SUPREME COURT OF NOVA SCOTIA

Citation: Trinity Western University v. Nova Scotia Barristers’ Society,

2015 NSSC 25

Date: 20150128

Docket: Hfx.No. 427840

Registry: Halifax

Between:

Trinity Western University and Brayden Volkenant

Applicants

v.

Nova Scotia Barristers’ Society

Respondent

Summary

[1] What one person sees as having the strength of moral convictions is just

sanctimonious intolerance to another. As with a lot of things, it depends on

perspective. Orthodoxies, secular or religious, can provide the comfort of certainty.

[2] The Nova Scotia Barristers’ Society (the “NSBS”) has said that it will

recognize law degrees to be granted by the proposed law school at Trinity Western

University (“TWU”) only if the institution changes its policy on student conduct.

That policy now prohibits sexual intimacy for students outside traditionally defined

marriage. The NSBS sees it as a matter of equality. TWU sees it as a matter of

religious freedom.

1. Summary

[3] This decision isn’t about whether LGBT equality rights are more or less

important that the religious freedoms of Evangelical Christians. It’s not a value

judgment in that sense at all. It is first about whether the NSBS had the authority to

do what it did. It is also about whether, even if it had that authority, the NSBS

reasonably considered the implications of its actions on the religious freedoms of

TWU and its students in a way that was consistent with Canadian legal values of

inclusiveness, pluralism and the respect for the rule of law. In that sense, it is a

value judgment. I have concluded that the NSBS did not have the authority to do

what it did. I have also concluded that even if it did have that authority it did not

exercise it in a way that reasonably considered the concerns for religious freedom

and liberty of conscience.

[4] The NSBS can only legally do what it has been given the power to do by

legislation. It acts under the authority of the Legal Profession Act 1 to regulate the

practice of law in Nova Scotia. That act does not give the NSBS the power to

require universities or law schools to change their policies. Its jurisdiction does not

reach that far.

[5] The NSBS does have jurisdiction to deal with the educational and other

qualifications of people who apply to practise law in Nova Scotia. If TWU

graduates were not prepared by virtue of their education to practise law in Nova

Scotia, or were inclined by virtue of their training at that institution to be

intolerant, refusing them admission would not be regulating the law school. It

would be regulating the competence of Nova Scotia lawyers. 1 SNS 2004, c. 28

[6] The Federation of Canadian Law Societies decided to recognize TWU law

degrees as suitable to prepare graduates for legal practice. It was agreed here that

graduates from TWU’s proposed law school would indeed be properly qualified. It

was also agreed that they would be no more likely to discriminate than graduates

of other law schools. So there is nothing wrong with TWU law degrees or TWU

law graduates.

[7] There is, according to the NSBS, something wrong with TWU. That

something is its mandatory Community Covenant which the NSBS says

discriminates against LGBT students. Unless that Community Covenant is changed

a TWU law degree is deemed not to be a law degree for purposes of the NSBS. An

otherwise qualified person would be deemed not qualified. The reason would not

relate in any way to the law degree, to that person’s ability or to his or her

suitability to practise law. It would not be because of anything other than the

university policy to which the NSBS objects. That is no different than deeming a

law degree not to be a law degree unless the university amended any number of

other policies that are not reflected in the quality of the graduate. Those could

include tuition policies, harassment policies, affirmative action admission quota

policies or tenure policies.

[8] The legal authority of the NSBS cannot extended to a university because it is

offended by those policies or considers those policies to contravene Nova Scotia

law that in no way applies to it. The extent to which NSBS members or members

of the community are outraged or suffer minority stress because of the law school’s

policies does not amount to a grant of jurisdiction over the university.

[9] The second issue is considered only if it is assumed that the NSBS had the

authority to regulate in the manner that it did. The issue involves whether the

NSBS reasonably considered the constitutional freedoms of TWU and its

graduates. The issue is not whether it is right or fair or morally justified or even

theologically sound to deny the right of equality to same-sex spouses in the context

of life at a private religious university. The issue is about the action taken by the

NSBS. The NSBS as a state actor has to comply with the Charter. TWU and its

students are protected by the Charter.

[10] The NSBS has characterized TWU’s Community Covenant as “unlawful

discrimination”. It is not unlawful. It may be offensive to many but it is not

unlawful. TWU is not the government. Like churches and other private institutions

it does not have to comply with the equality provisions of the Charter. It has not

been found to be in breach of any human rights legislation that applies to it.

