



No. **S=149837**
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

TRINITY WESTERN UNIVERSITY and
BRAYDEN VOLKENANT

PETITIONERS

AND

THE LAW SOCIETY OF BRITISH COLUMBIA

RESPONDENT

PETITION TO THE COURT

ON NOTICE TO: THE LAW SOCIETY OF BRITISH COLUMBIA
845 Cambie Street
Vancouver, BC V6B 4Z9

ATTORNEY GENERAL OF BRITISH COLUMBIA
Ministry of Justice, Legal Services Branch
6th Floor, 1001 Douglas Street
Victoria, BC, V8V 1X4

This proceeding has been started by the petitioner(s) for the relief set out in Part 1 below.

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) serve on the petitioner(s)
 - (i) 2 copies of the filed response to petition, and

- (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

TIME FOR RESPONSE TO PETITION

A response to petition must be filed and served on the petitioner(s),

- (a) if you reside anywhere within Canada, within 21 days after the date on which a copy of the filed petition was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed petition was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed petition was served on you, or
- (d) if the time for response has been set by order of the court, within that time.

- (1) The address of the registry is:

**Law Courts
800 Smithe Street
Vancouver, B.C. V6Z 2E1**

- (2) The ADDRESS FOR SERVICE of the petitioner(s) is:

**KUHN LLP
100-32160 South Fraser Way,
Abbotsford, BC V2T 1W5**

Fax number address for service (if any) of the petitioner(s): N/A

E-mail address for service (if any) of the petitioner(s): N/A

- (3) The name and office address of the petitioner's(s') lawyer is:

**Kevin L. Boonstra
100-32160 South Fraser Way,
Abbotsford, BC V2T 1W5**

CLAIM OF THE PETITIONER(S)

PART 1: ORDERS SOUGHT

1. A declaration pursuant to the *Judicial Review Procedure Act* that the decision of the Law Society of British Columbia (the “**Law Society**”) made on October 31, 2014 declaring that the School of Law at Trinity Western University (“**TWU**”) is not an approved faculty of law for the purposes of the Law Society’s admission program (the “**Decision**”) is *ultra vires* or is otherwise invalid;
2. A declaration that the Decision unjustifiably infringes upon s. 2(a), s. 2(b), s. 2(d), and s. 15(1) of the *Charter of Rights and Freedoms* (the “**Charter**”);
3. An order in the nature of certiorari pursuant to the *Judicial Review Procedure Act* and s. 24(1) of the *Charter* quashing the Decision;
4. In the alternative, an order that the Decision be set aside and remitted back to the Law Society to be reconsidered in accordance with the declarations made by the Court;
5. An order in the nature of prohibition pursuant to the *Judicial Review Procedure Act* and s. 24(1) of the *Charter* that prohibits the Law Society from taking steps to declare, or to implement a resolution of Law Society members declaring, that TWU’s School of Law is not an approved common law faculty of law for the purposes of Law Society Rule 2-27;
6. An order in the nature of mandamus pursuant to the *Judicial Review Procedure Act* and s. 24(1) of the *Charter* requiring the Law Society to recognize that TWU’s School of Law is an approved common law faculty of law for the purposes of Law Society Rule 2-27;
7. Such directions as may be necessary for the purposes of carrying out any reconsideration of the Decision;
8. Costs; and

9. Such further orders and relief as counsel may advise and this Honourable Court may permit.

PART 2: FACTUAL BASIS

1. The Petitioner TWU is a private Christian liberal arts and sciences university located in Langley, British Columbia. TWU offers over 40 undergraduate programs and 17 graduate programs, including professional programs in nursing, education, business, and counselling psychology. TWU has been a degree-granting institution recognized by the government of British Columbia since 1979. It was authorized to offer graduate degrees in 1985.
2. TWU is the largest privately funded Christian university in Canada. Approximately 4,000 students attend TWU per year. TWU has over 22,000 alumni.
3. The Petitioner Brayden Volkenant ("**Brayden**") is a graduate of TWU's Bachelor of Arts (Business) program. Brayden intends to go to law school in British Columbia and planned to attend TWU's law school (the "**School of Law**"). Brayden is interested in being a member of the bar in British Columbia after graduating from law school.

(a) Trinity Western University

4. For over 50 years, TWU has served as a flagship institution of higher learning for Canada's evangelical Christian community. TWU was founded to be, and has always remained, an arm of the evangelical Christian church. The mission of TWU and the Christian church are inextricably bound together.
5. TWU was founded on religious principles and has always been a religious community. TWU originated out of a desire by members of the Evangelical Free Church of America (the "**EFCA**") to establish a Christian liberal arts college in the Fraser Valley. From its inception to the present day, TWU has existed primarily to serve the educational needs of Canada's evangelical Christian community.

6. TWU retains direct institutional affiliation with two related Christian denominations: the EFCA and the Evangelical Free Church of Canada (“EFCC”), which are its sponsoring denominations. The EFCC was created in 1967, became autonomous in 1984, and remains affiliated with the EFCA. TWU was founded and continues to exist as an expression of the religious mission, heritage, and values of these evangelical Christian bodies.
7. TWU was originally incorporated in 1962 by the EFCA under the *Societies Act*, known then as “Trinity Junior College”. Trinity Junior College was continued by the *Trinity Junior College Act*, S.B.C 1969, c. 44, which empowered it to offer students two years of university education.
8. Section 3(2) of the *Trinity Junior College Act* provided TWU with a mandate to offer educational programs “with an underlying philosophy and viewpoint that is Christian.” Trinity Junior College was renamed Trinity Western College by legislative change in 1972. After another legislative change in 1979, TWU began granting undergraduate degrees. In 1985, the British Columbia Legislature passed *An Act To Amend The Trinity Western College Act*, c. 63, 1985, which changed the name of Trinity Junior College to Trinity Western University and provided it the authority to offer and grant graduate degrees.
9. Despite TWU being an educational arm of the church, TWU accepts all academically-qualified students, regardless of their personal beliefs, who wish to study in the evangelical Christian community that is TWU. TWU does not require or ask students to agree with its Statement of Faith.
10. TWU does not consider or ask for information regarding the sexual orientation of student applicants. Students of various sexual orientations have attended and do attend TWU.

