File Number: _____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

APPLICANT
(Appellant)

-and-

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

RESPONDENTS
(Respondents)

APPLICATION FOR LEAVE TO APPEAL OF THE LAW SOCIETY OF BRITISH COLUMBIA

(PURSUANT TO S. 40(1) OF THE *SUPREME COURT OF CANADA ACT*, R.S. 1985, C. S. 26, AS AMENDED)

Peter A. Gall, Q.C
Donald R. Munroe, Q.C.
Benjamin J. Oliphant

Gall Legge Grant & Munroe LLP
Suite 1000-1199 West Hastings Street
Vancouver, B.C. V6E 3T5

Tel: 604-891-1152
Fax: 604-669-5101
E-mail: pgall@glgmlaw.com

Counsel for the Applicant,
The Law Society of British Columbia

Mark Power

Power Law / Juristes Power
130 Albert Street, Suite 1103
Ottawa, Ontario K1P 5G4

Tel:613-702-5569
Fax: 1-888-404-2227
Email: MPower@powerlaw.ca

Agent for the Applicant,
The Law Society of British Columbia

ORIGINAL TO: **THE REGISTRAR**

The Supreme Court of Canada Building
Ottawa, Ontario, K1A 0J1

COPIES TO: **COUNSEL TO THE RESPONDENTS**

Kevin Boonstra
Jonathan Maryniuk
Kuhn LLP
100 – 32160 South Fraser Way
Abbotsford, BC, V2T 1W5

Tel: 604.864.8877 / 604.682.8868
Fax: 604.864.8867 / 604.682.8892
Email: kboonstra@kuhnco.net / jmaryniuk@kuhnco.net

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NOTICE OF APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE that the Law Society of British Columbia hereby applies for leave to appeal to the Court, pursuant to section 40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S. 26, from the judgment of the Court of Appeal for British Columbia, File No. CA43367 made November 1, 2016, and for costs or such further or other order that the said Court may deem appropriate;

AND FURTHER TAKE NOTICE that this application for leave is made on the following grounds:

1. That the proposed appeal raises the following questions of law which, by reason of their national and public importance, ought to be decided by this Honourable Court:

    a. Whether, and how, the courts should apply the *Doré* 'reasonableness' framework in the context of decisions involving conflicting *Charter* rights,

and resulting from a majority vote of statutory bodies, particularly in the absence of written reasons?

b. Whether the law societies' decisions to not approve TWU's proposed law school were reasonable or correct conclusions in light of the conflicting *Charter* rights and interests engaged in the context of the law societies' mandates to act in the public interest in the administration of justice?

2. These issues have deeply divided the courts in Ontario and British Columbia, with unanimous panels of the Ontario and British Columbia Courts of Appeal reaching directly conflicting decisions on these important legal issues.

3. The resolution of these issues of national importance is of profound significance to the immediate parties, to the legal profession generally, including other law societies in the country, as well as the public at large, and therefore merits consideration and resolution by the Supreme Court of Canada.

Dated at Vancouver, Province of British Columbia this 28th day of November, 2016.

"Peter A. Gall"

Peter Gall, Q.C.

Mark Power

GALL LEGGE GRANT & MUNROE LLP
Suite 1000 – 1199 West Hastings Street
Vancouver, B.C. V6E 3T5
T: (604) 669-0011
F : (604) 669-5101

Counsel for the Applicant

POWER LAW
Suite 1103 - 130 Albert Street
Ottawa, Ontario K1P 5G4
T: (613) 702-5560
F: 1-888-404-2227

Ottawa Agents for the Applicant

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Tel: 604.864.8877 / 604.682.8868
Fax: 604.864.8867 / 604.682.8892
Email: kboonstra@kuhnco.net / jmaryniuk@kuhnco.net

NOTICE TO THE RESPONDENT: A respondent may serve and file a memorandum in response to this application for leave to appeal within 30 days after service of the application. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration pursuant to section 43 of the *Supreme Court Act.*

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- and –

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RESPONDENTS
(Respondents)

NOTICE OF NAME
OF THE LAW SOCIETY OF BRITISH COLUMBIA
(Pursuant to Rule 14 of the *Rules of the Supreme Court of Canada*)

TAKE NOTICE that the Law Society of British Columbia certifies that it does not have a bilingual name.

Dated at Vancouver, Province of British Columbia this 28th day of November, 2016.

FOR:
Peter A. Gall, Q.C.
Counsel for the Applicant,
The Law Society of British Columbia

Peter Gall, Q.C.

GALL LEGGE GRANT & MUNROE LLP
Suite 1000 – 1199 West Hastings Street
Vancouver, B.C. V6E 3T5
T: (604) 669-0011
F : (604) 669-5101

Counsel for the Applicant

Mark Power

POWER LAW
Suite 1103 - 130 Albert Street
Ottawa, Ontario K1P 5G4
T: (613) 702-5560
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(Respondents)

CERTIFICATE OF APPLICANT

I, Peter A. Gall, Counsel for the Applicant, hereby certify that:

(a) There is no sealing order or ban on the publication of evidence or the names or identify of a party or witness; and

(b) There is no confidential information on the file that should not be accessible to the public by virtue of specific legislation.

Dated at Vancouver, British Columbia, this 28th day of November, 2016.

Counsel for the Applicant

FOR:

Peter A. Gall, Q.C.

Peter Gall, Q.C.

GALL LEGGE GRANT & MUNROE
Suite 1000 – 1199 West Hastings Street
Vancouver, B.C. V6E 3T5
T: (604) 669-0011
F : (604) 669-5101

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This is Exhibit "O" referred to in the affidavit of Timothy E. McGee, QC sworn before me at Vancouver this 26th day of January 20 15

A Commissioner for taking Affidavits for British Columbia

The Law Society of British Columbia

Law Society of British Columbia
Bencher Meeting
DATE: September 26, 2014

[Transcription begins at 4:33]

JL: Good morning everyone. It seems like we just did this but here we are again. [Inaudible]. I want to thank everyone for attending and to make a special welcome to some of the guests we know are here. They are from Trinity Western, Mr. Kuhns and Boomstra. We have life benchers Gavin Hume and Art Vertlieb. We have members, Mr. Mulligan, Ms. Findlay, Mr. Trower, Mr. [??] and Mr. Lacroix. I don't think I've missed anybody. We have some staff but lots of empty seats so lots of room for people to join us. Welcome all. I should tell you, Sharon Matthews is abroad but is planning to call in. She has managed to secure a landline that she, we expect her to be ringing in around 5, or sorry, around 9, and Bill is monitoring the [inaudible], he'll let us know when she's able to call in. And [inaudible] is here, [inaudible] are you with us?

??: Yeah, on the line.

JL: [Inaudible] at home today but he is with us [inaudible] as they say. Oh, and Mr. Crossin, Mr. Crossin, are you [inaudible] or not yet?

DC: Yes, I'm here, thanks.

JL: [Inaudible] so we have a couple on the line. All right. So now I need to [inaudible] along with and a basic agenda. You've all got the [inaudible] and we'll get the mics when people are speaking. Remember you have to hold the button down or push the button before you speak, and when you're finished speaking, push it again so that you're off. The [inaudible] agenda items, I have

not heard anything from anyone so we will move through that. The first item on the agenda then is the [inaudible] finance audit [inaudible] or the fees for 2015. Mr. [Walker??]?

KW: Hello everyone. I want to first of all thank my committee comprised of Peter Lloyd, public representative [inaudible] which is of great help to our committee, Tom Fellhauer, bencher, Craig Ferris, bencher, Miriam Kresivo, a bencher, Phil [??] former bencher and public at large, and member of the profession, Peter [??]. Our [inaudible] team is led by [inaudible] as well with [inaudible]. They worked hard on our recommendations. So you have in your material the 2015 recommendations made by our committee and they are included in your materials. The recommendation is that the practice fee be set at $1992, that's an increase of $52 from the last year. The lawyers insurance fee will remain stable from last year at $1750. As you can see, the mandatory fees will increase by 1.4 percent for a full time practicing member or insured lawyers. One of the things that you have to bear in mind is that the benchers' objective in setting the amount of the fee is to ensure that the operations of the Law Society and supported organizations are properly and appropriately funded to enable the Law Society to efficiently and effectively fulfill its mandatory mandate of protecting the public interest. I'm going to turn this over to Tim to talk about how management approached this process and then we'll talk to you a little bit about how finance [inaudible].

TF: Thank you Ken. The process for staff involvement in the preparation of the budget starts early in the year, almost after the approval of one budget by benchers, we start considering the subsequent year. The reason for that is we are in a dynamic process and we also work from what we call a zero based budgeting process which means that we need to look at every line item and look at every aspect of our operations and that takes time. Folks that know about this are department heads and managers and staff, and so we do a very detailed process starting early in the year that looked at each of these line items and asked questions such as is this activity one that is going to continue at the current level? Is it going to increase, is it going to decrease, have we looked at different ways to deliver, how is technology being used, how are you know, what's your staff

complement and so on. So that is [inaudible] revenue and that takes place over two or three months. It leads up to an April session where we meet with the Finance and Audit Committee to give what we call a preliminary view of key drivers for the following year. Much of this has to be done in real time, that is we don't know exactly where we're at until the end of any one year on final numbers but we have a pretty good idea of what is coming down the pipe, if you will, and we raise that with the Finance Committee. By that point though, we've pretty much created pro forma, just department by department, both on the expense side in particular, staffing requirements, changing in orientation of groups, and all that information is put together so that it can be brought to the Finance Committee. So I just wanted the benchers to be aware of that process at the staff level and I'll turn it back to Ken as the Chair of Finance and Audit Committee to take you through what happens after that. Thank you Ken.

KW: So then the Finance and Audit Committee [inaudible] senior management [inaudible] and we meet several times to review the draft fees and budget. The process is very much like a second sober thought. The Committee is very engaged and tries to challenge and make sure that management has thought about other ways to reduce fees. And this was a very engaged process this time as well. As – the bottom line, of course, is that the Finance Committee is recommending the resolutions, and we believe that the underlying budgets are in fact sound. We also believe that the fees and budgets presented support the co-regulation, co-regulatory operations of the Law Society and will help us meet our key performance measures and support our strategic plan. I'm going to highlight a few of the assumptions used in setting these fees. First of all, the general practice. As mentioned, the recommendation is the annual practice fee for this year should be $1992. $1605 of that fee contributes to Law Society operations. The remainder of the practice fee is the money that we collect of behalf of the organizations [inaudible] Law Society fund. These include the Corporate Library and the Federation of Law Societies. The revenues. We forecast that the practicing membership revenue will increase by about 1.75 percent from 2014 levels. In other words, we are assuming we will have about 11,310 members. This

assumption has, is historical and we've consistently had a continuing small increase in numbers. The second area I'd like to talk about is the PLTC revenues. They're budgeted at around 1.25 million dollars based on 485 students, and again we've increased, we believe, because of Thompson Rivers University, we'll have an increase in students of about 35 over the 2014 budget. I have to [inaudible] and you'll hear a little more about this is that PLTC in the past historically has received about $257,000 from the Law Foundation. It's been a budget that we've used and the Law Foundation has helped us with that. They've withdrawn that funding and that's put some pressure on the PLTC. The Law Foundation has said specifically that this funding that we've historically had will not be available and that results in obviously a decrease in revenue for this important program. So our Committee reviewed the program and we reviewed the [inaudible] revenue. Historically, the students' fee revenue has been set at $2250. The loss of that $257,000 is, as I've said, a bit of a pressure [inaudible]. The overall, the membership has always supported PLTC to some extent, but this $257,000, again, puts pressure on us. So the Committee discussed a number of fee options to make up the deficit. And one of the things we considered, and have recommended, is that PLTC fee be increased by $250. [Inaudible] sensitive to the fact that students who are enrolled in the upcoming or [inaudible] already enrolled and have paid so the Finance Committee suggested that the $2250 apply only to September students, those enrolling for the September PLTC. That lessens the pressure but it's sensitive to the students. [Inaudible] the Committee is recommending that the PLTC fee be increased by $250 to a total of $2500. [Inaudible] to note that PLTC fees have not increased since 2003, it's a small increase and we think it's [inaudible]. So as a consequence of that, the recommended retake PLTC fees are increased proportionately and it'll increase from [inaudible] to a total of $3900. That affects very few students. It should also be noted that even with this increase, the increase we propose, there will still be a significant deficit maintained by the membership but that's been historical. Turning to another positive, perhaps different but positive note, is that the external leasing revenues are increased by $184,000 because we have some new tenants on the second and third floor of

