Society to be able to delegate its public interest responsibilities, it would have used similar express language.

In my view, the *Legal Profession Act* does not envision delegating the Society’s public interest regulatory authority to the Federation. On the contrary, the scope and object of the *Legal Profession Act* is to create a *self*-regulatory body in the form of the Society. The *Legal Profession Act* does not confer discretionary authority on any other statutory authority other than the Society nor does it empower the Society to delegate its responsibilities in regulating the public interest.

The Society and the Federation alone must determine whether accrediting the law school at TWU would negatively impact the public interest in Nova Scotia.

Even if the Society does have the authority to delegate its public interest regulatory power to the Federation, the Society should not rely on the Federation’s report. The Federation’s public interest report is procedurally and substantively flawed for a number of reasons that have been highlighted by others in their submissions to the Society (in the preliminary submission process and in the written submission process that accompanied oral hearings on this issue).

The one flaw that I wish to highlight is the composition of the Federation’s Special Advisory Committee. The Committee was comprised of five lawyers from across Canada none of whom were members of the Society.

It is one thing to rely on a re-delegated authority’s decision with respect to whether a law school’s curriculum meets the knowledge and skills competencies outlined in the National Requirement; this is an assessment that can be done entirely on the basis of a paper record. It is quite another thing to rely on a re-re-delegated authority’s decision with respect to the Provincial impact of accrediting a discriminatory law school; this is not an assessment that should be done entirely on the basis of a paper record, and it certainly not the type of assessment that can be done by a centralized decision-maker without extensive inquiries being made of the various jurisdictions that will be impacted by the decision.

Regulatory decisions concerning the legal profession and the administration of justice in Nova Scotia should be made by Nova Scotians for Nova Scotians. At the very least, decisions should be made by entities that have sufficient knowledge of the unique circumstances and history of the legal profession and administration of justice in Nova Scotia. The Committee lacked that knowledge, and this severely undermines its conclusion on the public interest impact *in Nova Scotia* of recognizing law degrees from TWU.

THE EVOLUTION OF LGBT RIGHTS IN CANADA AND GLOBALLY

Over the past twenty years, the rights of LGBT persons have been increasingly protected by Canadian courts. The Canadian courts have recognized that sexual orientation is a prohibited

¹⁷ *Ibid*, s 41(1).

basis of discrimination under the *Charter of Rights and Freedoms*,¹⁸ required Provincial human rights legislation to include sexual orientation as a prohibited ground,¹⁹ extended family law spousal support legislation to same sex couples,²⁰ struck down the traditional definition of marriage on the basis that it negatively impacted the human dignity of LGBT persons,²¹ and upheld legislative amendments that permitted same-sex marriage.²² Throughout this process, the courts have continuously recognized the historical disadvantage of LGBT persons and the harm that they have suffered, individually and as a group, as a result of being excluded, discriminated against, and attacked in Canadian society.²³ The LGBT rights revolution in Canada is a response to this harm, and a product of the realization that such discrimination is no longer socially acceptable on any grounds.

The Canadian LGBT rights revolution was not an anachronism. On the contrary, countries around the world, with robust modern systems of rights protections, have embarked on similar LGBT rights revolutions. In the United Kingdom, the *Marriage (Same Sex Couples) Act*,²⁴ legalized same-sex marriage. In France, the National Assembly also passed a law legalizing same-sex marriage, which became law after it withstood a constitutional challenge. Additionally, Belgium, South Africa, Spain, Norway, Sweden, Portugal, Iceland, Argentina, and Denmark have all joined Canada in adopting marriage equality.²⁵ In a number of these countries, the evolutionary changes were the direct result of constitutional decisions finding that barring LGBT persons from the institution of marriage violated the right to equality and/or human dignity.²⁶