(b) The Community Covenant

11. TWU maintains a code of conduct, called the “Community Covenant”, which is based on TWU’s Christian philosophy and originates from TWU’s religious beliefs and character. All members of the TWU community agree to comply with the

Community Covenant as a matter of respect for the Christian values of the TWU community and as a means of achieving TWU's mission.

12. The Community Covenant is a significant means by which TWU maintains its religious character and facilitates the ability of the members of its community to practice their Christian beliefs in a safe and welcoming environment. The Community Covenant assists in fostering an atmosphere that is conducive to the integration of faith and learning, and facilitates moral and spiritual growth in a manner consistent with evangelical religious beliefs.
13. The Community Covenant requires TWU students to treat all people with dignity, respect, equality, and love, which are values rooted in the Christian belief that all people are created in God's image.
14. The Community Covenant expects that TWU students abstain from some activities that are legal, but which nevertheless conflict with evangelical Christian teachings, such as gossiping, lying, becoming drunk, and viewing pornography.
15. One provision in the Community Covenant requires students to abstain from sexual intimacy outside of marriage between one man and one woman. This understanding of marriage is based on evangelical and historical Christian beliefs and is shared by religious believers of other major religious faiths. Christian marriage predates, and is distinct from, the civil recognition of marriage. This Community Covenant provision is rooted in evangelical and historical Christian ethics and applies to persons of all sexual orientations that choose to join TWU's community.
16. A variety of accredited religious law schools in the United States have similar provisions in their codes of conduct. Like those schools, TWU does not forbid members of sexual minorities from attending; in fact, members of sexual minorities have attended and do attend TWU.
17. In 2001, the Supreme Court of Canada ordered the British Columbia College of Teachers to approve TWU's professional Teacher Education Program, which it had refused to do because of its conclusion that TWU's Community Standards (the

predecessor of the Community Covenant) was a discriminatory practice that was contrary to the public interest and public policy (*Trinity Western University v. College of Teachers*, 2001 SCC 31 [*TWU v. BCCT*]). The Supreme Court of Canada held that:

“Students attending TWU are free to adopt personal rules of conduct based on their religious beliefs provided they do not interfere with the rights of others. Their freedom of religion is not accommodated if the consequence of its exercise is the denial of the right of full participation in society” (para. 35).

(c) **The School of Law**

18. Opening a law school has been part of TWU’s long-term plan for over 20 years. In pursuing this goal, TWU assembled a team of advisors from all corners of the legal community to consider and develop a proposal for the establishment of the School of Law. Through the School of Law, TWU will offer a three year Juris Doctor common law degree (the “**JD Program**”) similar to programs offered by publically funded common law schools already operating throughout Canada.
19. Between 2009 and 2012, TWU engaged in significant consultation with a wide variety of groups, including the Law Society of British Columbia (the “**Law Society**”), other BC law school deans, and bar associations.
20. Entry into the legal profession is governed by Canada’s law societies. The Law Society is the gatekeeper to the legal profession in British Columbia. In 2010, Canadian law societies, including the Law Society, jointly adopted a national requirement that gave the Approval Committee of the Federation of Law Societies of Canada (the “**Federation**”) the responsibility for ensuring that new law degree programs comply with a uniform set of academic standards for the purpose of entry of Canadian common law school graduates into Canadian law societies.
21. The Federation’s “national requirement” outlines the knowledge and skills that applicants for entry to the bar admission programs of the law societies in the Canadian common law jurisdictions must possess, and the academic program and learning resources that law schools must have in place. The national requirement was

approved by Canada's law societies in 2010, and will come into force for law school graduates in 2015.

22. TWU sought two consents for the JD Program. TWU sought (a) consent from the Minister of Advanced Education (the "**Minister**") under the *Degree Authorization Act* ("**DAA**") to offer the JD Program; and (b) approval from the Federation that School of Law graduates meet the national requirement, as required for admission to membership in Canadian law societies. Without the latter approval, a graduate of the School of Law would have an academic degree, but would not be able to be admitted as an articling student or, ultimately, as a lawyer.
23. On June 15, 2012, TWU submitted proposals for establishing the School of Law to both the Minister and the Federation. TWU planned on the School of Law opening in September, 2016. TWU notified the public and the legal community of its JD Program proposal.
24. Following receipt of TWU's proposal, the Federation established a Special Advisory Committee, chaired by John Hunter, QC, to examine whether concerns raised in relation to the Community Covenant should affect the eligibility of graduates from the School of Law to enroll in admission programs offered by Canada's law societies.
25. In December, 2013, the Special Advisory Committee issued a report of its conclusions. It found that none of the many issues raised by opponents of TWU's School of Law proposal presented any "public interest bar to approval of TWU's proposed law school or to admission of its future graduates to the bar admission programs of Canadian law societies".
26. On December 16, 2013, after eighteen months of thorough consideration, the Federation granted preliminary approval ("**Federation Approval**") to the JD Program. The Federation's Approval Committee concluded that, subject to certain items to be addressed in TWU's future annual reports, the JD Program proposal meets the national requirement, is "comprehensive and is designed to ensure that students acquire each competency included in the national requirement."