[inaudible], and we've also had some increased revenue in the Atrium Café [inaudible]. So I want to now turn to the expense. The operating expenses relating to Law Society operations are budgeted to increase by 3.84 percent. The increases were reviewed by the Finance and Audit Committee. The two, the increase is mainly due to two factors. The first is that there is a market base salary adjustment made to staff salaries to ensure that the staff at the Law Society are paid at a mid-point in the market, and these salaries are benchmarked to similar organizations in the Vancouver area. [Inaudible] compensation policy ensures that the Law Society [inaudible] staff are fairly paid and comparable to [inaudible]. Secondly, the [inaudible] to support regulatory and practice advice purposes. These are being added in order to appropriately staff our co-regulatory functions, especially in light of the increased complexity of the professional conduct files and the increase in practice advice activity assisting lawyers. The capital plan is funded by a portion of the practice fee and the allocation of this funding remains the same as last year. These funds, this fund, the capital needs of both the Law Society operations and the required maintenance of [inaudible]. We do use reserve on one-time costs and there are a few this year as well. There are three items from reserve. First of all, there's $65,000 to review current practice standards program to improve the program and look at ways of being more proactive. The second item is $58,000 to fund a second year of an articling student pilot program. We will receiving a report about first year in December of this year. The third thing is the Real Program which we've agreed to fund for $50,000, and those are the items that come out of reserve. I should touch upon the organizations which we fund through, and are included in the practice fee. The Federation of Law Societies continues to provide national [inaudible] important national and international issues. The fee has been increased this year by $5 from 25 to $30. [Inaudible] is a primary source of Canadian law accessible [inaudible] website. The contribution is a slight increase, just under $3 to $36.98. Pro bono. You will remember last year we increased pro bono almost by double and its going to remain stable this year at $340,000 for access to legal services through the pro bono [inaudible] program. Courthouse libraries. They also are being challenged because funding is

drying up and – but the Courthouse Library BC provides lawyers and the public with access to legal information. The library fee will increase by $5 and it will increase to $195 per member. We support that as well. I mentioned about the challenges of the Law Foundation and CLBC, or the Courthouse Library, saw reductions of almost $492,000, so they have done their part and we're satisfied that could be our contribution. The contribution to Lawyer's Assistance Program, this program [inaudible] program for our profession and we think it is so good. There is an increase of $7 there to $67 per member. This is to allow some market based salary adjustments to their staff and providing support for succession planning for senior management. The Advocate subscription fee will remain at $27.50. We have had ongoing discussions with the Advocate and have asked for additional information on the Advocate's business plan on a go-forward basis. We want to make sure that there are areas of improvement including perhaps electronic publication and advertising rates which are being reviewed to ensure that the subscription remains at reasonable levels in the future. These discussions will continue through 2015. The Trust Administration fee. It was bumped to $15 per transaction last year. The intention is to remain there. The number of transactions on tap have been tabled in 2013 and 14, but [inaudible] reserve is projected to be three months at the end of 2014. The [inaudible] reserves will continued to be monitored on an annual basis to ensure that the fund, the program is being funded and has appropriate reserve [inaudible]. Special Compensation fund, there's no fee on that but we still have some money and we're waiting a little bit for some [inaudible]. Once the final claims and recoveries are resolved, the reserve will be transferred in accordance with the Legal Profession Act Amendment Act to the Lawyers Insurance fund. The Lawyers Insurance fund. As I mentioned, the fee remains unchanged at $1760. That's the fifth year in a row that it has remained that way and there are good reasons for that. The net assets were reviewed by the Finance and Audit Committee. Those net assets remain at 59.4 million dollars which include both part A and part B coverage. And according to our actuary's advice, that reserve level is considered appropriate. So, with that, I would ask you to turn to your material and look to the resolutions, and

if I can find those, I think my electronic material, they're found at electronic 71 or page 71 of the hard copy. And so I will move, and I'm hoping [inaudible] is still on the phone, or sorry, I'm going to ask Peter Lloyd to second this motion. Be it resolved commencing January 1st, 2015, the Practice Fee be set at $1992 pursuant to section 23 of the Legal Profession Act, consisting of the amounts set out on that page.

PL: I second that resolution.

KW: [Inaudible]. We need to pass that resolution.

JL: Does anyone have any questions for Ken or Peter or anyone on the Finance Committee? All in favor, oh, sorry, Cameron?

CW: I do. I appreciate the hard work that went into preparing these budget documents and the work of the Committee and staff members who participated. I just want to express a concern on behalf of sole practitioners and those in small firms that fees seem to [inaudible] annually every year. And my question is just whether every effort was made to try to hold the line on members' fees?

JL: Mr. Walker?

KW: Thank you Mr. Ward. Absolutely, I mean that is one of our functions, and it's a balancing function between keeping the fee as low as possible and also recognizing that we have to do the co-regulatory functions. For an example, staff came to us and asked for these three new positions, and we asked them a question about why they were needed, and we talked about that at length. We need to do that stuff [inaudible]. There – we have a lot of employees but are employees in fact work extraordinarily hard and in the public interest to support our organization and show the public that in fact we are doing our job. So yes, Mr. Ward, we are vigilant and careful and scrutinize. [Inaudible] question.

JL: Mr. Finch?

MF: Madame President, I follow on Mr. Ward's question and I share his concerns that we maintain a very vigilant approach to setting fees. In our province, sole practitioners and small firms have great difficulty in facing the economic

challenges of operating successful and prosperous law practices. That said I can't help but observe that it's only $500 more that we in British Columbia pay than those in Saskatchewan and it would appear that we are at the low end of the scale of fees for the country when one compares our position to that of Alberta and over $6000 per member there. And so in conclusion, I endorse Mr. Ward's notion about concerns, I urge continued vigilance, I also congratulate you. Thank you.

JL: Thank you Mr. Finch. Any other comments, questions? So we'll call the question. All those in favor of the resolution at page 71? Any opposed? That motion carries, thank you very much.

KW: So we have two more motions. The first one relates to the Lawyers Insurance Fund, and it requires us to – and it's found at electronic page 72 and I think it's page [inaudible] materials. And I'll make the motion and I'll look for a seconder. Be it resolved that the insurance fee for 2015 pursuant to section 30 (3) of the Act be set at $1750, that the part time insurance fee for that year be set at $875, and the insurance surcharge for 2015 pursuant to the rule be set at $1000. Do I have a seconder?

PL: Yeah, I second that motion.

KW: Thank you Mr. Lloyd.

JL: Any questions or concerns on that motion? Seeing none I call question, all those in favor? [Inaudible], any opposed? The motion is carried. Mr. Walker?

KW: The third and final motion, and thank you for your patience, is relating to PLTC [inaudible] and upon this motion I know this was debated at the Credentials Committee last night and I want to thank them for their support, and I'm hoping that David Mossop on the phone will second this motion.

DM: Yes.

KW: Be it resolved, effective September 1st, 2015, the training course registration fee be set at $2500 pursuant to rule 2-24 4A and that effective September 1st, 2015, the registration for repeating the training course be set at $3900 pursuant to that same rule. Mr. Mossop?

DM: Yes.

KW: I take that yup to be a second.

JL: Well [inaudible] a second on the motion. Any questions or concerns on the third motion on the PLTC fees? Okay, I'll call the question. All those in favor? Again, anyone opposed? That motion also carries, that's terrific. Just before we leave this topic, I want to [inaudible] sitting in our guest chair, she was [inaudible] and would have been most capable of answering any questions Ken couldn't field and I want to thank her for her continued support. So Mr. Vertlieb, please join us at the table. You'll all recognize Mr. Vertlieb for [inaudible] the past Pres [inaudible]. As you are aware, Mr. Vertlieb is chairing the LSRFT force, Legal Services Regulatory Framework Taskforce. The taskforce has been meeting and attending presentations and Mr. Vertlieb is here to update us on the work to date. Thank you.

AV: Thank you very much Madame President. It's a pleasure to be here and I know you have other matters so I will be brief. This taskforce was formed by you in April of this year and the members of the taskforce, four of them from this table, David Crossin who is the Vice Chair, Lee Ongman, the [inaudible] on the taskforce. In addition, Mr. Terry Brooks who's a member of Trial Lawyers, Dean Crawford, the past president of the CBA, Nancy Carter who's [inaudible] with the Ministry of Justice, Ken [??], a very well respected notary public and Carmen Marollo who is a paralegal [inaudible] and part of a previous taskforce that presented to this table. The same taskforce was created [inaudible] of the Legal Service Provider taskforce which was chaired by Bruce [??]. That recommendation passed unanimously by this table in December of 2013. The mandate was to develop a regulatory framework by which other existing legal service providers and new [inaudible] potential legal service providers who were not notaries or lawyers could be involved in the provision of legal service in the credentialed and regulated way. All of this recognizing the importance to the public interest of having [inaudible] in legal matters which of course is paramount to the members of this table. So with our introduction in April, creation, we

started our work in May, we've had a number of meetings and what we've carried on is an extensive consultation process including the Chief Justice of British Columbia, the Chief Justice of the Supreme Court, the Chief Justice of the Provincial Court and his two facilitators, the Chairs of the Administrative Tribunals of British Columbia, and representatives of the Law Society of Upper Canada and Washington State Bar Association. The purpose of that part of the work, the consultative approach, was to find out what areas right now are either unmet in legal assistance or under serviced, and also to learn where self-represented people are regularly appearing in tribunals, and also to learn where non-lawyers are already appearing in these tribunals. And finally, the [inaudible] jurisdiction [inaudible] of what models are available for our view and recommendation. It's clear from everything we're hearing, that there is a strong benefit to the public in having non-lawyers appear in tribunals and courts to assist people who have legal problems. In fact, I think it can be said there is a real enthusiasm for this new way of helping people [inaudible]. And so we are now going to move to the next phase of consultation and that is to go to the profession and go to the public and invite input on the survey that has been prepared by our staff. That survey's going to be on the web by the end of the weekend. But I really say to you, from everything we're hearing, I think it's likely that we will report back to you in December of this year that we should recognize the value of people who are non-lawyers and non-notaries, and that we should move to credential and regulate those people, all in the public interest to make sure the people who have issues of importance to them can be better served in the courts and administrative tribunals in the province. Now to do that, we need legislative approval for amendments because we presently, under our legislation, could not do this. And so the next phase, assuming the benchers decide to move forward, just to give you the next step that will be likely, would then be in December seeking approval to go to the government to see if the government will embrace this initiative because frankly if the government won't embrace it, then there's no more effort that should be put into the concept. And so what I'm anticipating our taskforce will be asking you to do is to give us the ability to go to the government to seek

legislative amendments which will then allow the benchers to develop rules and regulations around credentialing and the ultimate regulation of people who are not presently graduates of law school or the notarial program. So Madame President, that's the update I wanted to bring on behalf of the taskforce. I think our group is doing an extremely good job in appreciating what's out there and what needs to be done. We've got a ten-member taskforce, it's large, but everyone brings their own unique perspective [inaudible] and I think the taskforce has been very well created by you, Madame President, and members of the [inaudible]. And we're receiving excellent support from Doug Munroe and Mike [inaudible] and Adam [inaudible] who attend the meetings [inaudible] so there's a very strong interest from the top down in the Law Society administration to give us all the support we need, we're getting everything we need from them. So that is the report Madame President, I do appreciate the time, I know you have other matters.

JL: Thank you so much for bringing us up to speed or up-to-date on your work. Does anyone have any questions for Mr. Vertlieb? And I want to just give our technology people a little heads up [inaudible]. [Inaudible] we will continue to move it forward and come back [inaudible] with the answer.

AV: [Inaudible].

JL: All right. So Mr. Vertlieb, you know you're welcome to stay?

[Laughter]

AV: I think I'll take a pass on this one.