Similar processes are underway in other countries. In 2012, the Inter-American Court—in a decision comparable to the Supreme Court of Canada’s 1995 decision in *Egan*—ruled that the *Inter-American Accord on Human Rights* precluded discrimination on the basis of sexual orientation.²⁷ Based on the Inter-American Court decision, Mexico’s Supreme Court of Justice found a State ban on same-sex marriage to be unconstitutional.²⁸ This followed a 2010 ruling that required same-sex marriages performed in Mexico City to be recognized throughout the country.²⁹ In Columbia, the Constitutional Court, after a decade of progressively recognizing LGBT rights in areas such as pensions, matrimonial property, and health insurance, held that the legislature could not formally recognize only opposite-sex couples; the Court suspended its decision for two years to give the legislature the opportunity to legislate a constitutionally acceptable alternative.³⁰

¹⁸ *Egan v Canada*, [1995] 2 SCR 513 [*Egan*].

¹⁹ *Vriend v Alberta*, [1998] 1 SCR 493 [*Vriend*].

²⁰ *M v H*, [1999] 2 SCR 3.

²¹ See eg *Halpern v Canada (Attorney General)* (2003), 225 DLR (4th) 529, 65 OR (3d) 161 (ONCA) [*Halpern*].

²² *Reference re Same-Sex Marriage*, 2004 SCC 79.

²³ See *Egan*, 600-602; *Vriend*, 543; *M v H*, 52-55; *Halpern*, para 83.

²⁴ *Marriage (Same Sex Couples) Act*, 2013, c 30.

²⁵ Amicus Brief for Foreign and Comparative Law Experts Harold Hongju Koh, Sarah H Cleveland, Laurence R Helfer, and Ryan Goodman in *US v Hollingsworth*, 570 US ___, 133 S Ct 2652 (Docket No 12-144) (US SC), p 14.

²⁶ See eg *Minister of Home Affairs v Fourie* (2006), 3 BCLR 355 (S Afr CC).

²⁷ *Atla Riffo and Daughters v Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 239 (Feb 24, 2012).

²⁸ Amparo en Revision 581/2012, Primera Sala de la Suprema Corte de Justicia [SCJN], Dec. 5, 2012 (Mex SC).

²⁹ *Supra* note 25, p 16.

³⁰ Columbia Constitutional Court, Statement No 30, July 26, 2011 (Colum CC).

In the United States, there has been a flurry of recent case law recognizing the constitutional rights of LGBT persons. Last year, in a landmark decision, the Supreme Court of the United States struck down a key part of the *Defense of Marriage Act* that defined marriage as between a man and a woman for the purposes of federal law.³¹ In another decision, the Court allowed same-sex marriage to resume in California after restoring a District Court decision which had found that a voter-approved ban on same-sex marriage was unconstitutional.³² In the past month, Federal or state courts in three states have found bans on same-sex marriage to be unconstitutional.³³ The LGBT rights revolution in the US has occurred at such a fast pace that some have called it “the fastest of all civil rights movements.”³⁴ In announcing that the Federal government would put in place policies to ensure that same-sex couples received the same privileges, protections and rights within the criminal justice system, the US Attorney General called the LGBT rights movement one of “the defining civil rights challenges of our time.”³⁵

What this comparative constitutional law evidence shows us is that there is a rising tide of LGBT rights protection globally in countries that take the protection of human rights seriously. In many countries around the world, discrimination against LGBT persons is now rightly considered synonymous with discrimination based on sex, race, or other protected grounds. This evolution of LGBT rights is relevant in situations where such rights conflict and have to be balanced with other constitutionally protected rights such as freedom of religion.

BALANCING RIGHTS FAVOURS A REFUSAL TO SANCTION INSTITUTIONAL HUMILIATION

Misconceptions of the Issues Before the Society

Before discussing how LGBT equality rights should be balanced with Evangelical Christians’ religious rights, it is important to comment on two misconceptions that have come up in the debate around whether to accredit TWU’s law school. The first misconception is that the *Charter* and provincial human rights legislation do not apply because TWU is a private religious institution. The second misconception is that the preamble and section 3.1 of the *Civil Marriage Act* somehow immunize TWU from consideration by regulatory bodies.

