

Supreme Court of Nova Scotia

Court Administration
OCT 28 2014
Halifax, N.S.

Between:

Trinity Western University and Brayden Volkerant

Applicants

-and-

Nova Scotia Barrister's Society

Respondent

-and-

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

Intervenors

**BRIEF OF THE INTERVENORS
 CATHOLIC CIVIL RIGHTS LEAGUE and FAITH AND FREEDOM ALLIANCE**

Philip H. Horgan
 Philip Horgan Law Office
 301-120 Carlton Street
 Toronto, ON M2N 4A3

Tel: 416-777-9994
 Fax: 416-777-9921
 email: phorgan@carltonlaw.ca

Lawyer for the Intervenors
 Catholic Civil Rights League and
 Faith and Freedom Alliance

TABLE OF CONTENTS

PART I	OVERVIEW and STATEMENT OF FACTS	3
PART II	STATEMENT OF POSITION	4
PART III	ARGUMENT	5
A	The Freedom of Religion Protects Groups Rights	5
1.	The Purpose of the Freedom of Religion	5
2.	The Importance of Religious Group Rights	5
3.	Religious Institutions and Corporations Manifest Collective Religious Beliefs	7
B	The Freedom of Religion is Grounded in Authentic Pluralism	9
1.	Religious Freedom in Canada has Pluralistic Roots	10
C	Reconciliation of Competing Rights	11
1.	Pluralism Requires Reconciliation of Competing Rights	12
D	Authority of the Civil Marriage Act	14
E	Conclusion: A Broad and Robust Approach to Religious Freedom	15
1.	TWU's Freedom of Religion Has Been Infringed	15
PART IV	SUBMISSIONS CONCERNING COSTS	16
PART V	ORDER REQUESTED	16
SCHEDULE A	TABLE OF AUTHORITIES	17
SCHEDULE B	LEGISLATION	18

PART I : OVERVIEW and STATEMENT OF FACTS

1. The issues in dispute on this application include whether the Applicants enjoy the fundamental *Canadian Charter of Rights and Freedoms* (“*Charter*”) rights of freedom of conscience and religion, and whether the Nova Scotia Barristers’ Society (“NSBS”) has made a ruling which is inconsistent and incompatible with those rights. Moreover, have the NSBS’s terms for not accepting accreditation of graduates of the Trinity Western University (“TWU”) law school breached the rights of TWU and its future graduates without foundation and contrary to law.
2. While supportive of the position of the Applicants, the Catholic Civil Rights League and the Faith and Freedom Alliance (together, these “Intervenors”) intend to focus submissions on the principle that institutions, corporations, (and other legal persons) that are formed for the exercise of religious belief and evangelization, such as TWU, are entitled to the protection of section 2(a) of the *Charter*. It is further submitted that the NSBS has violated such rights, without any effort to balance what it purports to suggest are competing rights. Such violations cannot stand.
3. In support of its position, these Intervenors make the following submissions:
 - a. freedom of religion protects collective and group rights. Though religion is often about religious beliefs, it is also about the relationships between individuals that have a common faith. Religious corporations, including educational institutions such as TWU, in community with its staff, students and benefactors/stakeholders, further a religious way of life that should not be infringed without demonstrable justification.
 - b. other applicable law supports the recognition of the religious and conscientious rights of TWU and its prospective graduates, especially given the statutory protections afforded to all Canadians in the *Civil Marriage Act*, and rulings from other jurisdictions;
 - c. these Intervenors submit that Canada’s democratic and constitutional history promotes pluralistic liberalism, where disagreements and different beliefs amongst Canadians encourage social peace, mutual respect and diversity. A demand from the NSBS decision to require amendments to an institution’s Community Covenant is an obtrusive effort to “trump” one set of positions on closely held religious belief by a body that should remain neutral on such questions.
 - d. the test for determining whether a corporation’s section 2(a) rights have been infringed should ask whether the corporation’s purpose has a nexus with the exercise of a religious

belief. If so found, the NSBS should maintain a neutral view which neither favours nor hinders any particular religious belief. The NSBS has exceeded its authority and violated TWU's freedom of religion. The NSBS decision cannot be sustained.