[Laughter]

JL: I thought for sure he would stay, at least listen to the President's Report. [Inaudible] how difficult it is to pull together activities that seem to be endless but the [inaudible] some semblance of order so that you have some appreciation of the work that I'm doing and the issue that [inaudible] that you may not see. So I'm going to start with my holidays because it was a long summer break. I hope everyone enjoyed the beautiful weather we had here, lots of sunshine, I hope you all did a better job of attending to your gardens [inaudible]. The summer was not

without its events. You will recall there was [inaudible] that generated much activity, emails, letters, and we responded to each of them. And basically the Law Society does indeed recognize and support contingency fee agreements and recognize the role in the access continuum, and one decision on specific facts does not change Law Society policy. That [inaudible] and I think that furor has died down. Continuing on with the holiday theme, I traveled and went to St. John's, Newfoundland, for the [inaudible] National conference. I got to see [inaudible] of Great Big Sea, I went to the Duke for those of you who are CBC watchers, and saw Mr. [inaudible], also known as [inaudible] outside the Duke racing around in a car, it was very Newfoundland, had lots of fish and chips, it's the best fish and chips in the world. I don't know that I'll have [inaudible] anymore but that was a highlight [inaudible]. There were so many meetings, so many attending, so many [inaudible]. The [inaudible] activities was pages and pages that were multiple sessions all at the same time. It was impossible to do all of them. I tried to attend [inaudible] many sessions, although I will confess to being focused on those that interested me more than any others. I was able to travel to Kaslo, British Columbia, having never been to Kaslo. It was so impressive that whole part of our province. I think [inaudible]. I flew into Castlegar, drove to Nelson, beautiful [inaudible] and then to Kaslo, although with that lovely, historic [inaudible] Kootenay Lake and you come down the highway, it's a bit of a winding road but very pleasant, and you come over the crest and there's a big white church on the side and [inaudible] Community Center and then down the street is Kootenay Lake and it's blue and it's beautiful and then nothing but mountains [inaudible]. And then [inaudible] for a short walk that turned into an off road excursion extraordinaire and [inaudible] that Mr. [inaudible] and I weren't able to manage. And I'm sure that Mr. [inaudible] somewhat disappointed [inaudible] but it was lovely. It was beautiful. We did see [inaudible], we [inaudible] looked down on Slocan Lake and saw New Denver [inaudible]. Also, we saw [inaudible] but he didn't come on the hike. We saw the value of strong bar associations. Kootenay Bar Association really is active. They [inaudible] talking about the challenge of getting more than half their members to join the

Kootenay Bar Association [inaudible] voluntary organization but [inaudible] half of the area members belong to the Kootenay Bar [inaudible] they do a very good job given their geography and [inaudible] and even time challenges. Half of the Kootenays is in a different time zone. But they bring it together, they have meetings back and forth and they really have good relationships, you can see the strength of that organization, the camaraderie [inaudible]. Also [inaudible] we attended [inaudible] and Mr. Waddell and Mr. Finch regularly attend those meetings and know the strength of that organization. There's almost 120 members [inaudible] bar meeting [inaudible] Chief Justice [inaudible] was there and many, many members. And again the value of lawyers getting together in a non-adversarial, non-confrontational way to socialize, to visit, to share stories and to support each other in a professional way. I had opportunity to speak with the [inaudible] at [inaudible]. [Inaudible] was the week before the end of summer. They start [inaudible]. I attended UNBC and spoke to the first-year class and they were all very [inaudible] red t-shirts and [inaudible]. And then I had the opportunity to go to UVic. It was a different looking group and in the crowd was my daughter. So I was able to speak as the first mother from the Law Society to address [inaudible] at the opening of a law school class. I only cried a little bit but I did get through it, and then Ken was good enough to attend at the Thompson Rivers opening and I don't know if he cried but I'm sure he represented us well.

KW: [Inaudible].

JL: [Inaudible] expressing how proud I was of my daughter and then I added to the rest of them I know all of your parents and your family are equally proud of you too. But anyway, so, then I had the opportunity to speak [inaudible] another opportunity to speak [inaudible] and to try to inspire and to challenge. I love that opportunity but I have to comment on the [inaudible]. Now I know there was a review, seven-person, seven-bencher review panel going on that day and so [inaudible] scheduling was challenged on that. But the ceremony is not particularly well attended by benchers and [inaudible] encourage anyone who can [inaudible]. It's really only an hour of [inaudible] meetings rescheduled for an hour one way or the other or ask the court [inaudible] just a few minutes while

you finish off the ceremony. I think it matters to the young students who are looking up at the representative of the Law Society, their Law Society [inaudible] ceremonies [inaudible]. I think I'd like to see a few benchers there. [Inaudible] and I have attended at [inaudible] in there at the Legal Services Society. We listened to [inaudible] research on webspace platforms around legal [inaudible] support. And he's [inaudible] and he focused on, he was speaking [inaudible] but he [inaudible] kudos to BC. He said they've been at all [inaudible] reference to [inaudible] platforms like [inaudible] that join people, that connect people or direct people to very [inaudible] and support. [Inaudible] platform that will on the [inaudible] and design [inaudible] information and guidance. [Inaudible] will be a live person on that web or on that [inaudible] platform who will answer some questions [inaudible]. We came away from that realizing there's so much potential, the web is going to allow us to provide access and information to so many more people, offering a more convenient way for them. One of the things that I did take away, [inaudible] underrepresented groups in terms of access to the web, generally most people have access to the web, but one of the groups that doesn't have it, doesn't have the same kind of access are people who have disabilities and one would have thought that they would have better access, [inaudible] intuitively, but he says that's not the case. And so there's something that we need to, because they say that segment of the population will need more support and [inaudible] providing support more and more on the web, [inaudible]. That ties into the [inaudible] the resolution in front of people that the BC government has introduced, not yet implemented, but I should tell you that there is a [inaudible] appointed chair and she take [inaudible] with the CRT in providing web-based support services and dispute resolution service for BC citizens. It's not there yet and [inaudible] the difference between web-based dispute resolution, which is voluntary and [inaudible] consensual and web-based dispute [inaudible] making which has [inaudible] other particular challenges and we have, the Law Society is continuing to remind the CRT of our concerns about the legislation specifically around lack of representation or direct [inaudible] representation [inaudible] section 83, [inaudible] and trying to make sure that that

is [inaudible]. And just continuing on with that access and public support theme, [inaudible] and I both attended at the [inaudible]. I attended in Vancouver, Mr. [??] attended with me. I should tell you that I won the draw so I have a little gift basket courtesy of [Mediate??] BC [inaudible]. I think it's a Law Society asset so I'll probably bring it here. [Inaudible] the open house in Victoria. The two [inaudible], the [inaudible] in Vancouver and the [inaudible] in Victoria are [inaudible] models and they're both [inaudible] those open houses feeling that these are very vibrant, active centers where people, it's on the ground good work. People come in, in Vancouver, [inaudible] people [inaudible] are going through the [inaudible]. It's aptly, it's physically located near the Robson Square, or in Robson Square, near the courthouse at Robson Square. People who are in court or referred by the court to cross the hall and go and get some advice, there are people there advising on theft and rental, there's family counselors, there's a self-help center that's got a bunch of computers and a person, it's manned so there's someone there to walk you through [inaudible]. You can prepare your documents and then go down and meet with a lawyer and have them reviewed. There's a couple of lawyers issued by, sponsored by Legal Services, Access Probono is there, there's a civil resource [inaudible] and there's Mediate BC and there's a little plug for my good friend Kerry Boyle. Next week, October 11th to 18th, Mediate BC is declaring, determining it to be conflict resolution week. Everyone is supposed to, I don't know how [inaudible] or settle something in that week. So all of you [inaudible] but at the [inaudible], you really got a sense that people come in with complex problems. They think it's legal probably, it might not be a legal problem, they think it's an employment problem but it might not be and you [inaudible], they spend a long time on [inaudible] you and because they've got so many resources available that it's an opportunity for collaboration and for [inaudible] around helping the person [inaudible] issues. So it struck me that these [inaudible] are on the ground doing good work and providing real support for people who need access to not just legal service but [inaudible] social problems. Okay, and that [inaudible] what I've done over the last, since our last meeting. I want to rest assured that I'm continuing to work hard, I've finished [inaudible].

I'm not done yet. I'm going to Halifax [inaudible], the federation semi-annual meeting is in Halifax in [inaudible] so the focus of this meeting is on access and so Ken and are going to be attending but we'll also determine to bring two of our Access people, Nancy and Will, [inaudible] to participate in the training sessions that are going to be offered in Halifax with a view to bringing back to this table what we learned on the presentation [inaudible] Halifax. And on that, does anyone have any questions? That's my report. Thank you all. Now, we'll go to Mr. [??], pick up on all the pieces I missed.

New Speaker: Thank you Jan. A few things on my report which is an oral report this month. A couple of federation matters which Gavin [inaudible] is here, council representative we'll refer to. The second item is I just wanted to thank you all for your participation in the strategic environmental [inaudible] session we had yesterday. I know for some of you you're quite grateful that that doesn't happen more than every three years or four years, but just a couple of observations. Those sessions are never easy, depending upon wherever you're coming from, whether you do this as part of the organization that you're in or your professional, they're never easy and the reason is because you're dealing with ambiguity and you're dealing with lack of precision and you're dealing with lack of definition and concepts at the front end and [inaudible] particularly for lawyers in the room, including myself, those are often awkward spaces to be in. That's not, by their nature, what we, what we deal with. Having said that, it is a really, really important first step and I think that what you have given us in terms of staff to work with to help prepare your next ordering to this will be extraordinarily helpful and I think that what you will find is that the getting into detail and getting into the concrete [inaudible] will happen shortly. It is a tight timetable and I think the observation I took away that I think we validated that much of what we're doing and we're emphasizing today is we're on track, and that's something that you would all support. There are, clearly doors have been opened as a result of the discussion yesterday in some areas. Some of this is emphasis, some of it is timing, and we'll be looking at all of that so that we can ensure that the public interest is well served in our plan. The next thing I just wanted to mention was yesterday

while you all were busy in that project, there was, across the hall, you may have noticed, there was a discipline council advocacy workshop that was taking place. You may recall I referred to this at the retreat we had, the bencher retreat earlier this year, that this was being planned and it took place yesterday. This is the idea of Deb Armor and Jaya Rai in our, Deb of course is our Chief Legal Offiecr and Jaya Rai is the head of our Discipline Council group which I think is just a fantastic initiative. What they, what they did yesterday was conduct a workshop for the discipline council, interactive based on simulated hearings, and most importantly, they had the, working with them were three eminent, preeminent counsel, Len Doust QC, Glen Ridgway QC, and Ian Donaldson QC. And those gentleman volunteered their time to provide feedback, to listen, to answer questions, and basically to deal with a professional development aspect which really goes to the core of what we aspire to do as well as we possibly can. It's the workshop, I believe it's one of the first of its kind for law societies, I can't be totally sure of that, but in any event, something that I think we can build on, and by all accounts, from what I heard, it was very well received and very successful. So I just wanted to mention that and thank those that participated. And lastly, just a note, I was, participated, had the privilege of speaking to a UVic law class last week or perhaps the week before as a guest lecturer on the legal ethics and professionalism course, and many of you do do that at the law schools. I can tell you that as you know, when I first was invited to do these, it was an optional course at the school and now it's part of the national requirement, it's mandatory. And I can tell you that the group that I spoke to there were approximately 40 or 50 in the class, they were very engaged, the questions I had both during and after really indicated and validated for me that the decision to make this a core part of legal education was a very, very solid decision. And I would just like to publicly thank Professors O'Brien and Pyri who have extended that invitation. They do a terrific job and they've embraced this. And there are others of course at the other law schools, and Dean Jeremy Webber of course at UVic who is behind this. So from a personal experience point of view, it was extraordinarily positive and I just

think it's something that we all need to continue to emphasize. That's my report Madame President.

