Association for Reformed Political Action
ARPA CANADA

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s. 15(1)
Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

Good morning my Lord. My name is André Schutten, legal counsel for the Association for Reformed Political Action (ARPA) Canada.

INTRODUCTION - Concerns of Reformed community

What this case stands for – the message that has been communicated over the past year, and certainly has been heard by the Reformed community is that if a citizen belongs to a community that holds itself and its members to a Biblical standard of holiness, (to be "holy" simply means, to be "set apart", different) if a citizen belongs to such a community, then he or she cannot have equal access to the public square, and certainly not to the regulated professions.

This was very much perceived as a "shot across the bow" and is part of the reason ARPA Canada is here today. As the Barristers' Society put it at para. 95 – "By legitimizing acts of discrimination, the state sends a clear signal to citizens that discrimination is acceptable and justifiable." To which we say, "Exactly." By legitimizing, or, more accurately, by *perpetuating* acts of discrimination, the state sends a clear signal to citizens that discrimination (on the grounds of religion) is acceptable and justifiable.

The temptation, my Lord, in cases like the one we have here, is to hive off section 15 as an equality protection for the benefit of sexual minorities, and to leave religious groups with section 2(a). However, clearly religious individuals also benefit from section 15 equality rights.

I have three points I'd like to focus on in my oral submissions my Lord. First, I'd like to clarify exactly what the word discrimination means. Second, I'd like to spend some time on the central focus of the discrimination test, which is discriminatory effect. Third, I'd like to speak to the nature of our constitution, with reference to a sword and shield analogy.

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POINT 1 – Definition of discrimination

One of my wife's favourite movies is *The Princess Bride*. Throughout the movie, the main villain keeps using the word "INCONCEIVABLE." And at one point, the character Montoya says, "You keep using that word. I do not think it means what you think it means."

I submit that it is the same thing with the word "discrimination". When people, lawyers especially, hear the word "discrimination", they have a knee jerk reaction against it.

I would like to interact with my Lord's coffee shop analogy from yesterday. If a Catholic coffee shop only hires Catholics and only serves Catholics, then they are associating. It could be framed as discriminating (discriminating against Protestants and Buddhists and Jews and Atheists, etc.) but what they are doing is properly called association. But if a coffee shop hires and serves anyone except Catholics then that is properly called discrimination.

The term "lawful discrimination" should be rejected for the term "association". TWU associates. It doesn't "unlawfully discriminate". What the NSBS is doing, however, is discrimination.

It is interesting to note that the Barristers' Society, at para. 48, states, "There are notably no aboriginal law schools, LGB law schools, African Canadian law schools, women's law schools, nor even any Jewish or Muslim law schools in Canada."

We, for the record, would be okay with such schools, on the condition that they teach their law students Canadian law. The NSBS, *to be consistent,* would not be okay with any of these law schools, since a women's law school discriminates against men, and a African-Canadian law school discriminates against Asian students, etc., and should such schools be started, the NSBS would, to be consistent, have to discriminate against these graduates too. For the sake of diversity, of course.

POINT 2 – Focus on Discriminatory Effect

(The first stage of the discrimination test in section 15(1) is to demonstrate a distinction made on enumerated or analogous grounds. The distinction in this case is on the basis of religion, vis-à-vis the Community Covenant at TWU).

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In *Whitler*, para. 64 (at para. 25 in ARPA's brief), the Court lays out the second stage of the 2-step section 15(1) test.

> "The analysis at the second step is an inquiry into whether the law works substantive inequality by [1] perpetrating disadvantage or prejudice, or [2] by stereotyping in a way that does not correspond to actual characteristics or circumstances."

What I want to draw my Lord's attention to is that at this stage, the important thing to demonstrate is EFFECT. This point is emphatically made in *Quebec v. A*. There, Justice Abella writes, (at para. 357, ARPA Brief para. 44)

> "[t]here is no need to look for an attitude of prejudice motivating, or created by, the exclusion… Nor need we consider whether the exclusions promote the view that the individual is less capable or worthy of recognition as a human being or citizen… What is relevant is not the *attitudinal* progress towards them, but… their discriminatory *treatment*."

So, we don't need to prove that the Society has prejudiced motivations against TWU students. We don't need to prove that the Society's resolution resulted in prejudicial attitudes against TWU students (though there is ample evidence of this on the record – see for example, the submissions of Mr. Bob Kuhn, pp. 14-16). And we don't even need to prove that the Society's resolution promotes the idea that TWU students are less capable, (for example, that they are more likely to discriminate against LGB clients).

All of the foregoing is irrelevant. What we do need to prove is discriminatory effect, discriminatory treatment. We need to focus on the Society's resolution having a discriminatory effect on TWU grads.