4. Intertwined with the freedom of religion is the need for recognition of authentic pluralism, for which these Intervenors make the following submissions:
 - a. Authentic pluralism allows for religion to share space with competing rights in the public sphere. The NSBS is charged to ensure compliance with the *Charter*, so as to allow freedom of conscience, freedom of religion, freedom of thought, freedom of belief, freedom of opinion, and freedom of expression. Freedom of religion includes "the right to engage in the public dimensions of manifestation, declaration and teaching."¹
 - b. Canada's democratic and constitutional tradition promotes authentic pluralism, where disagreements and different beliefs are encouraged and promoted. The law acknowledges such freedoms and encourages respect for a diversity of views. The pre-determined denial of acceptance of graduates of an otherwise qualified law graduate from entrance into the NSBS would be an unacceptable intrusion into the religious and conscientious liberty of such individuals and of the institution itself.
 - c. A contextual, proportional, coherent, and flexible approach must be taken to avoid true conflict between equality rights and society's interest in promoting meaningful religious pluralism. The NSBS decision to reject prospective graduates of the TWU law school, unless certain terms are imposed, inflicts a discriminatory remedy on TWU and/or prospective law students of that institution, which ignores context, and is extreme, incoherent, and inflexible.
5. These Intervenors accept the facts as stated in the Applicants' Brief.

PART II: STATEMENT OF POSITION

6. These Intervenors support the Applicant's position that TWU its staff, students and stakeholders, and as an institution, enjoy and have the benefit of freedom of conscience and

¹ Benson, Iain T "The Attack on Western Religions by Western Law" International Journal of Religious Freedom Vol 6:1/2 2013 at 122 . Intervenors' Authorities Tab 21
online:[http://www.iirf.eu/index.php?id=103&no_cache=1&tx_ttnews\[backPid\]=102&tx_ttnews\[tt_news\]=2733](http://www.iirf.eu/index.php?id=103&no_cache=1&tx_ttnews[backPid]=102&tx_ttnews[tt_news]=2733).

religion under section 2(a) of the *Charter*, as stated in paragraph 136 of the TWU Brief. These Intervenors support the Applicant’s analysis of *Charter* applications to this case, from paragraphs 121 onward in its Brief. The particular expansion of arguments by these Intervenors herein focuses on institutional rights to freedom of religion and an understanding of the role that authentic pluralism plays in informing such understandings in Canadian law.

PART III : ARGUMENT

A. The Freedom of Religion Protects Group Rights

1. The Purpose of the Freedom of Religion

7. Section 2(a) of the *Charter* states that “[e]veryone has...freedom of conscience and religion”².
8. The “essence” of the freedom of religion is the “right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.”³
9. One of the major purposes of the *Charter* is to protect Canadians from “coercion or restraint”—if a person is compelled to do something she would not otherwise have chosen, she is not acting of her own volition and “cannot be said to be truly free”.⁴

2. The Importance of Religious Group Rights

10. There is no dispute that the freedom of religion has “both individual and collective aspects”.⁵ In *Edwards Books*, the Supreme Court held that the Constitution “shelters individuals and groups.”⁶

² *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, s 2(a) [*Charter*].

³ *R v Big M Drug Mart*, [1985] 1 SCR 295 at 336 [*Big M Drug Mart*]. Intervenors’ Authorities Tab 13

⁴ *Ibid* at 336-337,

⁵ *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 ¶31 [*Hutterian Brethren*] Intervenors’ Authorities Tab 2; *R v Edwards Books and Art Ltd.*, [1986] 2 SCR 713 at 781 [*Edwards Books*]. Intervenors’ Authorities Tab 8.

⁶ *Edwards Books*, *supra* note 5 at 759.

11. Group rights protect groups of individuals “because of their membership in a particular identifiable group”.⁷ In contrast, individual rights require the same or similar treatment regardless of an individual’s membership in a particular group.⁸
12. “Religion is about religious beliefs, but also about religious relationships.”⁹ If a community shares a common faith and a way of life that is viewed as a way of living their faith, an infringement of the group’s religious belief will impact both those beliefs and the life of their community.¹⁰ This right—the freedom to manifest one’s religion “in community with others”—is at the heart of the section 2(a) freedom.¹¹
13. Further, the autonomous existence of religious communities furthers pluralism in a democracy.¹²
14. Indeed, Section 27 of the *Charter* endorses this principle: “[t]his Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”¹³ Canada’s multicultural heritage includes recognition of our ethnic, cultural *and* religious differences.¹⁴
15. Though section 27 is not a right unto itself, it has been used to interpret other rights, including the freedom of religion. For example, in *Big M Drug Mart*, the Supreme Court held that compelling a universal day of rest preferred by one religion is inconsistent with Canada’s multicultural heritage.¹⁵
16. In *R v Zundel*, the Supreme Court recognized that section 27 should be interpreted in its broadest sense to protect “collective rights”. The Court cited, with approval, the view that “the cultural heritage of *minority* Canadians almost invariably includes a history of human rights violations through collective discrimination”.¹⁶
17. In sum, the collective aspects of the freedom of religion are intertwined with its individual aspects. It is not useful to discuss them separately, especially where an impugned act or law has the effect of undermining “communities of faith” and may result in collective discrimination.