JL: Thanks, whoopsie, thank you Mr. McGee. I'm reminded by Mr. [??] that I forgot to tell you, I forgot to mention, just to confirm that we have populated the Regulation of Law Firm taskforce. Herman is of course chair. The other benchers on the taskforce are Martin Finch, QC, Peter Lloyd, SEA, and Sharon Matthews, QC. Nonbenchers are Jan Christiansen from Prince George, Angela Westlicott from Victoria, and Ken [??] from Vancouver, and work is underway on that, from that group. And we move just to the next item, Mr. Hume, we're going to have a briefing from Mr. Hume about the federation meeting. He will also [inaudible] in Halifax. Just before we, before you start Gavin, I just want to clarify who's on. I'm hearing beeps, all three are on. David, David and Sharon are all on, are all hearing us?

New Speaker: Mostly.

SM: I am, Sharon.

JL: Thanks Gavin.

GH: Thank you Madame President. [Feedback – inaudible] So I was unable to attend the July meeting of this group because I was representing the federation at two conferences, the first dealing with a conference of legal regulators around the world. It's the third conference that's been held and that pulls legal regulators together for the purposes of talking about common issues and what the future might hold. I anticipate that that conference will be held in Canada next year. And then I attended an international legal ethics conference which largely involves ethics [inaudible] from around the world, plus I was interested in ethics topics. Therefore just very briefly with respect to the June meeting, there were three significant topics discussed and decisions taken. One was to proceed with a national requirements review for the law schools. I'll speak a bit more about that in a minute. Secondly was to proceed with a governance review, and thirdly to start in the strategic planning process. First of all dealing – and then that takes us to the conference that's going to occur, as Jan had said, in July or in October,

October 9 and 10, in Halifax. At that conference and at the council meeting, the topics that we'll be dealing with will include a national requirements review. The national requirements of course are the requirements set for the law schools and they set the competencies that need to be taught, as Tim has suggested, indicated, that includes ethics and those are the competencies that the law societies across the country require to be taught in order to permit those candidates to graduate from those schools to enter our credentialing or articling program. The first review has taken place of essentially all law schools. The program will be in full force as of 2015 with the graduates coming out in 2018 with the necessary training. The review, the actual review that's going to occur, is going to deal with, amongst other things, the [inaudible] discrimination issue. That was a recommendation from the Special Advisory Committee but there are a number of other issues that have arisen both from the Law Deans and just from the Approval Committee. So they'll take a look at those issues. We're going to be dealing with the process to deal with that [inaudible] recommendations before us on how to engage in consultation but technical support will be required and the composition of the committee, the first part already of that committee will be, a taskforce will be [inaudible] the non-discrimination provision and then requirement. We're going to go from there to get an update on the governance review that the federation is engaging in. Governance was last looked at in a very structured way in 2002. There have been adjustments of the governance process, all [inaudible] the federation, and it's succeeding here but it's time to stand back and take a fresh look at how the federation governs the governance itself. It's consistent with the work that was done at this table on governance and the Law Society of Upper Canada and a couple of other law societies. So we're going to receive a report on the progress made with respect to that governance review. Tim is a member of that committee. The next item that we'll be dealing with in terms of decision making will be a report from my standing committee on the [inaudible] proposing a number of amendments to the [inaudible]. And if those amendments are coming forward from the council after an extensive consultation across the country with respect to what changes should be made. And then last of all, at the council

meeting, we'll be dealing with strategic planning that we need to engage in but we'll I'm sure continue with the national initiatives such as the [inaudible] standards but we'll probably add to the strategic plan requirement to continue with the governance review and requirement to continue looking at the national requirements for law schools. The conference is or has [inaudible] is going to deal with access and it looks like a very innovative program. We're going to start off by hearing from United Way representatives about the effect of poverty on legal access and from there we're going to engage in a series of site visits in Halifax to look at the organizations that provide legal advice, legal services to those who can't afford a lawyer. So we're going to spend some time with those organizations and then a chunk of the conference will be spent looking at innovative ideas, ways that the law societies might pursue access to legal services. That's my report Madame Chairman.

JL: Thank you Mr. Hume. Anyone have any questions for Gavin? I'm again reminded I missed something else. I forgot to mention Mr. Wilson attending for us at the provincial meeting, provincial council meeting of the CBA last week in Delta or Richmond or something like that, Richmond, thank you Mr. Wilson. All right, we come to, [inaudible] agenda the report on outstanding hearing and review sessions. The good news is there are no conduct [inaudible] or meetings [inaudible] even listed, let alone [inaudible]. [Inaudible] under [inaudible] Mr. Doerksen, can you tell us where we are?

LD: Moving along... well we had a number of applications the morning of the hearing so we had to deal with that, and that's been completed and we're on to the next decision. So it's required more time than expected but we're getting there.

JL: And on the second page, Johnson, Mr. Wilson, you were busy last week.

TW: It's coming, I can talk about that in camera.

JL: Okay. Thank you. And the last one [inaudible] is sorry, [inaudible]. I just want everyone to know that the Lindsay on there is not me.

New Speaker: But we actually have circulated a draft, we're very, very close, [inaudible] being and that was a bit problematic but we're on it and we'll get it done soon.

JL: Thank you very much. Thank you all. All right, we, [inaudible] we move to the resolutions that arise from the special general meeting in June. We have circulated and got approval for the basic process here. The three motions will be introduced, seconded, without speeches, but then the suggested speaking order is to go back to the movers and seconders of the three motions, so that will take us through six speakers and then Mr. Hoskins and I will record hands and names that I will read out in advance for the technical people [inaudible] anticipate speaking. So just for the record for everyone in the other room, we are going to hear from Mr. McLaren, Ms. Bains, Mr. Wilson, Ms. Kresivo, Mr. Mossop, and Mr. Walker as the, to read and second the motions without speeches, and then in that same order for speeches. And we are all agreed that the speeches will be limited to five minutes and you've all got access to the timers that will keep you, eyes on. All right. Are we good to go? Okay, Mr. McLaren, can we please hear from you on motion number one?

JM: Thank you Madame President. I move as follows: Be it resolved that the Benchers implement the resolution of the members passed at the June 10th, 2014 Special general meeting and declare that the proposed law school at Trinity Western University is not an approved Faculty of Law for the purposes of the Law Society's admissions program. Thank you.

JL: Second it? Ms. Bains?

SB: Madame President, I second the motion.

JL: Thank you. Mr. Wilson?

TW: My motion, seconded by Ms. Kresivo is as follows: Be it resolved that a referendum, the referendum, be conducted of all members of the Law Society of British Columbia to vote on the following resolution: Resolved that the Benchers implement the resolution of the members passed at the Special general meeting

the Law Society held on June 10th, 2014 and declare that the proposed law school at Trinity Western University is not an approved Faculty of Law for the purposes of the Law Society's admissions program; yes or no. We call it the resolution. The resolution will be binding and will be implemented by the Benchers if at least one third of all members in good standing of the Law Society vote in the referendum and two thirds of those voting in favor of the resolution, sorry and two thirds of those vote in favor of the resolution. The Benchers hereby determine the implementation of the resolution does not constitute a breach of their statutory duties regardless of the results of the referendum. And lastly, the referendum be conducted as soon as possible and results of the referendum be provided to the members by no later than October 30th, 2014.

JL: Ms. Kresivo?

MK: I second that motion.

JL: Thank you. Now, Mr. Mossop.

DM: [Inaudible] one, the Benchers [inaudible] two motions in relation to the proposed law school at Trinity Western University. Two, there is a current, currently litigation in British Columbia, Ontario and Nova Scotia that relates directly to approval of the proposed law school and [inaudible] are expected [inaudible] before the end of this year. And three, the Benchers have a discretion under the rule 2-27 (441) to make a decision [inaudible] to adopt a resolution [inaudible] the proposed law school is not an approved Faculty of Law. Therefore be it resolved that in consideration of the motion before the Benchers [inaudible] be postponed until the next regular meeting of the Benchers [inaudible] 14 days after the Benchers and the member of the bar have an opportunity [inaudible] decision in one of the legal actions now before the courts.

JL: Thank you Mr. Mossop. Mr. Walker?

KW: I second that motion.

JL: All right. Go back to the same order. Mr. McLaren.

JM: Thank you Madame President. [Inaudible] to keep an open mind in our discussions of this issue. I strongly believe that both the legal and practical implications of our current situation compel us to reverse our previous decision to accredit TWU's prospective law school. I begin with the legal implications as I see them. We know that stable and predictable application of law promotes the rule of law. This value underlies the common law principle of [inaudible], providing much of the reluctant justification for granting TWU's accreditation on April 11th. But as the Supreme Court us in a [inaudible] reference, the rule of law also operates in symbiosis with other values like constitutionalism, fairness and human dignity. That is to say that the rule of law is dynamic and must respond to changing circumstances within society. The law's ability to adapt to changes and the substantive experience of Canadians is what sustain this relevance. Public confidence depends on it. We differ from the College of Teachers in that we are specifically charged with protecting the public interest and the administration of justice by preserving and protecting the rights and freedoms of all persons. This takes our task beyond that of merely ensuring that appropriate educational standards are met. We also differ from the College of Teachers in that we are tasked with accrediting a much more exclusive form of education. Admission to Canadian law schools is increasingly competitive and successful admission grants access to a degree that in turn grants access to privilege, influence, prosperity and status. Indeed, a law degree is a condition for entry to the judicial branch of government. Consider for a second the effects of TWU's discriminatory conduct on the dignity of prospective LGTBQ students deprived of one precious educational opportunity and the many [inaudible] prospects that follow all because of the fact of identity [inaudible] than skin colour, LGTBQ students will suffer loss of human dignity, social inclusion, and public standing. In at least a few circumstances, they'll be regarded as inferior, treated as inferior, and made to feel inferior for simply being who they are. So the legal issue before us is not whether or not TWU law graduates would become good lawyers and judges who do not discriminate against LGTBQ people, I'm certain that the vast majority of them would become good lawyers and judges [inaudible] discriminatory beliefs,

but whether or not the discriminatory conduct of TW law is an acceptable infringement of the equality rights of LGTBQ people would be consistent with an evolved public interest. Same sex marriage was legalized in BC in 2003 and public acceptance of LGTBQ relationships has greatly progressed since then. From what I heard on April 11th, most of the votes in favor of TWU stem from the view that accreditation is required by law despite being contrary to the public interest. TWU's covenant was described as abhorrent, repugnant and regrettable, among other things. Our monumental Special general meeting informed us that the vast majority of our members also view TWU's accreditation as contrary to the public interest. We received 3210 legal opinions advising us to lead on this issue by keeping legal education and the administration of justice in line with what the rule of demands of us in 2014 and not 2001 under different circumstances. To me, this means that we cannot fetter our discretion or remain passive bystanders in this great debate. We must be purposeful in our actions because here today, as Mr. Arvay will surely remind us, we are the law. Thank you Madame President.

JL: Thank you Mr. McLaren. Ms. Bains – I'm sorry, I've been asked to just clarify that Mr. Crossin is still on line, can still hear us and Ms. Matthews and we've heard from David, David, Mr. Mossop, I don't need to hear from you but I do need to hear from Ms. Matthews and Mr. Mossop, sorry, Mr. Crossin.

New Speaker: Madame President, I can tell you that Sharon Matthews emailed me one minute ago to say that she was on the line and the sound was good for her.

JL: Okay. Thank you. All right, Ms. Bains?

SB: Madame President, I second the motion in support of the resolution as [inaudible] and my support is based on my position to keep the public interest [inaudible] through this motion. As I sit here as an appointed Bencher, I realize I carry the weight of the public on my shoulders along with all of you, in my case, preserving the rights of all people and the responsibility of the Law Society. Reserving the decision of June 10th is [inaudible] undertake. Anti-discrimination laws are the hallmark of being a Canadian citizen. In all good conscious, I cannot support a

discriminatory law or process with the law school that has been proposed. That's why I second the motion.

JL: Thank you Ms. Bains. Please remember to turn off your microphone. Now I have Mr. Wilson.