Unlike some countries, such as Germany and France, where the Constitution applies (horizontally) between private actors, the Canadian *Charter* applies only (vertically) to government action. This has traditionally resulted in the *Charter* not applying to private actors; however, the Supreme Court of Canada recently held that private employers have a constitutional obligation to consider in good faith the submissions of employees.³⁶ Likewise, provincial human

³¹ *US v Windsor*, 570 US 12 (2013) (Docket No 12-307) (US SC).

³² *US v Hollingsworth*, 570 US ___, 133 S Ct 2652 (Docket No 12-144) (US SC).

³³ See *Kitchen v Herbert*, US Dis Ct for the District of Utah (Central Div), Case No 2:13-cv-217 (20 Dec 2013); *Bishop v US*, US Dis Ct for the District of Oklahoma, Case No 4:04-cv-00848-TCK-TLW(14 January 2014); *Griego v New Mexico*, New Mexico Sup Ct, Docket No 34306 (19 Dec 2013).

³⁴ Mark Z Barabak, “Gays may have the fastest of all civil rights movements,” (20 May 2012) LA Times, <http://articles.latimes.com/2012/may/20/nation/la-na-gay-rights-movement-20120521>.

³⁵ Matt Apuzzo, “More Federal Privileges to Extend to Same-Sex Couples,” (8 Feb 2014) NY Times, <http://www.nytimes.com/2014/02/09/us/more-federal-privileges-to-extend-to-same-sex-couples.html?src=recg>

³⁶ *Ontario (AG) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3.

rights legislation across Canada includes limited exemptions for religious organizations from the prohibition against discrimination.³⁷

The jurisdictional limitations of the *Charter* and exemptions in human rights legislation are irrelevant in the circumstances before the Society. The Society is not being asked to regulate the internal workings of TWU's law school. The Society is only being asked to consider whether accreditation of that institution would be against the public interest. The Society, unlike TWU, is a public actor and its regulatory decisions concerning the public interest are public decisions. While the Society has no jurisdiction to regulate the discriminatory community covenant of TWU's law school, it is very much entitled, and indeed obligated, to consider the public interest impact of accrediting a discriminatory institution. As will be explained below, when private religious actors seek public benefits, public law rightly applies.

The *Civil Marriage Act* is also not determinative of the issue before the Society. The purportedly relevant provisions of the Act are as follows:

Preamble

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 marriage

...

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 freedom.

The preamble of the *Civil Marriage Act* makes clear that the Act only protects the beliefs and expression of those beliefs by religious persons. The preamble's reference to actions—in the form of refusing to perform marriages—is limited to “officials of religious groups.” The

³⁷ See eg *Human Rights Act*, RSNS 1989, c 214, s 6(c)-(d) (which permit exclusively religious not for profit organizations to hire only members of the same religion where that is a reasonable occupational requirement and to discriminate in respect of volunteer public service activities); See also *Human Rights Code*, RSBC 1996, c 210, s 41 (which allows religious organizations, not operated for profit, to give *preference* to members of a religious group).

preamble does not authorize religious persons, who hold a particular belief of the definition of marriage, to discriminate against other recognized groups. Section 3.1 of the Act does protect such religious persons from discrimination, but only with respect to laws of the Parliament of Canada; even if the Federal government were permitted to legislate beyond such laws, s 3.1 does not confer a right on religious persons to discriminate against others, it only confers a protection for holding and expressing beliefs.

The *Civil Marriage Act* is of limited relevance to the decision before the Society. The Act does not technically apply to provincial areas of jurisdiction.³⁸ More importantly, the Act only protects holding and expressing beliefs that contravene the constitutionally-protected definition of marriage. The Act only protects actions based on such beliefs where they are made by “officials of religious groups.” The decision before the Society is a public decision to be made by a public actor; in this context, the *Civil Marriage Act* is not particularly relevant.