⁷ *Hutterian Brethren*, *supra* note 5 ¶130.

⁸ *Edwards Books*, *supra* note 5 at 808.

⁹ *Hutterian Brethren*, *supra* note 5 ¶182.

¹⁰ *Ibid.*

¹¹ *Ibid* ¶131.

¹² *Ibid.*

¹³ *Charter*, *supra* note 1, s 27.

¹⁴ *Bruker v Marcovitz*, 2007 SCC 54, [2007] 3 SCR 607 ¶1. Interveners’ Authorities Tab 3.

¹⁵ *Big M Drug Mart*, *supra* note 3 at 337.

¹⁶ *R v Zundel*, [1992] 2 SCR 731 at 818. Interveners’ Authorities Tab 17.

3. Religious Institutions and Corporations Manifest Collective Religious Beliefs and Benefit from Religious Freedom

18. In modern Canada, religious groups manifest their religious beliefs by forming churches or temples, organizing charities and disseminating their faith through schools and educational institutions. These practices accord with the “essence” of religious freedom.
19. It is practically impossible for a religious group of individuals to operate, or manifest such beliefs, without legal personality. Canada’s legal framework provides for special status for churches and church associations to allow them to enter into contracts, own land or operate a bank account.
20. Though religious charities and advocacy groups could operate as unincorporated associations, there would be significant legal risks to the group’s members and the group would be disadvantaged when soliciting donations. Further, it is practically impossible for a religious group to operate a school or other educational institution without incorporating.
21. Succinctly, religious corporations are the embodiment of religious relationships that are at the “heart” of the freedom of religion.
22. If a religious community has established a corporation that has, as its purpose, the exercise of a common faith, the imposition of a majoritarian view (secular or otherwise) may impede that community’s way of life. The state, or in this case the NSBS, cannot coerce a religious institution into doing anything that violates the institution’s religious purpose any more than it cannot coerce an individual member of the same religious community, such as a current member of the bar, to do anything that violates his or her religious free will.
23. Both the Court of Appeal for Ontario and the Québec Court of Appeal have found that religious organizations can rely on section 2(a) of the *Charter*:
 - a. In *R v Church of Scientology of Toronto*,¹⁷ the Church of Scientology, a corporation, was convicted of breach of trust. The Church of Scientology argued, amongst other things, that the “identification doctrine” violated its freedom of religion. The Court of Appeal for Ontario held that the “corporation embodies...the beliefs of its human parishioners”. The

¹⁷ *R v Church of Scientology of Toronto* (1997), 33 OR (3d) 65, [1997] OJ No 1548 (QL) (CA). Interveners’ Authorities Tab 14.

Church of Scientology could, therefore, rely “on the religious freedom of its parishioners” in asserting its section 2(a) rights.¹⁸

- b. In *Congregation of the Followers of the Rabbis of Belz to Strengthen Torah c Val-Morin (Municipalité de)*,¹⁹ the Congregation alleged that municipal zoning regulations that prevented it from using buildings as a synagogue violated its freedom of religion. There was no dispute at trial or in the Québec Court of Appeal that the Congregation could rely on section 2(a) of the *Charter*.

24. Canada’s international commitments also protect group or collective religious freedom. The *Universal Declaration of Human Rights*²⁰ and the *International Covenant on Civil and Political Rights*²¹ both state that the freedom of religion includes “freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

25. This protection for religious corporations or organization is consistent with other jurisdictions. For example:

- a. United States of America: In *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission*,²² the United States Supreme Court held that the First Amendment “gives special solicitude to the rights of religious organizations”, extending constitutional protection to religious groups for the purpose of collectively expressing and propagating shared religious ideals.²³
- b. Europe: In *Metropolitan Church of Bessarabia and Others v Moldova*,²⁴ the European Court of Human Rights held that though religious freedom is primarily a matter of individual conscience, it was manifested “in community with others”.²⁵

¹⁸ *Ibid* at 134.

¹⁹ *Congregation of the Followers of the Rabbis of Belz to Strengthen Torah c Val-Morin (Municipalité de)*, 2008 QCCA 577, [2008] JQ No 2459 (QL). Intervenor’s Authorities Tab 6.

²⁰ *Universal Declaration of Human Rights*, GA Res 217 (III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) 71, art 18.

²¹ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, arts 9-14, Can TS 1976 No 47, 6 ILM 368, art 18.1.

²² *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission*, 80 USLW 4056 (US 11 January 2012), 2012 US LEXIS 578. Intervenor’s Authorities Tab 10.

²³ *Ibid* ¶31.

²⁴ *Metropolitan Church of Bessarabia and Others v Moldova*, no 45701/99, [2001] ECHR (QL). Intervenor’s Authorities Tab 11.