We see this focus on effect in *Andrews* already. *Andrews* is a case where the BC law society insisted that lawyers become citizens before they can be licensed. At p. 183 of the judgment, (ARPA Brief para. 31) McIntyre J. wrote that insisting on a citizenship requirement,

> "without consideration of educational and professional qualifications or the other attributes or merits of individuals in the group, would, in my view, infringe s. 15 equality rights."

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The discriminatory effect for the non-citizen lawyer was a delay before these otherwise qualified lawyers could become lawyers.

The same is true of the case at bar. The Society admits that TWU students would be qualified. They just don't like that these students belonged to an Evangelical association. And so the Society allows that perfectly legal, constitutionally protected association to trump all other considerations of qualifications.

The effect is at minimum a delay. And that is pure discrimination. As the Supreme Court also notes in *Andrews* at p. 174 (ARPA Brief para. 33),

> "Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination."

Again, this is what the Society is doing, in effect (if not intentionally). They are making a distinction based on personal characteristics attributed to an individual solely on the basis of association with a group. The effect is, at the very least, a delay for TWU students to practice law in this province.

POINT 3 - Sword and shield

Our constitution has been referred to as a "living tree" since Oct. 18, 1929 and I'm not about to suggest we stop now. I submit that the analogy is used to advance the idea of slow but maturing growth and development. I submit that what is being advocated for by my friends on the other side is not the living tree doctrine, but some mutant organism argument. That is, the Human Rights Commission and the Society are asking this Court to fundamentally alter the *Charter* from being a shield to a sword.

The *Charter*, since it was added to our Constitution in 1982, has always been a shield to protect the citizen from the interference and meddling of the State. It was not meant to be used by the State as a sword to be imposed on private institutions and citizens.

This flaw in argument, with the greatest respect, runs throughout the Human Rights Commission's brief, and is more subtly present in the Barristers' Society's section 15 analysis.

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I note that the Society does state that TWU is entitled to "discriminate" (para. 306), but then goes on to apply the *Charter* as a sword to TWU's actions. For example, at para. 362:

> "In sum, it is the equality rights of LGB people that are at play and, had the Society not adopted an anti-discrimination policy in its Regulation and implemented it through its Resolution, those rights would be offended by the Society's lack of legislative and administrative action, both of which are subject to the *Charter*."

If TWU is entitled to associate under section 2(d) and to associate on religious terms (under section 2(a)), then why should the Society feel obliged to discriminate against it? It results in absurdity. As the SCC stated in the BCCT case at para. 25, (ARPA Brief, para. 42)

> "To state that the voluntary adoption of a code of conduct based on a person's own religious beliefs, in a private institution, is sufficient to engage s.15 would be inconsistent with freedom of conscience and religion".

Nor can we apply the *Charter* to a private institution through a back door of "*Charter* values" language. The Supreme Court in *Andrews* confirms this when it states that section 15(1) does not "impose on individuals and groups an obligation to accord equal treatment to others. It is concerned with the application of the law." (*Andrews* at 163-64, ARPA Brief, para. 41)

The Charter is meant to shield TWU and its students from the NSBS. The NSBS is bound by the Charter. TWU is protected by it.

CONCLUSION

To conclude, if I may with your indulgence, my Lord, take one big step back.

Everything I've said, everything that all of my colleagues have said and will say, and with the greatest deference and respect, anything my Lord writes on this matter, all of it is meaningless blather… if there is no rule of law. In particular, I mean the aspect of the rule of law that says that the law won't arbitrarily change, or change on social whim or fancy. In order for the *Charter* to work, in order for the fundamental freedoms to function and for equality rights to exist and to continue to exist, it requires us to recognize that Canada was founded upon principles that recognize the supremacy of God and the rule of law. Without that foundation, there is only us, lawyers and judges to determine the law.

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And if it's just us, there's nothing stopping another judge or panel of judges to rule that maybe section 15 should be interpreted in Orwellian fashion, that everyone is equal, but that some are just a little bit more equal than others.

For ARPA Canada, for the Reformed Christian community, we understand and believe in the sovereignty of God. And it's because we do, that section 15 works so well for us. My Lord, when a Christian encounters another person, we first see, (or we ought to first see), not skin colour, not gender, not disability. Rather, we see someone made in the image of our Maker, we see the *Imago Dei*. That's why we must treat every human being with dignity and respect. We can have vigorous debates and disagreements with our neighbours about issues and ideas and actions. But the love of neighbour remains because when we see our neighbour, we see an image of God.

My submission, my Lord, is that the State cannot create unequal access to the public square for Christians who belong to an orthodox community. To do so violates section 15(1) of the *Charter* and undermines equality, not just for Christians, but for everyone.

Subject to any questions, my Lord, those are my submissions.