Balancing Rights

In determining whether accreditation of TWU’s law school would be in the public interest, the Society must consider the *Charter*.³⁹ The Society has received submissions on why the Supreme Court of Canada’s decision in *Trinity Western University v British Columbia College of Teachers*⁴⁰ is distinguishable, or alternatively, subject to reappraisal given the recent evolution of LGBT rights. I share these views. In light of all these arguments, and because this matter will in all likelihood be litigated, a fresh assessment based on constitutional principles is warranted. The submissions that follow outline how the Society should undertake that approach.

Canadian constitutional law is clear on the steps an administrative decision-maker or court must take when balancing an apparent conflict between freedom of religion and another constitutional right. The proper approach was outlined by the Supreme Court of Canada in *Reference re Same-Sex Marriage*:

The potential for a collision of rights does not necessarily imply unconstitutionality. The collision between rights must be approached on the contextual facts of actual conflicts. The first question is whether the rights alleged to conflict can be reconciled. Where the rights cannot be reconciled, a true conflict of rights is made out. In such cases, the Court will find a limit on religious freedom and go on to balance the interests at stake under s. 1 of the *Charter*. In both steps, the Court must proceed on the basis that the *Charter* does not create a hierarchy of rights and that the right to religious freedom enshrined in s. 2(a) of the *Charter* is expansive.⁴¹

Based on this approach, Canadian courts have upheld limits on freedom of religion, in a number of cases, where the public interest or a competing right outweighed the right to freedom of religion. Freedom of religion was limited, where the law required all persons to submit to

³⁸ *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3, para 52.

³⁹ *Slaight Communications Inc. v. Davidson*, [1989] 1 SCR 1038 (holding that any exercise of statutory discretion is subject to the *Charter* and its values).

⁴⁰ *Trinity Western University v British Columbia College of Teachers*, [2001] 1 SCR 772 [BCTF].

⁴¹ *Reference re Same-Sex Marriage*, 2004 SCC 79, para 50, [2004] 3 SCR 698 [citations omitted].

having their picture taken when obtaining a driver's license, in order to protect the integrity of the license system.⁴² Freedom of religion did not invalidate criminal prohibitions against polygamy where such relationships harmed women and children.⁴³ Freedom of religion did not protect the right of religious adherents to testify in criminal proceedings, while wearing religious dress that covers their face, if such dress would negatively impact the fairness of a trial, no other alternative measures could be taken, and the benefits of requiring removal outweighed the deleterious effects of permitting testimony without removal.⁴⁴ In a case similar to the issue before the Society, freedom of religion did not permit civil marriage officials to refuse to conduct same-sex marriages that contravened their religious belief that marriage ought to be between a man and a woman.⁴⁵

In the case before the Society, there is a true conflict between the rights of Evangelical Christians and LGBT persons. As it currently stands, both groups can attend any accredited law school in Canada. If the Society chooses to recognize law degrees from TWU, it will create a situation where Evangelical Christians can continue to attend any law school in Canada, but LGBT persons will be effectively barred from attending one of those schools—a contravention of the right to equality. If the Society chooses not to recognize law degrees from TWU, it will create a situation where Evangelical Christians cannot get accreditation through attending the institution of their choice—a conflict of the right to freedom of religion. This is a true conflict.

One can theoretically conduct a s 1 analysis from the starting point of either accreditation or denial of accreditation of TWU's law school. The Society has a public interest obligation to seek to uphold all Charter values, including both equality rights and freedom of religion. An accreditation decision based on one or the other right would be rationally connected to protecting that right, but would infringe the other right. Denial of accreditation may result in less impairment to freedom of religion, since TWU could alter its community covenant, in a way that would permit future accreditation, without completely abandoning their faith-based approach to legal education. However, the intrinsic importance of the community covenant to TWU's faith-based educational model is a matter of perspective, so the Society should proceed as though the accreditation/non-accreditation decision would affect the competing rights equally.