²⁵ *Ibid* ¶118.

26. The protection of religious institutions and corporations is also consistent with anti-discrimination statutes, which the Supreme Court of Canada has described as quasi-constitutional.²⁶
27. For example, the Nova Scotia *Human Rights Act* exempts religious organizations from the prohibition on discrimination in the provision of employment or public services.²⁷

B. The Freedom of Religion is Grounded in Authentic Pluralism

28. A defining characteristic of Canada's national character is its "evolutionary tolerance for diversity and pluralism", which recognizes that "ethnic, religious and cultural differences" will be "acknowledged and respected".²⁸
29. However, Canada's many cultures, languages, religions, beliefs, and identities sometimes conflict. These conflicts pose a constant challenge for decision-makers, governments and citizens in delineating the balance between individual rights and the rights of others.
30. Canadians confront these challenges by reconciling their competing rights. This process of reconciliation is a fundamental aspect of our democratic and constitutional tradition, which promotes authentic pluralism. An authentic pluralistic liberalism means that disagreement and different beliefs are encouraged. It means employing a "complex, nuanced, fact-specific exercise"²⁹ of balancing rights that circumscribes competing rights to their proper spheres³⁰.
31. In stark contrast, the Respondent's position promotes a form of *radical liberalism* that views certain rights as "trump" and rejects compromise³¹. In the Respondent's view, some rights - here, the right to be free from discrimination on the basis of sexual orientation - can and should take precedence over others. Such a radical, monolithic liberalism is foreign to the values and

²⁶ *New Brunswick (Human Rights Commission) v Potash Corporation of Saskatchewan Inc*, 2008 SCC 45, [2008] 2 SCR 604 ¶19. Intervenor's Authorities Tab 12.

²⁷ *Human Rights Act*, RSNs, 1989, c.214 as amended, sections 6(c)(ii), 6(d).

²⁸ *Braker Supra* note 14 at ¶ 2.

²⁹ *Ibid* at ¶ 1.

³⁰ Benson, Iain T., "Living Together with Disagreement: Pluralism, the Secular, and the Fair Treatment of Beliefs in Canada Today" (Revised and updated presentation delivered at the Ronning Centre forums at the Faith and Life Chapel, University of Alberta, 17 February 2007, and Christ Church, Calgary, Alberta, 18 February 2007) (Edmonton: McCallum Printing Group Inc, 2010) at 5 online: SSRN <http://ssrn.com/abstract=1654405>. [Benson]. Intervenor's Authorities Tab 22.

³¹ *Chamberlain v Surrey School District No 36*, 2002 SCC 86 at ¶ 137, [2002] 4 SCR 710 [Chamberlain]. Intervenor's Authorities Tab 4.

traditions on which Canada rightly prides itself.³² The Respondent's position distorts "liberal principles in an illiberal fashion", leading to only a "feeble notion of pluralism". Justice Gontier added remarks about a notion of "false tolerance":

"In my view, the relationship between s. 2 and s. 15 of the Charter, in a truly free society, must permit persons who respect the fundamental and inherent dignity of others and who do not discriminate, to still disagree with others and even disapprove of the conduct or beliefs of others. Otherwise, claims for "respect" or "recognition" or "tolerance", where such language becomes a constitutionally mandated proxy for "acceptance", tend to obliterate disagreement."³³

1. Religious Freedom in Canada has Pluralistic Roots

32. Religion in Canada prospers within this context and conception of pluralism and liberalism, whereby society values the building of strong communities and not solely the pursuit of maximizing personal autonomy.³⁴ As Justice LeBel explained in *Lafontaine*:

"As a general rule, the state refrains from acting in matters relating to religion. It is limited to setting up a social and legal framework in which beliefs are respected and members of the various denominations are able to associate freely in order to exercise their freedom of worship, which is a fundamental, collective aspect of freedom of religion, and to organize their churches or communities."³⁵

33. The history of religious freedom in Canada is unique.³⁶ In 1867 the British North America Act secured religious freedoms for the Catholic and Protestant minorities in their respective provinces by providing a constitutional guarantee for minority religious schools. Most recently, *the Canadian Charter of Rights and Freedoms (Charter)* has entrenched Canada's unique religious traditions though its preamble and requirement that substantive rights be interpreted in a manner consistent with Canada's "multicultural heritage", which includes religious cultures.

34. Unlike the requirement for a strict separation between church and state under the United States of America's Establishment Clause,³⁷ the Constitution of Canada allows-if not encourages -state support of religious institutions.³⁸ For example, in *Adler v Ontario (AG)*, the Supreme Court held that the Province of Ontario could fund religious schools and treat Catholic and Jewish

³² Bruker *Supra* note 14.