27. TWU communicated the Federation Approval to all of Canada's provincial and territorial law societies to confirm that its graduates would be able to article and be admitted to the bar in those jurisdictions.
28. On December 17, 2013, the Minister granted consent to TWU's JD Program. On December 11, 2014, the Minister revoked that consent as a result of the Decision.
29. TWU law school graduates would currently be admitted in Alberta, Saskatchewan, Manitoba, New Brunswick, PEI, and the Yukon Territory. The Law Society of Newfoundland and Labrador has put the question of admission for TWU's graduates in abeyance pending the outcome of court processes in other provinces.
30. The law societies of Ontario and Nova Scotia have passed motions that would prevent the School of Law's graduates from admission to their respective law societies. In Nova Scotia, the Council voted 10-9 in favour of a motion that declined to approve TWU's JD Program unless it abandoned or amended the Community Covenant "in a way that ceases to discriminate". In Ontario, the benchers of the Law Society of Upper Canada declined to accredit TWU by a vote of 28-21. TWU has applied to judicially review those law society decisions in the superior courts of those two provinces.

(d) The Law Society of British Columbia

31. Canadian law school graduates must complete the Law Society Admissions Program ("LSAP") to be called to the bar in British Columbia. LSAP includes nine months of articles and completion of a ten week Professional Legal Training Course.
32. In order to enroll in the LSAP, an applicant must have proof of academic qualification. Under Law Society Rule 2-29, the Executive Director of the Law Society must consider an application for enrolment by a person meeting the academic qualifications established under Rule 2-27. Until the Fall of 2013, "academic qualification" under the Law Society Rules included the "successful completion of the requirements for a bachelor of laws or the equivalent degree from a common law faculty of law in a Canadian university" (Rule 2-27(4)(a)).

33. On May 8, 2013, the Law Society received a legal opinion from Geoffrey B. Gomery, QC, respecting TWU's JD Program proposal. This legal opinion stated that the Federation's national approval system adopted by the Law Society "is not consistent with Law Society Rule 2-27(4)...A rule change is required". It also stated that a court would "strike down any rule discriminating against TWU graduates unless justification for the rule was grounded in evidence rather than assumptions."
34. In September, 2013, the meaning of "academic qualification" in Rule 2-27(4)(a) was amended to include the "successful completion of the requirements for a bachelor of laws or the equivalent degree from an approved common law faculty of law in a Canadian university".
35. A new Rule 2-27(4.1) was also created that clarifies that the Law Society relies on the Federation's determination of whether a law school meets the academic qualification for the purposes of entry to the British Columbia bar. Rule 2-27(4.1) states:

(4.1) For the purposes of this Rule, a common law faculty of law is approved if it has been approved by the Federation of Law Societies of Canada unless the Benchers adopt a resolution declaring that it is not or has ceased to be an approved faculty of law.
36. The Benchers of the Law Society (the "**Benchers**") have never established any objective criteria or guidelines to guide the exercise of their discretion under Rule 2-27(4.1).
37. The Benchers have been statutorily delegated the power to govern and administer the affairs of the Law Society (*Legal Profession Act*, S.B.C. 1998, s. 4(2)). The Benchers are not elected to represent the interests of Law Society members, but fiduciaries entrusted with special duties under the *Legal Profession Act*.
38. Under Law Society Rule 2-49(1)(e), applicants who wish to transfer to the British Columbia bar from the bar of another province can only do so if they meet the "academic qualification" criteria under Rule 2-27(4)(a).
39. The Law Society relies on the Federation's judgment, without reservation, to ensure that foreign-educated law school graduates possess adequate academic qualifications

for entry to the British Columbia bar (Rule 2-27(4)(b)). The Law Society does not reserve any right in its Rules to “not approve” any foreign law schools or their graduates in a manner similar to Rule 2-27(4.1).

40. Rule 2-27(4.1) was passed pursuant to the Benchers’ authority under sections 20 and 21 of the *Legal Profession Act*:

Articled students

20 (1) The benchers may make rules to do any of the following:

- (a) establish requirements, including academic requirements, and procedures for enrollment of articled students; ...

Admission, reinstatement and requalification

21 (1) The benchers may make rules to do any of the following:

- (a) establish a credentials committee and delegate any or all authority and responsibility under this Part, other than rule-making authority, to that committee;
- (b) establish requirements, including academic requirements, and procedures for call to the Bar of British Columbia and admission as a solicitor of the Supreme Court; ...

41. The Law Society has a number of legislative objects and duties under the *Legal Profession Act* that guide the Benchers:

Object and duty of society

3 It is the object and duty of the society to uphold and protect the public interest in the administration of justice by

- (a) preserving and protecting the rights and freedoms of all persons,
- (b) ensuring the independence, integrity, honour and competence of lawyers,
- (c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,
- (d) regulating the practice of law,...

42. At their January 24, 2014 meeting, the Benchers invited public input from lawyers and the public on TWU’s School of Law.

43. At a meeting held on February 28, 2014, the Benchers circulated a notice of motion under Rule 2-27(4.1) (the “**April Motion**”) that would be considered at their April 11, 2014 meeting. The April Motion stated:

Pursuant to Law Society Rule 2-27(4.1), the Benchers declare that, notwithstanding the preliminary approval granted to Trinity Western University on December 16, 2013 by the Federation of Law Societies’ Canadian Common Law Program Approval Committee, the proposed Faculty of Law of Trinity Western University is not an approved faculty of law.

44. By March 3, 2014, the Law Society had received over 300 submissions regarding the April Motion. TWU asked the Law Society to explain what issues it considered relevant to exercising its discretion under Rule 2-27(4.1) but the Law Society refused to provide any guidance.
45. On March 15, 2014, the Law Society received another legal opinion from Mr. Gomery that examined the scope of discretion afforded to the Benchers under Rule 2-27(4.1). This opinion specifically considered whether the Law Society could impose a “community covenant condition” such that the Benchers would accept the Federation’s approval of TWU’s JD Program conditional upon TWU abandoning its Community Covenant. Mr. Gomery concluded that the Benchers could not decide against TWU under Rule 2-27(4.1) on any public interest ground unrelated to academic qualification:

...under Rule 2-27(4.1), the Law Society is confined to acting on grounds that are related to the academic qualification to be offered by the proposed law program and it is not authorized to impose the community covenant condition on unrelated grounds;

46. The Law Society made a number of inquiries in advance of the April 11, 2014 Bencher meeting to determine whether there was any evidence that TWU graduates engaged in discriminatory conduct relating to sexual orientation or otherwise. Presumably, this was done because the Supreme Court of Canada in *TWU v. BCCT* said that the BCCT could only deny TWU accreditation of a teacher program based on specific evidence, such as by examining “discipline files involving TWU graduates and other teachers affiliated with a Christian school of that nature” (para. 38).