TW: Thank you Madame President. I might take a little more than five minutes but I won't speak again. My fellow Benchers, we're here again today to vote on one of three resolutions respecting Trinity Western University and our decision of April the 11th to effectively approve a law school at that institution. Now what's happened since our April 11th meeting has been nothing short of profound. Not only did the Law Societies of Upper Canada, Nova Scotia, and now recently New Brunswick vote against accreditation of TWU's proposed law school, a Special general meeting was held in British Columbia on June 10th where lawyers across the province voted on this very important issue. The results of the SGM were historic, they were overwhelming, and they cannot be ignored. Out of a membership of approximately 13,000, 4178 attended the SGM, 3210 members voted to direct the Benchers to reverse their decision with respect to TWU, and only 968 members voted in support of the Benchers' decision, but in many ways this is really no longer an issue that deals with the accreditation of a law school. This has become an issue that affects the relationship that British Columbia lawyers have with their law society and with their benchers. And I believe it has become an issue that affects the governance of our law society. Now with respect to motion three, I know that there are some whose opinion I very much respect who believe that we've made our decision and that we should wait for the courts to make a ruling. And that, as I understand it, is the essence of motion three. However, waiting I believe ignores how unprecedented and indeed how overwhelming the members' vote was at the SGM. Waiting I believe sends the wrong message to members who expect something more from their benchers. Waiting makes us look unresponsive, undemocratic, and indifferent. I say that because of the emails that all of us have received since June the 10th. And as we all know, this may only be resolved in the Supreme Court of Canada and it may take years to get there. Now to quote my friend Sharon Matthews, who I think is

on the other line and she allowed me to quote her, she said, I think at the last meeting, the Law Society is a leadership organization, not a waiting around for someone else to make a decision kind of organization and I agree with her. So with great respect to our fellow Benchers, I can't support motion three which brings us to motion one. There are many in the profession, including some of my colleagues at this table, who believe that we should reverse our decision based upon the overwhelming results of the SGM and comply with the will of the majority, and I do respect that view. But people like Jennifer Chou, now Vice President of the Canadian Bar Association BC branch, and Charlotte [??] provincial counsel and many other lawyers in the province gave me a lesson in democracy and reminded me that that vote on June the 10th was non-binding and 9000 lawyers in BC relied on it being non-binding. For whatever reason, they didn't vote. I've been told by many lawyers that they were in court that day or they were out of the office that day or they were in the office but couldn't get away that day. I myself was in Mexico that day and I think other people at the table were away on holidays that day. One lawyer said to me that she worked in Quesnel. She couldn't drive two hours to Williams Lake or two hours to Prince George to vote. So when I've raised this issue with some lawyers, including some in my own office, I made the point of turning a non-binding vote into a binding vote effectively disenfranchises approximately 9000 lawyers who for good or for bad, for right or for wrong, relied on the non-binding nature of the special meeting and didn't vote. And I've been told by more than a few who cares about them, they should have voted. I care about them and many of my colleagues care about them. Although federal, provincial and municipal elections are won by those who vote as opposed to those who don't, federal, provincial and municipal elections are binding. The vote by our membership was not binding and I believe it's unfair to [inaudible] franchise 9000 lawyers who had other things to do on June the 10th. So let's fix that. Let's have a binding referendum, and that's what Ms. Kresivo and I have put forth for your consideration today in motion two. A binding referendum held by way of mail in vote and held immediately expedites the referendum process already available under our legislation. It allows every lawyer

in British Columbia to vote on this very, very important issue without leaving their offices. Every lawyer will know that there will be consequences to their vote. There will be no excuse not to vote, and every vote will count. Now some lawyers have emailed me and suggested that a Bencher-initiated referendum is undemocratic. I'm not sure how including the entire profession in such an important decision by way of a binding referendum is undemocratic. Others have emailed me and suggested that a binding referendum is an intent to gerrymander the process. Well the referendum asks the same question that was a put to the membership in the SGM and I don't know how that is gerrymandering. Still others have said that the Benchers can't be trusted to implement the results of a binding referendum that they initiated. Well I say to all my colleagues, don't vote for this motion if you're not prepared to implement. And finally, it's been claimed that we don't' have the authority to initiate a binding referendum. Well to that I say we are the Law Society of British Columbia regulating the legal profession in the public interest. If resolving the accreditation of TWU by way of a referendum isn't something that we can do in the public interest, I don't know what is. Again, a referendum while, or rather the motion that Miriam Kresivo and I put forward expedites the process already permitted under the Legal Profession Act under section 13. We don't want to wait until a referendum brought in July 2015, let's have it now, and I would urge everyone at the table to adopt motion two. Thank you.

JL: Thank you Mr. Wilson, don't forget your mic. Ms. Kresivo?

MK: Thank you Madame President. As a seconder of motion two, obviously I'm a strong proponent of calling for a referendum. But before I go into the motion, just let me start by saying the issues regarding the accreditation of TWU students are very difficult issues, difficult legal, personal, and emotional issues. I personally want to commend all my fellow Benchers for the gravity with which they have approached the issue, the time and effort in considering the submissions and determining the outcome, and eloquently voicing their positions [inaudible] how to be part of the debate at this table. Having said that, I must say that I believe that a referendum of the members is the right path forward, it may not be the perfect

path forward, but it is the right path forward. And I believe that because it is responsive and recognizes the significance of the issue to the membership. It is the most democratic in that it allows everyone to vote, understanding that it should be binding. And I believe it is principled, and I believe only motion two provides for all three. I'll turn to responsive. Let me talk about why this is important. In an unprecedented meeting, approximately 4000 Law Society members attended a Special general meeting and voted, the majority not to accredit TWU. This was clearly an issue that many members of the Law Society had and have serious concerns about and wanted to be heard. What does that mean or should that mean to the Law Society and to the Benchers at this table? In my view it means it needs to be recognized. It means that a significant portion of the membership has spoken. It means that therefore doing nothing is inappropriate. It means that waiting is inappropriate, and it means that failing to recognize what's happened that is serious is inappropriate. I'll turn now to the second issue. What does it mean to be responsive as Benchers? In my view, it means that we simply cannot just implement the decision of the members as the proponents of motion one have suggested. Why? I believe the answer is simple. 4000 of approximately 13,000 members voted. Is that significant? Obviously yes. Is it sufficient for the Benchers to say the full membership has spoken? No. There were members who were unable to vote. Personally, I was out of the country on the day of the vote and therefore couldn't vote. There are many members in remote communities who could not vote. As well as being responsive, we need to be democratic. We must ensure that we allow the entire profession, all of the members of the Law Society, to vote. We need to provide for a referendum with ballots mailed to all members of the profession, setting out the questions to be determined. I have heard some say that those who failed to vote quote don't deserve to vote since they didn't care enough to attend or vote. In my view, that is far too narrow a view of what the Law Society stands for and the concerns we have for our membership. We need to provide a forum which allows all to vote. As Winston Churchill once said, democracy is the worst form of government except for everything else that has been tried. And therefore what should we do?

What did our members understand might happen as a result of the vote? In my view they could not believe it was binding because if you look at the Legal Profession Act, it states that a resolution of the general meeting is not binding on the Benchers except as provided and the provision provides for a referendum of all members to be conducted if the resolution has not been substantially implemented by the Benchers within 12 months, which would be June of 2015, and certain thresholds are met. This is important, the fact that the Act requires a referendum is important to me because it says that we Benchers, some say we Benchers must determine the issue without looking to the membership. It is not an issue for which a membership should have issue. And I say if the Act didn't provide for it, we perhaps would consider that. But we must look at what the Act provides for which is a referendum. What is proposed is motion two is merely bringing it forward. There are comments in the legal opinions in TWU's submissions that the proposed referendum is not the referendum. I say that is irrelevant. The Benchers of the Law Society have a right to decide and conduct a referendum. There is no question about that, and to consider whether it will be binding. That is what we're asking you to do. If I can indulge for one more moment, I will [inaudible] a rebuttal. I do not – there are some that say that we are fettering our discretion, and I say we are considering both potential outcomes of the resolution and whether in future we would be willing to vote for either of the outcomes and the Benchers will have to consider it at this table once the results of a referendum are taken. And finally I say this is principled. It would be inappropriate to disregard the response from the membership and I believe it would be inappropriate to simply vote to adopt the members' resolution. By allowing for a referendum, we acknowledge the unprecedented vote and we reconsider the underpinnings of the vote and the applicable case law. We consider whether we as Benchers have truly put our minds correctly to the application of the case law. We may have strongly held views but without the benefit of a Supreme Court of Canada case on the merits, there is not really one right answer. If there were, the entire profession would not be in such a conflict over this issue. For that reason, I say we have to consider the views of the membership. Finally,

there are some that would argue that we should wait until the Supreme Court renders a decision in December. I say that the only decision that will provide guidance in this area is the decision of the Supreme Court of Canada, and even if that is expedited, it will take some time. In the interim, we should allow the membership to vote on the issue in a referendum and adopt the results. That is responsive, democratic and principled. Thank you for your indulgence.

JL: Thank you Ms. Kresivo, don't forget your mic. Mr. Mossop, are you with us?

DM: Yes, thank you. First of all, I'd like to say I don't think there are two things that the Benchers [inaudible]. The first is that none of the Benchers support the controversial [inaudible]. So let's get that out of the way, even those who supported [inaudible]. The second thing is the final arbitrator in this is going to be the courts. The members and the Benchers have some say in it but [inaudible] the final arbiter [inaudible] in this kind of [inaudible] the courts. There are three resolutions in front [inaudible] at this time. The first resolution asks [inaudible]. Many members of the Benchers are reluctant to reverse the decision and that is because they've studied [inaudible] extensively and made their decision on April [inaudible] 2014. This decision [inaudible]. There's nothing about the General Meeting that changes that. If you had the view then, you have the view now. But at the same time, [inaudible] recognize that the membership is greatly upset about it. And this is where we come to resolution two which is the referendum. And my concern about the referendum, and originally I thought it was a good idea, but if you look at the date we have to complete it by, we have to complete it by October the 30th, 2000 and 14. That is one month before the [inaudible] cases in front of Ontario, British Columbia, Nova Scotia that will [inaudible] at the trial level, whether Trinity Western is [inaudible]. Why does it have to be October 30th? [Inaudible]. A [inaudible] sometimes in September of 2016, and even that I think is wishful thinking [inaudible] litigation that's going to go forward. So this is the most, out of fairness of that, not only [inaudible] to the members because if the members are going to [inaudible] a referendum, they should have all the possible [inaudible] in front of them and they should have the opportunity of at least having one decision from the [inaudible] courts in the three provinces. So from a

policy point of view, that's a fatal flaw in this referendum accept [inaudible] and there's no prejudice to anybody to have it put off until we have at least one decision from the trial court. Then there are other problems. Among them is I don't think this is going to satisfy those who [inaudible]. They don't want any referendum. They want the decision reversed and I don't, [inaudible] September 30th, I think putting a referendum in front of them is not going to satisfy them and we're just going to have [inaudible]. And so, and finally [inaudible], I [inaudible] the opinion on this issue of the referendum, and I have severe doubts whether we have the authority. And I think we can't delegate [inaudible] to the membership on this issue. [Inaudible] for the members to decide [inaudible] it doesn't matter what I believe, I think there's a very good chance litigation will stem from this and that [inaudible]. Now my resolution, you know [inaudible] the one thing that occurred, that struck me is no one mentioned the litigation, the [inaudible] litigation. I've got emails from people and I've talked to people and when you talk to them and explain to them about the litigation going on and that [inaudible] are set for December, [inaudible] surprise and [inaudible] in my opinion to wait and see what the courts say on this matter. And so I think we, if [inaudible] and we can tell it to the membership on [inaudible], we the Benchers are not going to do anything at least until we get one decision from the [inaudible]. And that can be circulated to the Benchers and to the members and there's no prejudice for anyone [inaudible]. [Inaudible] in to this process. The other thing [inaudible] is [inaudible] the lawyers representing Trinity Western and the lawyers that are upholding Trinity Western, it may be possible to speed up this thing significantly. There is an obscure section of the Supreme Court Act, the Federal Supreme Court Act, section 38, that allows, if all the parties consent, to bypass the Court of Appeal and go directly past so that a judge [inaudible] a trial judge [inaudible] Supreme Court of Canada. It's rarely used [inaudible] if, I think most of the parties in the litigation want this resolved. This matter could be speeded significantly and that's something [inaudible] could look into. I know there's a lot of members at the Bencher table who wish [inaudible] resolution to and [inaudible] to that, but I would hope that they would consider what I have to say

and [inaudible] the other Benchers. [Inaudible] a little pause and allow the courts to proceed with their decision making process. And I'm sure the Chief Justices [inaudible] judge [inaudible] knowledge [inaudible] and those are my comments, thank you very much.