³³ Chamberlain *Supra* note 31.

³⁴ Benson *Supra* note 30 at 3-4.

³⁵ *Congregation des temoins de Jehovah de St-Jer6me-Lafontaine v Lafontaine (Village)*, 2004 SCC 48 at ¶ 6, [2004] 2 SCR 650. Intervenor's Authorities Tab 5.

³⁶ Rt Hon Beverly McLachlin, PC, "Freedom of Religion and the Rule of Law: A Canadian Perspective" in Douglas Farrow, ed, *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion and Public Policy* (Montreal: McGill-Queen's University Press, 2004) 12 at 16-21. Intervenor's Authorities Tab23.

³⁷ Peter W Hogg, *Constitutional Law of Canada*, loose-leaf(consulted on 25 August 2014), 5th ed. (Toronto:Carswell, 2007), ch. 42 at ¶ 42.2. Intervenor's Authorities Tab24.

³⁸ *Ibid* ¶42.8.

schools differently, because of the constitutional protection given to Catholic schools under the Constitution and despite that funding may "sit uncomfortably with the concept of equality embodied in the Charter".³⁹

35. At the same time, the state in Canada has a duty to remain neutral. It is submitted that the NSBS likewise should remain neutral. However, TWU is not a government body that is enacting the Community Covenant, but a privately funded faith community, at a privately funded university. Students who voluntarily sign on to the Community Covenant cannot simply have their religious freedom rights ignored. There is no evidence of a conflict of rights arising from a voluntary commitment to the Community Covenant. Moreover, should an issue arise with the Community Covenant, the proper jurisdiction is in British Columbia, beyond the jurisdiction of the NSBS.⁴⁰

C. Reconciliation of Competing Rights

36. It is submitted that there is no discrimination to the LGBT community in Nova Scotia by allowing TWU graduates to enter the bar admission process. However, the Executive Committee of the NSBS acknowledged the requirement for a balancing of competing rights in the event of a TWU graduate sought admission to the bar admission program, if TWU was not accredited.⁴¹ It is submitted that the NSBS has acknowledged that the implications of religious pluralism must be taken into account when considering claims of discrimination and beyond. This is especially true as Canada becomes increasingly ethnically and religiously diverse,⁴² and its appreciation of multiculturalism "grows".⁴³ In the event of any alleged discrimination, there is a requirement for a reconciliation of rights so as to advance the goals of a truly authentic pluralistic Canadian society.

1. Pluralism Requires Reconciliation of Competing Rights

37. Authentic pluralism does not presume that one right will necessarily trump another.⁴⁴ The Supreme Court of Canada has repeatedly rejected the attempt to give certain rights a "superior

³⁹ *Adler v Ontario (AG)*, [1996] 3 SCR 609 ¶ 36-39, 46-48. Intervenor's Authorities Tab 1.

⁴⁰ Newman, Dwight G., "On the Trinity Western University Controversy: An Argument for a Christian Law School in Canada" (June 22, 2013) at 5. (2013) 22:3 Const. Forum 1-14, revised version of presentation to Canadian Association of Law Teachers (CALT) Annual Meeting in Victoria, British Columbia, June 4, 2013. online: SSRN <http://ssrn.com/abstract=2283782> [Newman]. See also the Applicant's factum. Intervenor's Authorities Tab 27.

⁴¹ Record, NSBS 1064/14, referenced at paragraph 222 of the Applicants' factum.

⁴² Heather M MacNaughton and Jessica Connell, "A Delicate Balance: The Challenges Faced by Our Democratic Institutions in Reconciling the Competing Rights and Interests of a Diverse Population" (2011) 44 UBC L Rev 149 at 150. Intervenor's Authorities Tab 26.

⁴³ Bruker *Supra* note 14.

⁴⁴ *Ibid* at 30-3.

status".⁴⁵ Instead, courts and tribunals should focus on how the space between competing rights and groups can be shared rather than granting dominance to one viewpoint over another.