47. The Law Society investigated its own disciplinary records, and made inquiries of the BC Human Rights Tribunal, the Deans of three British Columbia law faculties, the Teachers Regulation Branch, and the College of Registered Nurses of British Columbia. The responses revealed that there was no evidence of discriminatory conduct by TWU graduates.
48. TWU made written submissions to the Benchers on April 3, 2014.
49. On April 11, 2014, the Benchers defeated the April Motion by a 20-7 vote. The only concern raised was the Community Covenant. No concerns were raised with the quality of the education to be provided or that School of Law graduates would not be adequately prepared for the practice of law.
50. Nearly all of the Benchers who voted against the April Motion stated during the meeting that they were legally required to follow *TWU v. BCCT* in exercising their discretion.
51. After the defeat of the April Motion, a Special General Meeting of Law Society members (“SGM”) was requisitioned by some of its members pursuant to Law Society Rule 1-9(2). The meeting was held on June 10, 2014. At the SGM, members were asked to consider the following resolution (“SGM Resolution”) on the basis that the School of Law would not “promote and improve the standard of practice by lawyers as required by section 28 of the *Legal Profession Act*”:

The Benchers are directed to declare, pursuant to Law Society Rule 2-27(4.1), that Trinity Western University is not an approved faculty of law.
52. In its “Notice to the Profession” sent to all Law Society members, the Law Society included correspondence from a member of the Law Society that urged members of the Law Society to pass the SGM Resolution. TWU was not permitted to provide correspondence to Law Society members in a Notice to the Profession, despite its request.

53. At the SGM, members of the Law Society passed the SGM Resolution by a vote of 3,210 to 968. Members were not required to be present during the member speeches in order to vote. The SGM Resolution was not binding on the Benchers.

54. On July 15, 2014, the Benchers received another legal opinion from Mr. Gomery. It examined whether reversing the April Motion would constitute a breach of the Benchers' statutory duties under section 13(4) of the *Legal Profession Act* if there was a referendum under this section. The opinion concluded:

Therefore, a resolution directing the Benchers to reverse a determination which they believe to have been legally required of them by the decision in *TWU v. BCCT* is not a binding resolution, because to pass it would be contrary to the Benchers' statutory duties.

55. At its September 26, 2014 meeting, the Benchers voted on two motions. Similar to the April Motion, the first motion was for the Benchers to implement the SGM Resolution. This motion was defeated by a vote of 21-9.

56. The second motion (the "**September Motion**") resolved to hold a referendum of Law Society members "conducted as soon as possible" on implementing the following question:

Resolved that the Benchers implement the resolution of the members passed at the special general meeting of the Law Society held on June 10, 2014, and declare that the proposed law school at Trinity Western University is not an approved faculty of law for the purpose of the Law Society's admissions program.

(the "**Referendum Question**")

57. The September Motion stated the referendum results would be binding on the Benchers if at least one-third of Law Society members voted and two-thirds of members voted in favour of the resolution. The September Motion also stated that "[t]he Benchers hereby determine that implementation of the Resolution does not constitute a breach of their statutory duties, regardless of the results of the Referendum." The Benchers passed the September Motion by a vote of 20-11.

58. A third motion that would have delayed further action until after the Courts in various jurisdictions had ruled on matters pertaining to the School of Law was then withdrawn.
59. The referendum was held among Law Society members pursuant to Rule 1-37 of the Law Society Rules. TWU was denied the opportunity to include material in the mailing that included the referendum ballots, despite its request to do so. On October 30, 2014, the Law Society released the results. There were 5,951 BC lawyers (74%) who voted in favour of the Referendum Question and 2,088 (26%) who voted against it.
60. At a meeting held on October 31, 2014, the Benchers voted 25-1, with four abstentions, to implement the Referendum Question (the “**Decision**”). There was no substantive debate or discussion on the Decision at the meeting. The Decision stated:

Resolved that the Benchers implement the resolution of the members passed at the special general meeting of the Law Society held on June 10, 2014, and declare that the proposed law school at Trinity Western University is not an approved faculty of law for the purpose of the Law Society's admissions program.

PART 3: LEGAL BASIS

(a) Overview

1. The rule of law animates judicial reviews of administrative action. The rule of law ensures that administrative decision-makers act within their grant of authority; “all exercises of public authority must find their source in law” (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 28).
2. In *Roncarelli v. Duplessis*, [1959] SCR 121, the Supreme Court of Canada held that one could not revoke a liquor licence from an individual because of his association with a religious community. In holding that administrative decision-makers must act according to their grant of authority, Rand J. stated that “there is always a perspective within which a statute is intended to operate”:

In public regulation of this sort there is no such thing as absolute and untrammelled “discretion”, that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express

language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. (p. 140)

3. Similarly, in *Smith & Rhuland Ltd. v. R.*, [1953] 2 S.C.R. 95, the Supreme Court of Canada held that an administrative decision-maker could not refuse certifying a trade union on the basis that it employed a Communist, in the absence of evidence that said membership would frustrate the relevant legislative scheme.