The result of the foregoing is that the Society must make its decision based on the proportionality or balancing step in the s 1 analysis. A number of submissions have been made to the Society regarding the deleterious effects of TWU's law school on legal education and the legal profession. While I share some of these concerns, in my view, the most significant deleterious effect of accrediting TWU's law school is that it will create a separate and unequal society. I have argued in previous "submissions" to the Society that sanctioning a separate and unequal society is a form of institutionalized humiliation that harms LGBT persons and the public interest more generally.⁴⁶ When institutionalized humiliation is implicitly or explicitly condoned by society, it debases the fundamental principle that all persons are born with freedom and equality in dignity and rights.

⁴² *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567.

⁴³ *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588.

⁴⁴ *R v NS*, 2012 SCC 72, [2012] 3 SCR 726.

⁴⁵ *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3.

⁴⁶ See Benjamin Perryman, "N.S. bar should oppose Canada's first anti-gay law school," (23 Jan 2014) Chronicle Herald, <http://thechronicleherald.ca/opinion/1181644-ns-bar-should-oppose-canada-s-first-anti-gay-law-school>.

In *Marriage Commissioners Appointed Under The Marriage Act (Re)*, the Saskatchewan Court of Appeal recognized the harm caused by such forms of institutionalized humiliation.⁴⁷ There, the Court had to consider proposed legislation that would permit certain civil marriage officials to refuse to conduct same-sex marriages on religious grounds. The Court concluded that the harmful effects of permitting such refusals, on both LGBT persons *and* society, outweighed the negative impact on freedom of religion of requiring officials to perform all marriages.⁴⁸ In doing so, the Court implicitly recognized the harm of institutionalized humiliation that I have outlined:

I turn then to the question of deleterious effects.... [The proposed legislation] would perpetuate a brand of discrimination which our national community has only recently begun to successfully overcome. It would be a significant step backward if, having won the difficult fight for the right to same-sex civil marriages, gay and lesbian couples could be shunned by the very people charged by the Province with solemnizing such unions.

Second, and more concretely, allowing marriage commissioners to deny services to gay and lesbian couples would have genuinely harmful impacts. This can be seen, for example, in *M.J. v. Nichols* (2008), 63 C.H.R.R. D/145, where M.J. testified as follows about his reaction to being denied services by a marriage commissioner:

It was actually pretty devastating... So when this happened I was quite devastated. I rehashed this I don't know how much when I couldn't sleep because I actually wound up sleeping very little. I was just crushed about it. I couldn't believe that as a human being I wasn't going to be treated as a real person. And everybody should be treated as a real person. ...

Negative effects of this sort would not be restricted to those gay and lesbian individuals who are directly denied marriage services. A more generalized version of it would obviously be felt by the gay and lesbian community at large and, indeed, there is no doubt it would ripple through friends and families of gay and lesbian persons and the public as a whole. Simply put, it is not just gay and lesbian couples themselves who would be hurt or offended by the notion that a governmental official can deny services to same-sex couples. Many members of the public would also be negatively affected by the idea.⁴⁹

In my view, TWU's law school is anti-gay. It is true that the university does not hang a sign on its doors that says "no gays allowed." But, its community covenant functions to exclude LGBT persons. As one gay TWU graduate recently stated, in discussing the impact of the community covenant on LGBT persons: "If you're going to say that this is such a loving and great and

⁴⁷ *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3.

⁴⁸ *Ibid*, paras 94-99.

⁴⁹ *Ibid*, paras 94-96.

supportive place, the question I would have is, where are all these gay people? Are they hypothetical abstractions?”⁵⁰ The community covenant at TWU is a reminder to LGBT persons that they and their relationships are less worthy. Should the Society acquiesce or endorse law degrees from TWU, the Society will be condoning and contributing to the institutionalized humiliation of LGBT persons.