JL: Thank you Mr. Mossop. You should know that you went through your five minutes and your three so, not that you're done but you're done. Just for the table, I want to hear from Mr. Walker then we are going to hear from Mr. Crossin, and I haven't seen any other hands and so I'll call for hands as this is going on. Mr. Walker.

KW: [Inaudible] had another 30 seconds. So wow, what an issue, what an issue for us to have to revisit. I called my little speech as I prepared April revisited. We voted to accredit TWU in April. The membership, at their Special general meeting, passed a resolution to discredit and asked us to reverse. The statute, our statute, gives us the right to call, the right to consider and the membership has an absolute right, it is their right to call for the referendum. But they only have that right one year after the Special general meeting. And I tried to think about why there's that one year, and I'll come back. Now that happens, that one year happens to be in the middle of the year that I'm to be president of this organization, and many at this table, out of this table, have urged me just do anything, do anything, to get it off the table, get it out of your year. We've got other stuff to do, any cost, reverse, referendum, do anything. I'm not [inaudible]. Why are we given a year? It's to reflect, not to wait, not to sit on the sidelines, but to think how should we implement, when should we implement, should we? What's new? So in our thinking, I said okay, well Mr. Mossop has mentioned there's actions right before the courts in Ontario, in British Columbia, in Nova Scotia, and I agree with him, they're set in December and we have reason to believe that we'll have reasons from one or all of those during my year for this table to consider. Accreditation has been treated differently in different jurisdictions. We know that we and New Brunswick Law Society has moved to accredit. We know that Ontario has moved to discredit. We know that Nova Scotia is, has said we accredit if the covenant was changed. We know that some jurisdictions have just adopted the position of

the federation to accredit. We know some jurisdictions have said we're not going to make any decision, we're just going to sit on the sidelines and wait. This is headed towards the Supreme Court of Canada. It's really of national importance, there's no issue about that. I've looked at the news and tried to follow the news to see what the news looks like. And the news is divided in my view. Some say we were right to accredit, some say no, you shouldn't accredit for all of the reasons people wish to do that. I considered our mandate which requires the Benchers to decide this issue in the public interest. I've also thought about the cost and necessity of litigation. I've thought about timing it. We accredit in April, we expect one or some or all of the reasons will come out in early 2015 at the original, originating court. I have reason to think it could get to the Court of Appeal within a year, that's in 2016, and it would probably be in the Supreme Court of Canada likely in 2017. So it seemed to me that you have to put that in context of when TWU will have its first class started, September of '16, so they won't have graduated. I really do think that I will be guided by the reasons of one or all of the Supreme Court decisions. I believe that our membership will be guided or informed by those reasons, and that's the reason why we should wait. I have 12 seconds, I'm not done, I'll continue on for maybe 2 minutes and 30 seconds. So on the covenant, I agree with Mr. Mossop, the Benchers, our membership and the Benchers are not divided on this, we're not divided on whether the covenant is controversial or a portion of the covenant is controversial. We all agree on that. I was kind of hoping that Trinity might change their beliefs but they have a right to believe, that's what the law says. So I'm in favor of reviewing this matter again when we get reasons from one or more of the originating courts in 2015, right in the middle of my year. I support adjourning this issue. I say to you, if those original if those original reasons say that my analysis of the law was wrong, our legal opinion was wrong, I will vote for motion one because that's the law of the land. I won't wait for the Court of Appeal, I won't wait for the Supreme Court of Canada. I ask those of you who are seeking a referendum to also wait. A final comment to our membership. I want our membership to know, all of my fellows at this table and those on the phone

worked really, really hard in April. We read, we reviewed, we thought, we considered and we voted. We worked hard again today and we will continue to work hard on your behalf, and we ask you to do the same. When the time comes, I have, this should remain with the table, but do the work, thanks very much Madame President. I have a minute.

JL: Thank you Mr. Walker. I just want to get a sense. I've had an email that the webcast is not very clear and I'm wondering are we, would it be advantageous to reboot, take a, to turn it off and turn it on again or should we just press on? [Casual conversation not transcribed] All right, the next speaker I have is Mr. Crossin. Mr. Crossin, are you still with us?

DC: I am, can you hear me?

JL: Yes, you're loud and clear.

DC: All right, it's been a bit of a struggle this morning and I should apologize that I haven't been able to hear some of the things [inaudible] so I may not be able to address all the comments but let me just say this. You know since our last meeting in April, [inaudible] members have essentially declared they want a say in determining the outcome of this issue. And they want that say collectively as [inaudible] representation. You know I personally believe this to be a very healthy, very inspiring engagement by the membership. Frankly, I hope it continues on a number of issues concerning the justice system. The speakers I have heard, and this is typical of my struggle, I agree with the substance of everyone's comments and it has been a struggle for me. But I think the best way forward and the best way [inaudible] properly and fully served, that circumstance is to proceed with the suggested referendum. For me, the public will have its interest well-served and vigorously protected by the collective good will and conscious reflection of our membership, and I believe my duty is fulfilled by endorsing this suggested process. You know my thoughts on this really boil down to first principles. We, and when I say we I mean the lawyers of this province are a self-governing profession. We well know that in order to maintain our independence and guard against [inaudible] by the state or otherwise, it is critical

in our decision making to ensure and foster public confidence in our profession and in the administration of justice. Section 3 of our Legal Profession Act applies to that [inaudible]. Section 3 isn't the voice of the government and it's not the voice of the courts and it's not the voice of the public, and it's not merely the voice of the Benchers. Section 3 is the voice of the lawyers and the members recognize it as fundamental, that any erosion of the public trust or surrender of the public interest, you know places our profession as we know it in jeopardy. And so in order to carry out that mandate, we, the members, settled on a democratic construct of governing. I'm elected by the members to govern their affairs, to make decisions to ensure the public is well-served by a [inaudible] that is ethical, an independent bar. So my duty, as I see it, the vote is a matter of statute and [inaudible] of membership is to do what I believe serves the public and to do so with reflection, good faith, and a clear conscience. And my duty is not circumscribed, you know [inaudible] simply by resting my decision making on a personal view without regard to the circumstances. My duty is necessarily driven by the [inaudible] and it's always an assessment of all the circumstances that best determines the course that serves the public perspective. And so [inaudible] evolving, the factual [inaudible], I think from the point of view of my statutory duty and logic and democratic process that the issue should be determined, frankly by the hearts and minds of the many and not [inaudible]. And certainly there are important aspects of this decision that are fundamentally legal in nature but we are not a court. How that legal issue will be determined will be decided by the court. Also [inaudible] many of the [inaudible], many of our members will be disappointed that the court will not arrive at the right answer from their perspective. The courts will give out the answer, not necessarily what we think is the right answer, and that's just how it works. So for the moment, I think it is fair to say how the legal issues will be decided are unknown and uncertain, but I'm confident [inaudible] beyond [inaudible] the members will blend their collective voice and [inaudible] on all of these issues to determine the public interest as it relates to TWU. Of course, look I have [inaudible] to the fact that a good many members took the opportunity to speak at the vote. I appreciate many did not,

either unable or unwilling to attend that meeting. They had their chance but they didn't take it. I very much appreciate those points from a, you know from an advocacy point of view. But I don't, I hope we don't see ourselves dealing with this in an adversarial form. The question now is how to best maintain [inaudible] that our profession, our Law Society is doing all it [inaudible] concerning this important issue. We must be as far reaching [inaudible]. And there is a very good argument to be made that we have now done enough but I think we must do everything that is reasonable to fulfill our obligation and for the public [inaudible] to do everything we can reasonably do. And I also have regard to David Mossop and Ken's remarks. It has an unassailable pragmatic attraction. The fact is the ultimate fate of TWU will be decided in Ottawa, not in Vancouver, and we know that and the members know that. But I think we must respect the fact the members, the public want [inaudible] whatever the future court processes may bring in years to come. And I think we should proceed to conclude a process that best [inaudible] public confidence [inaudible]. And on balance, [inaudible] a referendum [inaudible]. And I'd like to conclude this way, if I may, I want to say this publicly, the process to date has proceeded I think in a democratic structure [inaudible]. It has unfolded in a [inaudible] as a [inaudible] of the leadership of our president. And wahtever we decide our next steps to be, can I just say that her leadership with continue with that singular goal and that singular goal [inaudible] is to uphold the integrity of our Law Society and integrity of our [inaudible]. And so those [inaudible] my remarks. I'm only going to speak once, I'm sorry I'm not there, something at the last minute came up [inaudible] a venue that some of you may be familiar with, a phone booth [inaudible]. So thank you for that, but that's what I [inaudible].

JL: Thank you Mr. Crossin, your comment about being in the phone booth [inaudible] drew a chuckle. We're going to take a health break but I cannot help but note that five minute speeches have turned into eight minute speeches and I just want to remind people that there are consequences and I don't have anyone wanting to speak after Mr. Crossin although I'm sure there are. So I will quickly put together my list and then let's take a 10, 15 minute break. [Inaudible].

New Speaker: Can I make one comment?

JL: Please.

New Speaker: I [inaudible] note for the record that everybody in this room voted for five minutes speeches except me.

JL: Sorry, 10 minutes.

[Transcription resumes at 2:12:48]

JL: Welcome back. We have a new guest that I want to recognize. When I had an opportunity to visit his place of work I was recognized and so it gives me great pleasure to introduce Leonard Krog who is the MLA for Nanaimo and Justice Critic in the House. Welcome Mr. Krog. All right, I have a list. It starts with Mr. Arvay, Mr. Acheson, Mr. Ward, Ms. Ongman, Mr. Ferris, Mr. Riddell, Mr. Meisner, that's [inaudible] enough, are we good? We'll start with Mr. Arvay please.

JA: This is not the occasion to repeat what I said at the April where I argued unsuccessfully that the Benchers should not approve TWU's law faculty. My argument, in a nutshell, was that the community covenant was discriminatory and that there was no countervailing argument based on freedom of religion or anything else that could somehow justify it. That remains my view today. The question today is no longer about rights and freedoms. The question today is about governance, it is about democracy. As Benchers, our role is to govern the profession in the public interest. On April 11th, each of us tried to carry out that fundamental duty in the best way we could. To borrow from Edmund Burke for a moment, I think each of us had taken the view that we were elected by the members to exercise our best judgment as to what was in the public interest, and in particular to do what our governing statute required of us and not what our members are telling us to do. But the Legal Profession Act has not changed our role from what it was on April 11th. The Act allowed our members to consider our decision and in very significant numbers rejected it. At this point, the resolution is not strictly binding on us but because it represents more than one third of the

profession voting, and more than two thirds of which who voted to reverse our April 11th decision, it is deserving of the highest degree of deference and indeed as much as [inaudible] that would occur were there to be a referendum. Indeed, in my view, there has in effect been that referendum. The only way we would not be bound by that resolution of the members or a referendum would be if the members were asking us to do something that would be contrary to our statutory duty. Whatever that phrase means in our Act, it cannot apply to this matter. I cannot be said that if you now give effect to the members' wishes that you would be acting contrary to your statutory duty. All you would be acting contrary to is your opinion, your belief that the Supreme Court of Canada decision in the teachers' college case was [inaudible]. Acting contrary to your opinion about the binding nature of the Supreme Court of Canada case is not the same as acting contrary to your duty, your statutory duty. Indeed, for those of you who may be intending to support the motion of Tony Wilson to order a referendum now, you will be acknowledging that whatever the outcome, you would not be acting contrary to your statutory duty. And for others, I ask you this, why would we have wasted the more than $100,000 on a special meeting if it was a foregone conclusion that any decision of the members to disagree with our decision on [inaudible] was contrary to our statutory duty. Hence, if we agree that there is nothing in our Act that precludes us from giving effect to the recommendation of the members at the last special meeting, the question is why would you put the Law Society and our members through the time, expense, the turmoil, of yet another referendum? Some of you might say because you're not satisfied that all the members have spoken, but surely enough have. By my estimate, there were, there was approximately 36 percent of the members eligible to vote who voted at the referendum, which is almost exactly the same percentage who voted for all of us in the last Benchers election and more than voted in the previous two elections. In the last election, we were voted in by approximately 36, 30 percent of the members eligible to vote. In 2011, by 29 percent, in 2009 by 31 percent. If that percentage of the members voting for us as Benchers gave us the legitimacy to be Benchers, then surely that same percentage is enough to give our members the

legitimacy to override our decision. Some of you may be unpersuaded and you would say that there are still out there, members out there who would vote, who didn't participate in the June meeting. That may or may not be the case but in my view that's really beside the point. Those of you who voted in June are the members of our profession who care deeply about this issue, and I refer to those who voted either pro or con. Their vote took considerable effort. They left their offices and their practices and spent the good part of the day to listen to the debate and cast their vote. It is truly fanciful in my respectful opinion, if indeed not just ingenuous, to suggest that there are 9000 lawyers who were disenfranchised on that June day. Well there might be a few who had no ability to vote. The vast majority simply chose to stay home and they must accept the consequences of that decision, just as they must accept the consequences of staying home when it was their decision whether to vote me in as a Bencher. I also think that it's quite offensive to order another referendum. Requiring yet another referendum smacks to me as a kind of [judge??] shopping, or if not that then simply appealing. The Benchers will be seen to be calling for another referendum because you don't like losing, a trait most of us lawyers happen to share, but this is not the time to be advocates, this is the time to be governors. Hence ordering yet another referendum will strike our members as highly disrespectful of their views and simply gamesmanship. Given that so many of you found the community covenant abhorrent, Mr. Walker says we all did, I simply don't understand why you would not now take the opportunity to do the right thing when the way is now clear to do so. The members have spoken. It is our duty now to give effect to their wishes. It is that simple. It is also time to put the TWU issue behind us and move on to more important business. I support Jamie's motion and urge you to do the same.