38. Implicit in the Supreme Court's decisions on competing rights is the fact that prioritizing one right over another "is not good for politics or democracy".⁴⁶ In the case at bar, these Intervenor's concur with the analysis set forward by the Applicants that there has been no satisfactory evidence of any conflict of rights, as set out in paragraphs 205 and following of the Applicant's Brief. These Intervenor's submit that the previous decision of the Supreme Court in *Trinity Western University v. British Columbia College of Teachers Association* remains applicable to the current situation. The Supreme Court reiterated that there should be no hierarchy of rights, and that a delineation of rights claims should be engaged to address possible conflicts.⁴⁷
39. Even if there has been some suggestion of a need to reconcile rights, the Supreme Court has relied on four overarching principles, none of which appear to have been applied in any way by the NSBS. These principles are as follows:
- a. Context: Rights should be viewed in their context and their limits defined within such boundaries.
 - b. Proportionality: Limits on rights must weigh the deleterious and salutary aspects of the effects and the measures.
 - c. Coherence: Courts should avoid a conflict between seemingly clashing rights by properly determining the scope of rights.
 - d. Flexibility: The analysis must be flexible and capable of addressing broader social purposes beyond Charter or legislated rights.⁴⁸
40. The objective of the analysis, which is derived from Canada's evolutionary tolerance for diversity and pluralism, is to find a way to give "full force and effect" to each right within the relevant context.⁴⁹
41. Building on the decisions in the press freedom cases,⁵⁰ the Supreme Court, in *R v NS*, established a framework for analyzing competing rights questions. The framework in that case focused on

⁴⁵ *Gosselin (Futor of) v Quebec (AG)*, 2005 SCC 15 at ¶ 26, [2005] 1 SCR 238.

⁴⁶ Benson *Supra* note 30 at 30-31, citing Charles Taylor, "The Public Sphere", in his *Philosophical Arguments* (Cambridge, MA: Harvard University Press, 1995) 257 at 281.

⁴⁷ *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 SCR 772 ["*Trinity Western*"]

⁴⁸ Iacobucci, Hon Justice Frank, "Reconciling Rights: The Supreme Court of Canada's Approach to Competing Charter Rights" (2003) SCLR (2d) 137 at 155-161 online:<<http://pi.library.yorku.ca/ojs/index.php/sclr/article/view/34956>>

⁴⁹ *R v NS*, 2010 ONCA 670 at ¶ 147; aff'd by 2012 SCC 72, [2012] 3 SCR 726 [NS]. Intervenor's Authorities Tab 16.

the claimant's religious belief and the respondents' fair trial rights. Using those facts, the Supreme Court described the framework as follows:

- a. Would requiring the witness to remove the niqab while testifying interfere with her religious freedom?
 - b. Would permitting the witness to wear the niqab while testifying create a serious risk to trial fairness?
 - c. Is there a way to accommodate both rights and avoid the conflict between them?
 - d. If no accommodation is possible, do the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so?⁵¹
42. The majority judgement of McLachlin, CJC, in *NS* indicates an approach to dealing with freedom of religion claims that are in conflict with other rights that first looks for a mutual modification with other rights, and only then to a "balancing" of rights as a last option.⁵²
43. For its part, the Ontario Human Rights Commission has adopted a Policy on Competing Human Rights,⁵³ which mirrors the analytical framework established in *NS*:
- a. Recognizing competing rights claims: What are the claims about? Do the claims connect to legitimate rights? Do the claims amount to more than minimal interference with rights?
 - b. Reconciling competing rights claims: Is there a solution that allows enjoyment of each right? If not, is there a "next best" solution?
44. The essential element of both approaches is to, again, identify the competing rights and then attempt to reconcile them so as to give them both "full force and effect".
45. The view of marriage and sexuality held by TWU and its students is based on their genuinely held religious beliefs.
46. The decision of the NSBS calls for removal of the clause in the TWU Community Covenant dealing with sexuality and marriage. In so doing, the NSBS seeks to put aside the faith traditions of TWU, its staff, faculty, and students, and direct the religious beliefs and morals of TWU law students. The NSBS justifies this religious discrimination against TWU and its students as

⁵⁰ *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 878 Intervenors' Authorities Tab 7.; *R v Mentuck*, 2001 SCC 76 at ¶ 132-36, [2001] 3 SCR 442. Intervenors' Authorities Tab 15.

⁵¹ *NS Supra* note 49 at 9.

⁵² *Newman Supra* note 40 at 5.

⁵³ Ontario Human Rights Commission, "Policy on Competing Rights", online: <http://www.ohrc.on.ca/en/policy-competinghuman-rights>. Intervenors' Authorities Tab 28.

necessary to protect the public interest in the practice of law of Nova Scotia. There is no justification for the NSBS position, as a matter of addressing a perceived breach of rights, or on the basis of a delineation of purported competing rights.

D. Authority of the Civil Marriage Act

47. The *Civil Marriage Act* (“CMA”) recognizes the right of individuals to hold a view of marriage in agreement with their religious beliefs. In its preamble the Act states:

“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;”⁵⁴

48. A broad protection in respect of conscientious and religious claims is then provided to all persons and “organizations”, in accordance with the aforementioned preamble to the Act:

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 freedom⁵⁵

49. The Supreme Court has stated that “tolerance of divergent beliefs is a hallmark of a democratic society”.⁵⁶ The provisions of the *CMA* clearly indicate that Parliament, in its modification of the civil definition of marriage, did not consider the holding of differing views on marriage to be contrary to the public interest nor to constitute discrimination.