In understanding the harm of accrediting an anti-gay law school, it is important never to forget the harm that the evolution of LGBT rights in Canada was intended to address. LGBT persons have experienced pervasive discrimination and violence in Canada. Despite the revolution in their legal rights, LGBT persons continue to be attacked and killed because of their sexual orientation. LGBT persons remain a vulnerable group in society. In this context, rolling back the rights of LGBT persons, in order to permit the accreditation of a particularly extreme form of faith-based legal education, strikes the wrong balance and is against the public interest.

It is also important to recognize the roll that the interpretation of the *Charter* plays in the global community. The *Charter* is increasingly one of the most influential bills of rights globally.⁵¹ In a globalized world, it is no surprise that the Canadian LGBT rights evolution played a role in the recognition of LGBT rights in other countries. The corollary of this observation is that if Canada curtails the rights of LGBT persons, it will send signals to other countries that it is acceptable to treat LGBT persons differently. In this respect, the Society’s decision may have a public interest impact well outside Nova Scotia.

A proper balancing of rights, in the circumstances before the Society, favours refusing to accredit TWU’s law school.

RECOMMENDATIONS FOR FUTURE ACTION

The Society should:

1. reiterate its public interest obligation to regulate both the lawyer-client relationship *and* the impact of the legal profession and the administration of justice on society;
2. acknowledge that one of its roles is to raise, not lower, the bar of equality;
3. refuse to rely on the Federation’s Special Advisory Committee’s public interest decision, since the Society did not have the legal authority to delegate such decisions to the Federation;
4. recognize the tremendous evolution of LGBT rights in Canada and globally and the impact this evolution has on existing precedent as well as the legitimacy of the Society’s activities to address discrimination against vulnerable groups;

⁵⁰ James Bradshaw, “Religious rights at risk, B.C. law school with gay-intimacy ban warns alumni” (5 Feb 2014) *Globe & Mail*, <http://www.theglobeandmail.com/news/national/education/religious-rights-at-risk-bc-law-school-with-gay-intimacy-ban-warns-alumni/article16723294/>

⁵¹ David S Law & Mila Versteeg, “The Declining Influence of the United States Constitution” (2012) 87:3 *NYU L Rev* 762.

5. make clear that when institutions seek accreditation from the Society, the Society's decisions are public decisions made in the public interest;
6. amend its Regulations so that the definition of "law degree" includes reference to institutions that are against the public interest on the grounds that they discriminate;⁵²
7. receive written and oral submissions from TWU's law school if it chooses to make them;
8. grant the opportunity to interested parties to make reply submissions to TWU's submissions;
9. explain why the *BCTF* case is distinguishable or requiring reappraisal based on the Canadian and global LGBT rights evolution;
10. balance the impact of recognizing TWU's law school on LGBT rights against the impact of refusing to recognize TWU's law school on religious rights; and
11. conclude, subject to persuasive arguments that have yet to be made, that accrediting TWU's law school would strike the wrong balance between equality and religious rights, and harm LGBT persons, their supporters, and the general public in a way that is against the public interest in Nova Scotia.

⁵² For example, the definition of law degree in s 3(1)(b) of the Regulations, could be amended as follows:

"law degree" means

- i) a bachelor of laws degree or a juris doctor degree from a faculty of common law at a Canadian university approved by the Federation of Law Societies of Canada for the granting of such degree, or an equivalent qualification; or
- ii) a degree in civil law, if the holder of the degree has passed a comprehensive examination in common law or has successfully completed a common law conversion course approved by the Credentials Committee, or
- iii) a Certificate of Qualification issued by the National Committee on Accreditation of the Federation of Law Societies of Canada; **and**
- iv) **the degree, equivalent qualification, or degree underlying the Certificate of Qualification, was not granted by an institution that the Society has found to discriminate in a manner that is against the public interest.**