4. In *TWU v. BCCT*, the Supreme Court of Canada applied these principles to TWU's Community Covenant. It found that the BCCT could not reject TWU's teaching program because it believed "the proposed program follows discriminatory practices which are contrary to the public interest and public policy." The Supreme Court of Canada also found the BCCT's focus on the Community Covenant was "disturbing" and held that the BCCT acted without evidence and outside its jurisdiction:

Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected....For the BCCT to have properly denied accreditation to TWU, it should have based its concerns on specific evidence.

5. After considering *TWU v. BCCT*, and having failed to identify any specific evidence upon which to reject TWU's JD Program, including that graduates of TWU would act discriminatorily or be academically unqualified, nearly three-quarters of the Benchers rejected the April Motion. They thereby voted to recognize TWU's School of Law graduates.

6. Only months later, and in the absence of any new arguments or evidence, the Benchers reversed themselves in the Decision and declared that all TWU School of Law graduates are academically unqualified to be admitted to the British Columbia bar.

7. Like *TWU v. BCCT*, this Decision was not based on any specific evidence and fell outside the authority granted by the legislature.

8. The Decision should be set aside on all of the following grounds:

- (a) The Decision is incorrect and unreasonable because the *Legal Profession Act* does not give the Law Society the authority to refuse law school graduates who meet the *Legal Profession Act's* statutory objective, which is to ensure the competence of lawyers.
 - (b) The Law Society had no jurisdiction or authority to sub-delegate its decision under Rule 2-27(4.1) to the members of the Law Society. The September Motion and the Decision are void.
 - (c) The Law Society fettered its discretion and allowed the members of the Law Society to dictate outcome of the exercise of discretion afforded to the Benchers under Rule 2-27(4.1).
 - (d) The Decision is also incorrect and unreasonable because it is an abuse of discretion and falls outside the range of acceptable outcomes defensible on the facts and law. In any event, it is unreasonable.
 - (e) The Law Society erred in its duty of procedural fairness to TWU.
 - (f) The Law Society failed to properly balance the relevant *Charter* values with the statutory objectives of the *Legal Profession Act*, including the freedom of religion, freedom of expression, freedom of association, equality rights, and s. 32 of the *Charter*.
 - (g) The Decision unjustifiably violates s. 2(a), s. 2(b), and s. 2(d), and 15(1) of the *Charter*.
- (b) The Standard of Review**
9. The Law Society must be correct in its determinations of true questions of jurisdiction, or *vires*. This standard should be applied in determining whether the Decision resulted from impermissible subdelegation.

10. A standard of correctness ought to apply to the review of the Decision. *TWU v. BCCT* has already determined the degree of deference to be accorded with regard to this particular category of question on judicial review.
11. If the standard is not determined by precedent, the standard of review analysis favours a correctness standard of review in any event. The Decision does not involve any meaningful factual component and was a question of law. The Decision was not one subject to discretion within the Benchers' specialized area of expertise. The admittance of people to the bar is of significant importance to the legal system. The question of law in this case requires uniform and consistent answers, particularly given that in making the Decision, the Benchers reversed themselves on a point that the majority of them originally stated were legally required to make. There is no privative clause in the *Legal Profession Act*.
12. If the standard of review is reasonableness, which is denied, the Decision must nevertheless fall within a range of possible, acceptable outcomes that are defensible in respect of the relevant facts and law. The degree of deference owed to the Benchers is determined by the words and context of its grant of authority under the *Legal Profession Act*. To be reasonable, the process and the outcome of the Decision must conform to the principles of justification, transparency and intelligibility. The Decision cannot be justified at law and is not intelligible in the context of the *Legal Profession Act*.
13. Whether the Law Society complied with its duty of procedural fairness will be reviewed on a standard of correctness.

(c) The Nature of the Decision

The Decision in the Context of the *Legal Profession Act* and the Rules

14. The Law Society has no authority to regulate universities or their faculties of law. In the context of Rule 2-27, the specific question before the Benchers was whether an applicant to the bar who graduates from TWU's School of Law would have adequate academic qualification under Rule 2-27(3)(b) to become a fit and competent lawyer.

15. Statutory provisions enable the Law Society to establish requirements, including academic requirements, for applicants for call and admission (*Legal Profession Act*, s. 3(c), s. 20(1)(a), s. 21(1)(b)). These requirements are made in the context that all applicants admitted to the bar be competent and fit to practice law (*Legal Profession Act*, s. 3(b), s. 19).
16. The Law Society has established rules under these specific statutory provisions. In particular, it has established Rule 2-27 for “Enrolment in the Admission Program”. Under Rule 2-27(3), applicants for enrolment, including any TWU School of Law graduate, will have to deliver certain listed items to the Executive Director, including: “(b) proof of academic qualification under subrule (4)”.
17. Rule 2-27(4) establishes what constitutes “academic qualification”, which is the successful completion of a J.D. or LL.B. from an “Approved common law faculty of law”. As such, the question under Rule 2-27(4.1) is whether TWU School of Law graduates will be academically qualified such that they are fit and competent to article and practice law in British Columbia.
18. The SGM Resolution, upon which the Decision was based, only references section 28 of the *Legal Profession Act* as the reason why graduates of TWU’s School of Law should not be approved. Section 28 concerns the education of lawyers after entry to the bar. It is unrelated to the true question under Rule 2-27(4.1), which concerns the prerequisite academic qualifications for entry to the bar.
19. Neither the SGM Resolution, the September Motion, nor the Decision refer to the “public interest” provisions contained in section 3 of the *Legal Profession Act*.
20. Due to the Federation’s approval, graduates of the School of Law are approved and will be recognized unless the Benchers decide otherwise under Rule 2-27(4.1). The Decision under Rule 2-27(4.1) directly and significantly impacts TWU’s rights, privileges, and interests and those of members of TWU’s religious community, including Brayden Volkenant.