JL: Thank you Mr. Arvay, don't forget your mic. Mr. Acheson please.

HA: Thank you. I will be brief. I certainly respect the [inaudible] resolution from the members at the Special general meeting and I'm guided accordingly as I review the three motions going forward. I had the opportunity to speak to a cross-section of my fellow Benchers representing all three motions, and I must say that there are merits for all three motions, but my duty today is to vote on a particular

motion and I support the resolution on the referendum. I do so because I believe it's most democratic, it's most timely, it also meets the test of the public interest.

JL: Thank you Mr. Acheson. I have Mr. Ward then Ms. Ongman, Mr. Ferris, Mr. Riddell. Mr. Ward?

CW: Thank you Madame President. I'd like to address the resolutions two and one in that order. Firstly, a few words about my friend Tony's resolution number two [inaudible] saying that we hold a referendum by mail out ballot. We've done that before and frankly the track record on such referenda isn't very good. By way of example, in 2003, we held a referendum by mail out ballot that dealt with amending our rules with respect to various matters, webcasting the AGM, conducting Special general meetings, Bencher term limits and [inaudible] for life Benchers. And I know that then, about a decade ago, question one was webcasting general meetings, are you in favor of the Benchers amending the rules respecting general meetings to allow members to attend and vote by way of the Internet? There were, the answer was yes, 2714 or 88 percent of the votes cast. There were 2867 votes cast out of 10,614 members that year, which is a return of about 27 percent. By the way, Annual General Meetings are still not being webcast and voting isn't done over the Internet. So with the greatest of respect, resolution two is well intentioned in that it reaches out to all the members, it's still likely that only a tiny fraction of members will exercise their franchise in any event and it's unclear what effect the resolution might ultimately have. I support resolution one and I will again proudly vote in favor of it and I urge my colleagues to do the same. In my view, our members have spoken with great clarity and force at the Special general meeting, and I feel that we should respect their views, pass resolution one and move forward. Our members say, and I say, British Columbia should not have a law school that discriminates against members of the LGBTQ community. With the greatest of respect to those who may have different views, this debate has nothing to do, in my opinion, with the exercise of religious freedom. It has everything to do with assessing whether a discriminatory institution should be educating our future lawyers and judges, who themselves will have professional obligations to respect the constitutional values set out in

our Charter of Rights and Freedoms. We've been told recently that we the Benchers face a critical choice today, and I quote, whether to go forward with noble principles in defense of all or step backward into a past laced with prejudice, suspicion, and marginalization. I agree with that being the nature of our decision and I find that it's ironic that those words were written by the President of TWU this week in a Vancouver Sun editorial. I believe that defeating resolution number one, the resolution that calls for implementing the vote of our membership, would be disrespectful of our members and be a giant step backward into a past that would indeed be laced with prejudice, suspicion and marginalization. Thank you.

JL: Thank you Mr. Ward [inaudible]. Ms. Ongman, then Mr. Ferris, Mr. Riddell, Mr. Meisner. Lee?

LO: Thank you Madame President. My name is Lee Ongman, I am the Bencher, one of the Benchers from the Cariboo and I'm happy to have this opportunity to speak to you today. Today, we're here to consider the three resolutions that have been described. And before I tell you where I stand on it, I want to once again take the opportunity to thank all of the experts and the lawyers and folks out there that provided their opinions and their submissions. I want to congratulate and tell the members of the Society of how very proud I am of them in the way they stood up to be counted on this issue of discrimination, and that's the issue for me, it's clear in that community covenant that that's what we're talking about. And it's a difficult issue, and we've struggled for months about it. I know that...

JL: [Inaudible].

LO: Section 3, as it was before, and still is now, has been addressed again today by several members, Mr. Crossin, Mr. McLaren, and I share all of those comments and rather than repeating them entirely I just want to, I think for the record, would be nice to talk about the statutory duty and objects. Section 3 says that these are the duties and those are the statutory duties and objects of the Law Society. And that is is the object and the duty of the Society uphold and protect the public interest in the administration of justice by preserving and protecting the rights and

freedoms of all persons, and ensuring the intent, independence, integrity, honor and competence of lawyers. And that is as equally important, the integrity, the honor and competence of lawyers cannot be talked about without realizing the education of lawyers, the training, the training in non-discrimination. And that is inherent and should be inherent to students as they learn to become lawyers. Mr. Walker thinks we should hold on and wait for, wait for a while and an abundance of caution, that is something that I am familiar with doing over time, delay sometimes is a victory. But we are governors, as has been pointed out by Mr. Arvay and Mr. Ward. It is time to govern. We've heard from the members, we have a process, that process is working right now. It worked as soon as the members, a few days after our decision, started that process in motion. And so the referendum will happen by the members if we don't act and govern. They will take over that responsibility, they have, however in this particular case, I don't think that we need to wait. I don't see the reason for the delay. The delay is hurtful to all, it causes, it keeps this festering and it is hurtful to TWU. The government, in its wisdom, gave them a conditional approval to operate a law school if, and some say there isn't even a need for another law school, but in any event, it was conditional, it was conditional upon receiving the approval of the federation and the approval of the Law Society of British Columbia. And I, you can see where this is leading, they do not have, at this point, in my respectful opinion, the approval of the majority of the members of the legal profession in British Columbia. That's not going to get better for TWU, it's only going to get worse, and it's going to just continue to turn on the same vein for another year. I don't want to see that happen. I think we can govern, I think we can make a decision today, and I think that it's fair to TWU to have that decision. Some of the members, I believe, have noticed and are very aware that during this period of time, TWU has our approval. They have met the conditions, although I'm sure the government is very aware that that may, that may change. And they need to be prepared to change their conditional, act on that conditional approval. So in all fairness, let's [inaudible] an institution begins hiring teachers, making plans for this new law school, starting to invite prospective students, and certainly those

students will not include a certain segment of our population, that the sign says please do not apply. So that, that momentum that TWU has, at this point in time, in getting ready to open the law school in 2015, needs to be addressed and we can only address this now, not a year from now. We can easily address that as governors and not put our members through the continuing torture and have to raise another referendum that they, that then we must [inaudible] Legal Profession Act act upon. So I think, if I could predict the future, I would say that the dissenting opinion in the college teachers' case is the one that ultimately will prevail. And those are my comments, thank you.

JL: Thank you Ms.Ongman. Mr. Ferris then Mr. Riddell, Mr. Meisner, Mr. Richmond. Mr. Ferris?

CF: Thank you Madame President. I'd just like to start by saying I'm privileged to be part [inaudible] and then thank everybody for their respectful comments. I would like to start by saying I agree with much of what Mr. Arvay has said. I think our role has changed since the April meeting. I think our legislation that governs us is a mixture of us governing but also the, it's a democratic situation where the members can have their say. And the members have had their say. I agree with Mr. Wilson that their say in June was powerful and what is required of this table is a response to what the members have had to say. And so this is where I begin to differ from Mr. Arvay is the question of what is that response to what the members have said. And there's been three responses that have been put forward. One is to delay the decision, and I'm not in favor of that because I think the members deserve a response to their vote in June. The second is to overturn our decision that we came to in April. I have, I have reached into the depths of my conscience, I have reread many opinions, and I remain of the view that I expressed in April that the public interest, the main public interest that I serve as a Bencher is to follow what I think the law is, and I continue to believe that the teachers' case is currently the law until change. I don't believe the law changes because it gets old. I don't, I acknowledge that there's valid arguments that it would not apply, but I have come to the personal conclusion that that remains the law. So I'm not in support of my friend Mr. McLaren's motion because I don't

believe I can reverse myself in good conscience. So that takes me to Mr. Wilson's motion which I support. I think the members have spoken. We are ultimately a democratic organization and it deserves a response, and the response is let's let the members have their say and let's do it quickly, that deals with the issue of responding quickly. And if the members want to finally speaking as a group, meeting the requirements in the statute that, on quorum and approval, then this table I believe should reverse their decision. If they don't speak in that loud voice, then I don't think we should. Now I'd like to respond to a couple of things that have been said about the referendum which I personally think are not correct. The one is that it's judge shopping and it's a process which looks like we're sort of gerrymandering. That's not my intention. My intention is to follow as closely as we can the statutory process the referendum has provided in our act. It's not to look for a different result. It's to look for a result which everybody knows will be binding and which meets the requirements which everybody has accepted through our legislation. The second is Mr. Ward's comment that the mail out ballots don't work. I think this is an historic issue for the Law Society and I personally believe we can't compare it to a mail out ballot about whether we televise meetings, that this will generate huge public interest and my expectation is that we will far exceed the quorum required for the referendum. And then the final thing is that I think this was Mr. Ward's comment as well, is that we should do the right thing. I agree we should do the right thing but I think the right thing is to, is to put this to the members in a way that they know that their answer will be decisive and in a way that we can respect the opinion because there's no question about whether or not [it's supposed to be decisive??]. So I'll be supporting Mr. Wilson and Ms. Kresivo's resolution.

JL: Thank you Mr. Ferris. Mr. Riddell?