50. The definition of “marriage” remains a matter of federal jurisdiction. The maintenance of a personal or organizational view of the definition of marriage, as the union of a man and a woman, remains valid in law. That allowance is instructive in informing the rights of TWU or other comparable institutions, or for that matter members of the NSBS, to inform its dealings.

⁵⁴ *Civil Marriage Act*, S.C. 2005, c. 33 [*CMA*].

⁵⁵ *Ibid* at s. 3.

⁵⁶ *Trinity Western*, *Supra* note 47 at ¶36.

The recognition of the place of sexual intimacy by TWU's Community Covenant within a Biblical understanding of marriage is a reasonable extension of this view of marriage, as recognized by many religiously informed or non-religious citizens.

E. Conclusion: A Broad and Robust Approach to Religious Freedom

51. In *Syndicat Northcrest v. Amselem*⁵⁷ the Supreme Court provides that religious beliefs should receive special protection because they are part of an individual's deeply-rooted cultural identity, connecting him or her to a larger cultural or religious community. If such beliefs are sincerely held, having a nexus with religion, a Court or quasi-judicial body should not adjudicate or interfere with such beliefs or religious obligations. A broad and expansive approach to religious freedom should not be narrowly construed prematurely. It is submitted that the *Anselem* test be applied, with necessary modifications to institutions or corporations, which maintain or advance religious beliefs.

1. TWU's Freedom of Religion Has Been Infringed

52. The freedom of religion, properly understood given its purpose and essence, protects both individual religious beliefs and religious communities. If religious communities manifest their religious belief through an institution or corporation that has, as its purpose, the exercise manifestation and promotion of religion, then that institution or corporation also enjoys freedom of religion.
53. In this case, TWU is an Evangelical Christian education institution, as defined by its originating documents. Its mission, teachings and characteristics are clearly rooted in Evangelical Christianity. All of TWU's school life is imbued with God, faith and Christian morality. Its purpose is to provide its students with a biblically based Evangelical Christian education.
54. TWU's students, students' parents and employees have decided to manifest their Christian faith and culture and pass it to future generations through TWU. TWU, as an institution, is therefore entitled to enjoy freedom of religion.
55. The NSBS now requires TWU to set aside aspects of its Christian purpose and manifest a secular world view, at least in respect of its view of marriage, contrary to federal law, and in violation of its right to religious freedom.

⁵⁷*Syndicat Northcrest v. Amselem*, 2004 SCC 47.

56. However, state neutrality is only guaranteed when the state “neither favours nor hinders any particular religious belief”.⁵⁸ The state must show “respect for all postures towards religion”.⁵⁹ For the state to promote secularism in all contexts would be to “distort liberal principles in an illiberal fashion”⁶⁰ and undermine the constitutional guarantee of pluralism.
57. By requiring TWU and its students to maintain or manifest a non-religious—if not anti-religious—world view, the NSBS has exceeded its authority and violated TWU’s freedom of religion. The NSBS decision incorrectly failed to perform any balance the *Charter* values of freedom of religion and multiculturalism with the statutory objectives of the relevant regulation.
58. These Intervenors further adopt the analysis set out in the Applicant’s Brief on a Section 1 of the Charter, from paragraphs 214 and following, with any necessary modifications as applicable to the rights of TWU.

PART IV: SUBMISSIONS CONCERNING COSTS

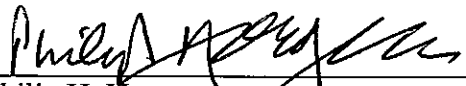
59. These Intervenors do not seek their costs of this application. The Intervenors should not be ordered to pay any part of the costs of this application.\

PART V: ORDER REQUESTED

60. These Intervenors respectfully support the Order(s) being requested by the Applicants.

ALL OF WHICH IS REPECTFULLY SUBMITTED,

October 28, 2014


Philip H. Horgan
Counsel for the Intervenors, Catholic Civil Right
League and Faith and Freedom Alliance.

⁵⁸ *SL v Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 SCR 235 ¶32. Intervenors’ Authorities Tab 18.

⁵⁹ *Ibid.*

⁶⁰ Chamberlain *Supra* note 31 at ¶137.