The Referendum was Non-Binding

21. The SGM Resolution and Referendum Question are not, and could not be, binding on the Benchers, because these resolutions were not passed pursuant to section 13 of the *Legal Profession Act*, and in any event, their implementation would breach the Benchers' statutory duties. According to that section, a resolution of members can only be binding on the Benchers if:
- (a) It was not substantially implemented by the Benchers within 12 months of being adopted;
 - (b) The Law Society receives a petition from at least 5% of members requesting a referendum;
 - (c) One-third of Law Society members vote in the referendum;
 - (d) Two-thirds of those voting vote in favour of the resolution; and
 - (e) Implementing the resolution would not constitute a breach of the Benchers' statutory duties.
22. In this case, 12 months had not passed from the SGM Resolution and no petition was received. Further, implementing the resolution would breach the Benchers' statutory duties, which s. 13(4) states they "must not" do. The power to consider the academic qualifications of TWU graduates is solely within the authority of the Benchers within the confines of the *Legal Profession Act* and the *Charter*.
- (d) The Interpretation and Proper Application of Law Society Rule 2-27(4.1)**
23. The Law Society must frame their Rules within the scope delegated to them by the Legislature. A rule that exceeds the Law Society's jurisdiction even slightly will be declared *ultra vires*. A rule cannot transform a statutory grant of power to a delegate into a discretionary power broad enough as to permit discriminatory, arbitrary, unjust, and oppressive decisions. A decision made under a rule must ultimately be made according to the statutory grant of power.
24. Rule 2-27(4.1) cannot be interpreted as transforming a legislative power to make rules establishing academic requirements (*Legal Profession Act*, ss. 20, 21) into an

administrative, adjudicative power to “not approve” a faculty of law in the untrammelled discretion of the Benchers. The Rule cannot reasonably be interpreted as granting a discretionary power to discriminate against individuals who have attended a certain law school based on grounds unrelated to their competency and fitness to become a lawyer, which is the sole purpose of the “academic qualification” requirement under Rule 2-27(3)(b).

25. The Decision under Law Society Rule 2-27(4.1) was *per se* incorrect and unreasonable, because it was not made in accordance with the powers delegated to the Benchers under the *Legal Professions Act*. The *Legal Profession Act* empowers the Benchers to make rules that establish academic requirements. The academic requirement in Rule 2-27(4.1) must be related to the Law Society’s statutory mandate under the *Legal Professions Act* to ensure a person is competent and fit to become a lawyer. Rule 2-27(4.1) specifies no requirements, guidelines, or criteria upon which the Benchers are to exercise their discretion to not approve a law school. The only criterion specified in Rule 2-27 is academic. The academic credentials of an applicant are generally recognized if an faculty of law is approved by the Federation as meeting the national requirement. TWU’s School of Law met the national requirement.
26. The Decision is further incorrect and unreasonable because the *Legal Profession Act* does not give the Law Society the authority to *a priori* deny entry to the bar to a law school graduate who meets legitimate criteria under the Law Society’s statutory objective, which is to ensure the competence of lawyers. The Federation’s approval of TWU’s JD Program is determinative of whether graduates of TWU meet the Law Society’s statutory objectives, since the Law Society has adopted the Federation’s national requirement for academic standards and TWU’s JD Program has met that requirement. In any event, the Decision was not premised on any perceived academic or professional short-coming of the JD Program.
27. The implementation of a resolution of members is also unreasonable as a breach of the Benchers’ statutory duties, regardless of whether it was implemented pursuant to

s. 13 of the *Legal Profession Act*. The roles and duties of the Law Society Benchers and members are disparate. The legislature never intended to grant the power for members of the Law Society to make discretionary decisions on matters which adversely affect the rights of graduates of the School of Law to become lawyers in British Columbia, particularly when based on non-academic grounds. Members of the Law Society cannot exclude prospective lawyers by resolution any more than disbar existing ones. Even if they could, implementation of a resolution of members would breach the Benchers' statutory duties contrary to s. 13(4) of the *Legal Profession Act* by acting contrary to the *Human Rights Code*, and not applying the *Charter* and law as determined by the Supreme Court of Canada.

28. The Benchers are statutorily bound to follow and apply that law, as was previously acknowledged by a majority of the Benchers when they rejected the April Motion. The Benchers failed to follow the legal advice they received in this regard.

(d) The Benchers Improperly Subdelegated their Authority.

29. Subdelegation is only permitted when it is authorized by statute, either expressly or by necessary implication.
30. The *Legal Profession Act* authorizes the Benchers to govern and administer the affairs of the Law Society, as well as ensure applicants to the bar are fit to become barristers and solicitors. The *Legal Profession Act* does not authorize the Benchers to delegate their statutory powers to the members of the Law Society. There is no statutory authorization permitting a decision under Rule 2-27(4.1) to be made by anyone other than the Benchers.
31. A resolution cannot be binding on the Benchers because the preconditions set out in s. 13 of the *Legal Profession Act* were not met. The Decision was blindly determined *a priori* by the September Motion and the results of the Referendum Question, without any assurance that those voting in the referendum would have properly acquainted themselves with and applied the relevant law or facts. In any event, the members of the Law Society are not authorized to make such a decision.

32. The subdelegation that resulted in the Decision was not authorized by statute and would breach the Benchers' statutory duties. The Referendum Question and the Decision is therefore *ultra vires*.

(e) The Law Society Fettered its Discretion and its Discretion was Dictated

33. It is an abuse of discretion for a statutory decision maker to fetter its discretion by policy, contract, or by a non-binding plebiscite. Fettering of discretion occurs when a decision-maker does not exercise any independent judgment in a matter, such as when it binds itself with another person's opinion.
34. Similarly, it is an abuse of discretion for a decision-maker to permit another person to dictate its judgment.
35. The Decision was a result of fettering and dictation. The September Resolution disabled the Benchers' independent discretion and judgment, as it allowed the Decision to be made by the members of the Law Society. The September Resolution stated that the vote on the Referendum Question "will be binding and will be implemented by the Benchers" and its implementation would not breach the Benchers' statutory duties, "regardless of the results" of the referendum. In implementing the results of the SGM Resolution and the Referendum Question, the Benchers permitted a non-binding vote of the members to control their judgment. Most of the Benchers had previously expressed that they were legally bound to approve of TWU's JD Program, given the Supreme Court's decision in *TWU v. BCCT*. The Decision is a result of actions outside the Benchers' jurisdiction and a breach of their statutory duties.
36. The Decision also constitutes fettering by prematurely closing the Benchers' mind to evidence that an individual applicant graduating from TWU's School of Law would be competent and fit for entry to the bar.