Counsel for the NSBS described TWU’s proposed law school as a “rogue” law

school. It would be so only in the sense that its policies are not consistent with the

preferred moral values of the NSBS Council and doubtless many if not a majority

of Canadians. The Charter is not a blueprint for moral conformity. Its purpose is

to protect the citizen from the power of the state, not to enforce compliance by

citizens or private institutions with the moral judgments of the state.

[11] People have the right to attend a private religious university that imposes a

religiously based code of conduct. That is the case even if the effect of that code is

to exclude others or offend others who will not or cannot comply with the code of

conduct. Learning in an environment with people who promise to comply with the

code is a religious practice and an expression of religious faith. There is nothing

illegal or even rogue about that. That is a messy and uncomfortable fact of life in a

pluralistic society. Requiring a person to give up that right in order to get his or her

professional education recognized is an infringement of religious freedom. Private

religious schools are not limited to training members of the clergy, theologians,

missionaries or those who want professional degrees but do not want to practise.

Those institutions already do produce nurses and teachers and grant any number of

academic degrees that are widely accepted.

[12] Rights and freedoms are not absolute. Sometimes there has to be room for

compromise. That involves deciding whether both the religious freedom and an

important legislative goal can co-exist. The NSBS argued that its decision was an

effort to uphold the equality rights of LGBT people. It was not an exercise of

anyone’s equality rights. It was the decision of an entity acting on behalf of the

state purporting to give force and voice to those rights. The NSBS is not the

institutional embodiment of equality rights for LGBT people. To justify an

infringement of religious liberty the NSBS action has to be directed at achieving

something of significance. Refusing a TWU law degree will not address

discrimination against anyone in Nova Scotia.

[13] The NSBS through its counsel has said that it hoped that its decision, along

with decisions of other law societies, would prompt TWU to change its policy on

same sex marriage. It is hardly a pressing objective for a representative of the state

to use the power of the state to compel a legally functioning private institution in

another province to change a legal policy in effect there because it reflects a legally

held moral stance that offends the NSBS, its members or the public.

[14] The NSBS has argued that it would be wrong for it to countenance or

condone what counsel described as the “homophobic” policies of TWU. Many

people in Nova Scotia are offended by the TWU policy. For some, particularly

LGBT people, living in the knowledge that an institution with policies such as

TWU’s would have its degree recognized in Nova Scotia, adds to the considerable

stress they already experience in their lives. There is an element of stress that is

inherent in living in a multicultural society where beliefs and practices that offend

majority values are not only on display, but are actively tolerated. Society does not

seek to eradicate the practices or re-educate the believers but recognizes their rites

and their organizations for state purposes such a solemnization of marriage, tax

exemptions and charitable status.

[15] There is a difference between recognizing the degree and expressing

approval of the moral, religious, or other positions of the institution. The refusal to

accept the legitimacy of institutions because of a concern about the perception of

the state endorsing their religiously informed moral positions would have a chilling

effect on the liberty of conscience and freedom of religion. Only those institutions

whose practices were not offensive to the state-approved moral consensus would

be entitled to those considerations.

[16] The NSBS regulation and policy are in effect a statement of principle to

stand in solidarity with LGBT people. The force or value of that statement has to

be considered against the infringement of religious liberty that was the means by

which it was made. The statement would not prevent TWU graduates from

practising in Nova Scotia. A TWU graduate could article somewhere else and then

apply to be admitted to practise in Nova Scotia. Individual TWU graduates could

make a special application to the Executive Director and perhaps be admitted,

without knowing for sure what criteria would be applied. Those criteria could be

academic, but there is no concern with academic qualifications. The criteria could

be personal, but once again there is no concern that TWU would produce lawyers

who discriminate. Yet it was argued that it should be assumed that the as yet

undefined process would be reasonable. The statement is in the form of an

obstacle, the special application, that is put before a TWU graduate that is not put

before others. That statement has no connection to the equality rights of the LGBT

community or the public interest in the practice of law in Nova Scotia. That’s less

a statement about equality than a statement about the futility of just making

statements .

[17] The NSBS refuses a TWU law degree and puts that obstacle before the

individual graduate even though he or she may not agree with the university’s

policies and may even be member of the LGBT community. Yet, quite properly, it

does not prevent lawyers from practising law who may agree with the religious

tenets that underlie TWU’s policy or who belong to religions or private

organizations that espouse those moral positions and impose similar restrictions on

their members. Any rational distinction in principle between those lawyers and a

TWU graduate would have to be very finely drawn.

[18] The value of the statement of principle made by refusing to recognize TWU

law degrees is not proportional to the direct and substantial impact on freedom of

religion. The NSBS acted unreasonably by failing to properly or adequately

consider Charter rights in making the decision to refuse TWU law degrees and in

passing the regulation that put that resolution into effect.