SCHEDULE A

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<i>Bruker v Marcovitz</i> , 2007 SCC 54, [2007] 2 SCR 607.	¶ 1, ¶ 2
<i>Chamberlain v Surrey School District No 36</i> , 2002 SCC 86, [2002], 4 SCR 710.	¶ 137
<i>Congregation des temoins de Jehovah de St-Jer6me-Lafontaine v Lafontaine (Village)</i> , 2004 SCC 48, [2004] 2 SCR 650.	¶ 6
<i>Dagenais v Canadian Broadcasting Corp</i> , [1994] 3 SCR 835.	878
<i>Gosselin (Futor of) v Quebec (AG)</i> , 2005 SCC 15, [2005] 1 SCR 238.	¶ 26
<i>R v Mentuck</i> , 2001 SCC 76, [2001] 3 SCR 442.	¶ 132-36
<i>R v NS</i> , 2010 ONCA 670; aff'd by 2012 SCC 72, [2012] 3 SCR 726.	¶ 9, ¶ 147
<i>Syndicat Northcrest v. Amselem</i> , 2004 SCC 47	
<i>Trinity Western University v. British Columbia College of Teachers</i> , [2001] 1 SCR 772	¶ 36
Secondary Sources	Cited at
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Hogg, Peter W., <i>Constitutional Law of Canada</i> , loose-leaf(consulted on 25 August 2014), 5th ed. (Toronto:Carswell, 2007).	42.2, 42.8
Iacobucci, Hon Justice Frank, "Reconciling Rights: The Supreme Court of Canada's Approach to Competing Charter Rights" (2003) SCLR (2d) 137 online:< http://pi.library.yorku.ca/ojs/index.php/sclr/article/view/34956 >	155- 161
MacNaughton, Heather M and Connell, Jessica, "A Delicate Balance: The Challenges Faced by Our Democratic Institutions in Reconciling the Competing Rights and Interests of a Diverse Population" (2011) 44 UBC L Rev 149.	150
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Ontario Human Rights Commission, "Policy on Competing Rights", online: http://www.ohrc.on.ca/en/policy-competinghuman-rights	

SCHEDULE B

LEGISLATION

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.

“2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.”

“27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”

Civil Marriage Act, SC 2005, c. 33.

“Preamble

WHEREAS the Parliament of Canada is committed to upholding the Constitution of Canada, and section 15 of the *Canadian Charter of Rights and Freedoms* 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;

WHEREAS the courts in a majority of the provinces and in one territory have recognized that the right to equality without discrimination requires that couples of the same sex and couples of the opposite sex have equal access to marriage for civil purposes;

WHEREAS the Supreme Court of Canada has recognized that many Canadian couples of the same sex have married in reliance on those court decisions;

WHEREAS only equal access to marriage for civil purposes would respect the right of couples of the same sex to equality without discrimination, and civil union, as an institution other than marriage, would not offer them that equal access and would violate their human dignity, in breach of the *Canadian Charter of Rights and Freedoms*;

WHEREAS the Supreme Court of Canada has determined that the Parliament of Canada has legislative jurisdiction over marriage but does not have the jurisdiction to establish an institution other than marriage for couples of the same sex;

WHEREAS everyone has the freedom of conscience and religion under section 2 of the *Canadian Charter of Rights and Freedoms*;

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;

WHEREAS, in light of those considerations, the Parliament of Canada's commitment to uphold the right to equality without discrimination precludes the use of section 33 of the *Canadian Charter of Rights and Freedoms* to deny the right of couples of the same sex to equal access to marriage for civil purposes;

WHEREAS marriage is a fundamental institution in Canadian society and the Parliament of Canada has a responsibility to support that institution because it strengthens commitment in relationships and represents the foundation of family life for many Canadians;

AND WHEREAS, in order to reflect values of tolerance, respect and equality consistent with the *Canadian Charter of Rights and Freedoms*, access to marriage for civil purposes should be extended by legislation to couples of the same sex;..."

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

3.1 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.”

Human Rights Act, RSNS, 1989, c.214

Exceptions

6 Subsection (1) of Section 5 does not apply

(c) in respect of employment, to

(i) a domestic employed and living in a single family home,

(ii) an exclusively religious or ethnic organization or an agency of such an organization that is not operated for private profit and that is operated primarily to foster the welfare of a religious or ethnic group with respect to persons of the same religion or ethnic origin, as the case may be, with respect to a characteristic referred to in clauses (h) to (v) of subsection (1) of Section 5 if that characteristic is a reasonable occupational qualification, or (iii) employees engaged by an exclusively religious organization to perform religious duties;

(d) in respect of volunteer public service, to an exclusively religious or ethnic organization that is not operated for private profit and that is operated primarily to foster the welfare of a religious or ethnic group with respect to persons of the same religion or ethnic origin, as the case may be;

International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, arts 9-14, Can TS 1976 No 47, 6 ILM 368, art 18.1

“Article 18.

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his conviction, religion or belief in worship, observance, practice and teaching.”

Universal Declaration of Human Rights, GA Res 217 (III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) 71, art 18.

“Article 18. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”