(f) The Decision was Incorrect and Unreasonable

37. For the following reasons, the Decision was incorrect, and in any event, unreasonable, because it was not made “within a reasonable interpretation of the margin of maneuver contemplated by the legislature” (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817).
38. The Court should not defer to the Decision. The Decision lacks the existence of justification, transparency, and intelligibility within the decision-making process that are the hallmarks of a reasonable decision. It is therefore unreasonable.
39. The Benchers must not consider factors that depart from the *Legal Profession Act*’s language or objects. Contrary to *TWU v. BCCT*, the Law Society acted on the basis of irrelevant considerations and with no evidence. The Law Society considered the religious beliefs reflected in the Community Covenant without any evidence to support the conclusion that TWU JD Program graduates would be inadequately qualified to become lawyers. The Law Society wrongly accepted that the jurisdiction for making the Decision was derived from section 28 of the *Legal Profession Act*, which is irrelevant to the exercise of discretion under Rule 2-27(4.1). The results of the non-binding vote on the Referendum Question were also irrelevant. The Decision is therefore incorrect and unreasonable.
40. By applying irrelevant considerations, the Decision ignored relevant considerations, including:
 - (a) TWU met the national requirement for academic qualifications set by the Law Society through the Federation. There is no principled reason to deviate from that requirement and conclude that TWU’s School of Law graduates would be not be fit and competent for admission to the bar;
 - (b) There is no evidence that TWU graduates who have already been admitted to the British Columbia bar discriminate against sexual minorities at all;

- (c) There is no evidence that TWU graduates have engaged in discriminatory conduct in law school, as teachers, or as nurses;
- (d) The Law Society does not look at the conduct policies of any other law school and freely permits other applicants to be admitted to the bar who attend foreign law schools with conduct policies similar to the Community Covenant, meaning that TWU School of Law graduates would be treated in a discriminatory manner;
- (e) The Decision constitutes unlawful discrimination under the *Human Rights Code*;
- (f) The Decision is contrary to the Law Society's legal obligations under the *Labour Mobility Act*, S.B.C. 2009, c. 20, *Agreement on Internal Trade Implementation Act*, S.C. 1996, c. 17, Inter-Jurisdictional Practice Protocol, the National Mobility Agreement, and Territorial Mobility Agreement;
- (g) TWU is not subject to the jurisdiction of either the *Charter* or the *Human Rights Code* and the Community Covenant does not infringe either of them;
- (h) The Decision fails to protect and uphold the public interest by preserving and protecting the constitutional rights and freedoms of members of TWU's community, whom the Supreme Court of Canada said were "free to adopt personal rules of conduct based on their religious beliefs provided they do not interfere with the rights of others";
- (i) TWU is legislatively empowered to provide education with an underlying Christian philosophy and viewpoint;
- (j) TWU graduates will enhance diversity in the legal profession; and
- (k) It has been recognized by the Supreme Court of Canada, by the Federation, and by statutes, including the *Civil Marriage Act*, that there are no material public interest reasons to deny TWU's JD Program on the basis of the Community Covenant.

41. The result of the vote on the Referendum Question was implemented and the resulting Decision was a breach of the Benchers' statutory duties under the *Legal Profession Act*. It was also contrary to other legislation binding upon the Law Society, including the *Charter* and *Human Rights Code*.
42. By focusing on the sectarian nature of TWU and the Community Covenant, the Decision was made with an unauthorized purpose and in a discriminatory manner that is not permitted by the *Legal Profession Act*. The right to inquire into and reject an applicant based on the religious beliefs of a law school attended by that applicant is discriminatory, contrary to the *Human Rights Code*. The Decision sets a disturbing precedent, as it permits the Law Society to exclude individuals from being a lawyer in British Columbia based upon the religious policies of organizations to which they have previously belonged.
43. The Decision is also incorrect and unreasonable because it was based on the vote on the Referendum Question, which ratified a flawed SGM Resolution. The SGM Resolution incorrectly relies on section 28 of the *Legal Profession Act* for making a decision under Rule 2-27(4.1). Section 28 is only concerned with promoting and improving the standard of practice among existing lawyers. It and the SGM Resolution were completely unrelated to the academic qualifications for entry to the bar under Rule 2-27(4.1).
44. It was unreasonable for the Benchers to reverse their vote on the April Motion in the absence of additional relevant evidence.
45. The Decision failed to consider, address, and respond to TWU's submissions to the Law Society. No reasons or rationale were provided for the Law Society reversing its April Motion vote. Given the impact of the Decision to TWU and its graduates, reasons were required.

(g) The Decision Was Not a Proper Balancing of *Charter* Values

46. The Law Society is required to exercise its statutory discretion in accordance with *Charter* protections. The Law Society failed to properly balance *Charter* values with

the applicable statutory objectives under the *Legal Profession Act* in determining how the relevant *Charter* values would be best be protected in light of those objectives. In particular:

- (a) The Law Society did not identify the proper statutory objectives in making the Decision;
- (b) The Law Society completely failed to consider *Charter* protections and values in making the Decision;
- (c) The Decision infringes the s. 2(a) *Charter* rights of freedom of conscience and religion protecting TWU and the members of its religious community;
- (d) The Decision infringes upon the rights and fundamental freedoms of thought, belief, opinion, and expression of TWU and the members of its community under s. 2(b) of the *Charter*;
- (e) The Decision interferes with TWU and its community members' freedom of association protected under s. 2(d) of the *Charter*;
- (f) The Decision denies members of the TWU community and the evangelical Christian community the right to equal benefit of the law without discrimination based on religion under s. 15(1) of the *Charter*; and
- (g) The Decision failed to take into account that the *Charter* applies to the actions of the Law Society, but does not restrict TWU and its activities. The Decision failed to respect the *Charter* values of liberty and autonomy, which grant students the personal freedom to voluntarily attend an institution that respects and encourages their religious beliefs.

(h) The Decision was Reached in a Manner that Denied Procedural Fairness

47. The Law Society acted unfairly and without procedural fairness by:

- (a) Denying TWU an opportunity to make relevant submissions and denying it a meaningful opportunity to understand the grounds upon which the Law Society would assess the academic qualifications of TWU School of Law graduates or the grounds upon which the Decision would be made;
- (b) Failing to grant TWU the opportunity to make submissions directly to the individuals that were *de facto* responsible for the outcome of the Decision, the Law Society members, in advance of the SGM Resolution and with the referendum ballots on the Referendum Question;
- (c) Permitting individuals to vote on the SGM Resolution and Referendum Question without hearing any of the speeches at the SGM or the submissions offered by TWU;
- (d) Re-hearing, re-considering, and re-deciding the April Motion without any legally significant change in circumstances; and
- (e) Failing to adhere to the legitimate expectations of TWU, including those created by the Law Society's undertaking at the time that TWU submitted its JD Program proposal. TWU had a legitimate and reasonable expectation that the academic requirement component of its JD Program proposal would be assessed solely on the Federation's uniform national requirement adopted by the Law Society.

(i) The Decision Violates the *Charter*

48. The Community Covenant is an expression of the religious beliefs of TWU and members of its community. It is a means by which TWU meets its mission to provide education with an underlying Christian philosophy and viewpoint.

49. Members of the TWU community voluntarily join and adopt the Community Covenant, understanding that it is, and for the purpose of joining, an expressly religious educational community. TWU's primary associational role is to provide education within a Christian community and with an underlying Christian philosophy.
50. The Decision unjustifiably infringes s. 2(a), s. 2(b), and s. 2(d) of the *Charter* because it infringes upon the rights of TWU and members of the TWU religious community, such as Brayden Volkenant. Specifically:
- (a) The Decision creates coercion and constraint upon the choice of TWU and its community to act in accordance with their religious beliefs, contrary to s. 2(a) of the *Charter*;
 - (b) By making the Decision, the Law Society hindered a particular religious belief and failed to show respect for all postures towards religion, contrary to s. 2(a) of the *Charter*;
 - (c) The Law Society failed to accommodate religion, religious belief, and religious practice by making the Decision, contrary to s. 2(a) of the *Charter* and contrary to the direction of the Supreme Court of Canada in *TWU v. BCCT*;
 - (d) The private expression embodied in the Community Covenant is protected under s. 2(b) of the *Charter*. The Decision imposed a cost on that expression and hindered it, contrary to s. 2(b) of the *Charter*; and
 - (e) The Decision "places a burden on members of a particular religious group and in effect, is preventing them from expressing freely their religious beliefs and associating to put them into practice" contrary to s. 2(b) and s. 2(d) of the *Charter* and contrary to the direction of the Supreme Court of Canada in *TWU v. BCCT* (para. 32).

51. The Decision also unjustifiably infringes s. 15(1) of the *Charter* by denying members of TWU's religious community, such as Brayden Volkenant, a benefit available to other law school graduates. The Decision creates a distinction based on religion, which is an enumerated ground in s. 15(1) of the *Charter*. This distinction imposes a significant disadvantage and burden on members of the TWU community. If TWU and the members of its community do not abandon the Community Covenant, they renounce recognition of the academic qualifications of their graduates. "Students are likewise affected because the affirmation of their religious beliefs and attendance at TWU will not lead to" being called to the bar in British Columbia (*TWU v. BCCT*, para. 32).

PART 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Brayden Volkenant made December 12, 2014;
2. Affidavit #1 of Dr. W. Robert Wood made December 12, 2014;
3. Affidavit #1 of William (Bill) Taylor made December 15, 2014;
4. Affidavit #1 of Earl Phillips made December 15, 2014;
5. Affidavit #1 of Dr. Janet Epp Buckingham made December 15, 2014;
6. Affidavit #1 of Dr. Jeffrey P. Greenman made December 10, 2014;
7. Affidavit #1 of Dr. Samuel H. Reimer made December 10, 2014;
8. Affidavit #1 of Dr. Gerald Longjohn Jr. made December 11, 2014;
9. Affidavit #1 of Iain Cook made December 10, 2014;
10. Affidavit #1 of Austin Davies made December 10, 2014;
11. Affidavit #1 of Sabrina N. Ferrari made December 10, 2014;
12. Affidavit #1 of Richard M. Green made December 12, 2014;
13. Affidavit #1 of Natalie L. Hebert made December 12, 2014;
14. Affidavit #1 of Jessie Legaree made December 12, 2014;
15. Affidavit #1 of Arend Strikwerda made December 12, 2014;
16. Affidavit #1 of Jody L. Winter made December 11, 2014;

- 17. Affidavit #1 of Teresa Lesberg made December 12, 2014; and
- 18. Affidavit #1 of Kristina Jennings made December 16, 2014.

The petitioners estimate that the hearing of the petition will take 5 days.

Date: December 17, 2014



Signature of the lawyer for Petitioners
Kevin L. Boonstra

To be completed by the court only:

Order made

- in the terms requested in paragraphs of Part 1 of this notice of application
- with the following variations and additional terms:

Date:

Signature of

Judge Master