PR: My position begins simply that ultimately, whether TWU has a law school or does not have a law school, it's not a decision that can be made at this table. It's a decision which will made by the Supreme Court of Canada. So really what we're dealing with today is governance. How do we accept or how do we deal with the membership vote from June of this year? It was a huge turnout for a Law Society

event. 36 percent of the eligible voters showed up to vote. There was a 70 percent plus vote against TWU. That cannot be ignored. But that vote took place as part of a process. It was a nonbinding resolution that comes to the Bencher table. If we think about what we're doing today, we are accelerating by looking at our motion, you're dealing with certain ways with Section 13 of the Legal Profession Act. The Act says the Bencher table has one year to act upon special resolutions. If we don't act upon it, the membership can bring a referendum. That would be June of next year. If you look at the order of our resolutions today, resolution one is do we accept, do we adopt the nonbinding resolution of the members? If we do, it ends the issue. If we don't, there's very little [inaudible] cause to change our mind between now and next June. There are three pieces of litigation before the courts right now, and there's the British Columbia piece with regard to the decision of the Minister of Advanced Education to accredit, there's the piece where review is being sought by Trinity Western and the Law Society of Upper Canada's decision, and again these, the Nova Scotia piece dealing with the same issues as the Law Society of Upper Canada legislation. One or all three of those pieces of legislation will progress to the Supreme Court of Canada. But if we are lucky we might get a trial decision by next June. We might get a trial decision out of British Columbia that doesn't deal with the underlying issue of the balancing of right. It may deal with the issue of fettering, administering and properly fettering [inaudible] and it goes back to the minister. With all due respect to the trial decisions, this [inaudible] really made [inaudible] out there. So what we're really doing is, in my mind, by the way of Mr. Wilson's resolution, accelerating the section 13. We're telling the membership there will be a binding resolution, referendum, we are following the procedures set out in the Legal Profession Act, we're doing it eight months early, nine months early, but we're following the same rules, we're going down the path that the legislation sets out. And everyone will know what they're voting for, [inaudible] what I believe the members are voting for is they want a voice in the litigation. They are upset with the TWU covenant, and really, I look at a voice to disaccredit TWU by the membership, it's a vote saying we want to be an active part of the litigation because quite clearly, if

TWU is disapproved by the Law Society, we will be subject to a review, we will be part of a litigation. A vote, to my mind, in favor of keeping TWU's accreditation, would be a vote by the membership in which they are saying maybe we sit on the sidelines. I don't know where the membership's going to go. I do want the membership to have a voice in knowing there is a, they are voting in a binding referendum that follows the spirit of the Act and that will have real consequences. The other referendums Mr. Ward refers to, Madame President, I'll rub over a bit but I won't, I [inaudible]. The other referendums that Mr. Ward referred to were not binding and did not have the same divisive effect on the profession that this issue has. Realistically, I anticipate a huge return and I will say one thing about the process in June, at our special general meeting. We should really consider a change in that process with webcasting and Internet voting. [Inaudible] during the summer, I had occasion to be in the north and I was [inaudible] some prosecutors asking about the TWU issue, they were asking me about it. And I asked some Crown in Dawson Creek did you vote? And they said no, we couldn't because we had to drive to Fort St. John, court shut down at 4:30, it's an hour, an hour and five minutes to Fort St. John, we couldn't make it, we weren't going to go, we weren't going to make it and it was nonbinding. To me, that had a real effect. I support the Wilson resolution for a referendum. I believe it leads to good governance, it gives the membership a voice, and it gives the membership a voice on an issue it's clear, they know that their decision will be binding. Thank you Madame President.

JL: Thank you Mr. Riddell. Mr. Meisner, then I have Mr. Richmond, Mr. Lawton, Ms. Cheema. Mr. Meisner?

BM: Thank you Madame Chair. May I start by saying that the Law Society of BC, indeed Canada, have been involved in the decision to accredit TWU, it's been expensive, divisive, to this time and into the future, nonbinding on either party. I have heard numerous times around this bench earlier today that they're saying that this decision will ultimately be made by the courts, the Supreme Court of Canada, and I made a note to myself that says no, the decision as to whether TWU has a law school or not can be made by TWU. It doesn't have to go to the

Supreme Court. What a shame that the two parties, that the two parties involved in this, the Gay Pride and TWU, who espouse tolerance, continue to dig in, looking for a solution that favors them rather than trying to sit down and work towards a common ground, a positive step for both of them, that would not only save the expense for the people of Canada, the expense of the law societies of Canada, but would show that tolerance, that each party says they believe so strongly in. I just want to address this if I may. Unless there are people specific to this discussion today, who are at this table who possess heretofore unknown powers, anything, anything past at this table is meaningless in the final decision of TWU. Indeed, the law societies of all of Canada, those 3210 people who voted to change our minds, asking us to do this, none of them, not one single person has the ability to change that which will come from the courts. We talk about a binding referendum, there is no such thing as a binding referendum that's going to take place that has to come in by the end of October. In fact, it's not binding on anyone, it's not binding on the final decision, it's not even binding on the lower courts. Speaking of the significance of those people who are involved in this issue, I still, and to this point, I'm holding my mind open towards resolution two or three, I have the sense that if I support resolution two I'm committing the membership to expense but at the same time I'm saying if you want to vote on this issue, if you want to have a say in an issue which is really nonbinding, go ahead, it's your money. I'm an appointed Bencher, it doesn't affect me. I appreciate, I appreciate the direction you're going in, I appreciate your efforts. I would say that if somebody said that we will have the Charter of Rights, we have to change, times are changing, indeed they are changing, indeed they are changing, but we don't know until we have a decision in the courts as to what direction they're changing and I am still left, I am still left with the decision of the Supreme Court in 2001. So I go back and say I do wish, I do wish in this eleventh hour, that the people of TWU would sit down with those people from the opposing party and come to a common ground. Let's both show some tolerance, let's show that we are concerned about not only the cost of this litigation but

concerned for all people in Canada. That's my decision. Thank you Madame Chairman.

JL: Thank you Mr. Meisner. I have Mr. Richmond, then Mr. Lawton, Ms. Cheema, Mr. Doerksen.

CR: Thank you Madame President. And first of all, let me say that I thank everyone for their views on this issue. I respect their views and speak my mind with no animosity towards anyone. I share many of the points that I've heard around the table, not all, but we've all thought very long and very hard about this issue and it hasn't been easy. I can think of many reasons why TWU should have the law school and I really can't think of any why they shouldn't. I have no problem with same sex marriage or the rights of the LGBTQ people, none at all. Neither do I have a problem with those who hold Christian beliefs. The Supreme Court made it clear the beliefs of one interest group should not trump those of another, it is a balancing act. We made our decision in April and I can't think of one good reason why we should revisit our decision. Are we going to change our mind? Were you not sure of the decision we made in April? I was. I think we made the right decision so why should we be changing it now? As many learned people here have said, there are several court cases pending, why don't we just let the issue unfold as it should? Secondly, or thirdly, do the members of the New Brunswick Law Society and others really believe that lawyers who graduate from TWU will be inferior to those who attend other law schools? I think that's absurd. There are faith-based universities in many countries and they seem to function very well. Why is TWU any different? As I ask myself, if this were a university of any faith other than Christian, would we be having this discussion? I think not. I understand the reasoning behind the motions and the motion to change our position, however, my position as a lay Bencher or appointed Bencher is different from yours and with the greatest of respect to all of you lawyers, and I mean it sincerely, I do not represent lawyers and am not elected by them so my opinion will be different from yours. I was appointed by the provincial government to represent the views of the public as I see it and I hear from different people than you do. I do remind you that the provincial government approved Trinity Western's application for a

law school. It is the law of the land. We have made our decision, let's leave it alone and I think that ultimately the courts will decide the issue. Thank you very much.

JL: Thank you Mr. Richmond. I just want to read the list as I have it, just so that people know that I have your name. Mr. Lawton, Ms. Cheema, Mr. Doerksen, Mr. Finch, Mr. Petrisor, Ms. Matthews, Ms. Morellato and Mr. Van Ommen. I have [inaudible] names and we will go to Mr. Lawton please.

DL: Thank you Madame President. I acknowledge receiving very many email communications both from members of the public and members of the bar. And I tried my best to respond to all of them with the exception of those that came in yesterday morning and at 6 am today. I take this matter very seriously, I see that we are in a process that doesn't simply include today's meeting but rather what happened in April, what happened again in June with the special general meeting, and what will happen after today. I agree with my colleagues who say you've had an opportunity to contribute a great deal of intellectual time and energy to the main question. We did that in April. My submission of what we're dealing with now is what comes next and what is appropriate in accordance with our [inaudible] under the Legal Profession Act and our governance obligations. Now, I simply cannot forget the fact that 3210 members voted in favor of rescinding the accreditation of Trinity Western University and 968 voted against it at the special general meeting. That was an overwhelming communication. Nevertheless, we have 11000 practicing members, 13000 members in total. In the result, 8000 of us did not vote in the special general meeting. We don't know why, and from my perspective, I think it would be presumptuous on my part to criticize them for not doing so at that time. They may have been reserving their opinions and participation for a number of reasons that have been raised today. In my opinion however, the 4000 members who voted cannot be ignored just as the 8000 who did not vote cannot be ignored. So where does that leave us? I suggest the controversy over Trinity Western University and its faculty of law and its covenant as treated by our Law Society, as voiced by the public, as seen in the media, and as treated by other law societies in Canada demonstrates the balancing

of equality rights is a national concern reflecting divergence of opinion about this issue for lawyers [inaudible]. And indeed, that divergence of opinion, I suggest, has flowed energetically around this table. Given the importance of this issue, I believe that the Benchers should ensure a process gets followed that is both fair and complete. And I emphasize the word complete because we've had some of our colleagues reference section 13 of the Legal Profession Act, and embedded in that is a process and procedure to invoke a referendum. In circumstances, I suggest that the legislature may not have envisaged immediately but had enough thoughtfulness to predict might occur one day. And so I turn to the motions. I cannot support motion number one because in my view its outcome would truncate the remainder of the members who have not yet voted. Similarly, I cannot support motion three because although I agree it's a very logical perspective, and I very much respect the opinions of those who have advanced it, in this instance, I believe that the Benchers should move to a process that incorporates the collective voice of the membership. So for these reasons, I am in support of Mr. Wilson's motion for a referendum. And in closing, I would simply like to say that whatever the result of the voting today, this issue, I believe, will be resolved by the Supreme Court of Canada, and I would like to think that with a referendum our membership and the public would be satisfied that we have completed our duty to see that a fair and complete process has been undertaken. I'd like to leave one final comment if I may. I disagree, Mr. Arvay, with your suggestion that some of us may be judge shopping, to use a metaphor, or engaged in gamesmanship, that would never be my objective. My objective is to see that I fulfill my obligations o the public as I have promised to do.

JL: Thank you Mr. Lawton. Ms. Cheema, then Mr. Doerksen, Mr. Finch and Mr. Petrisor.

PC: Thank you Madame President. I am grateful to all of those who have put forward their time, their effort and their energy to get us to this point today. I will be supporting the Wilson motion for a number of reasons, and I acknowledge the comments of everyone who has put forward their views. I believe that the call for a referendum as framed in the Wilson resolution balances competing interests and

objectives. I start with the principle that as governors of the Law Society it is our obligation to take action to fulfill our statutory objectives. Given the unprecedented 4000 plus responses by our members at the SGM, we as governors are obligated to respond. The question is what form does that response take given our primary role as governors? Should we wait and see what the Supreme Court does? In my respectful opinion, while we can defer the legal decision to the Supreme Court of Canada, we cannot defer our governance function. As governors, we have to fulfill our statutory mandate and in voting for the Wilson motion to hold the referendum, we are seen to be taking action on this issue and we are deciding what subsequent action is to be taken. That is good government. The Wilson motion is also fair. It gives notice and apprises TWU of the purpose, the function of the referendum, and of our intention as to how we will utilize the results of the referendum. That is good government. And finally, and perhaps most importantly, it gives notice to our members that we are holding our referendum, what it's purpose is, and how it will be utilized in our ongoing governance function. That is good government. The Wilson motion proposes a clear, defined course of action in the face of ongoing legal certainty. It conforms to our statutory mandate, it proposes a transparent determinative and proactive response, it gives notice to everyone who is affected of what we are doing, when we are doing it, how we are doing it. I am mindful of the comments that the quality of the participation or the results of the methodology may impact the referendum, but in my view, it is the adherence to the principles of good governance that ought to rule the day and not the ultimate participation or quality of the methodology. In summary, I support the Wilson motion. Thank you Madame President.

JL: Thank you Ms. Cheema. Mr. Doerksen then Mr. Finch, Mr. Petrisor, Ms. Matthews.

LD: Thank you Madame President. I'll likely go to my [inaudible] time. We made a legal decision on April 11th yet our legislation allows our membership to overrule us. I'm not aware of any other administrative group that has this kind of appeal process. We as lawyers are generally dispassionate and objective but this issue

has become emotional and divisive. I'm not being critical of the membership for this. It speaks to how this is not a legal issue or not just a legal issue, but a social one and the process we embarked upon and the legislation we operate under lends itself to this politicization of this issue. This has to stop. My worry is that this issue will continue to evolve as a political one and not a legal one. This organization, this table, cannot become politicized. If we become politicized, we put in jeopardy our ability to self-regulate this profession. In June, our meeting felt like we were a parliament with a majority and minority and I didn't like it. And I'm not blaming anyone for that, I'm saying that's what this decision or this issue has done to this table and I want it back to what I consider normal. So where do we go from here? I cannot change my vote because I'm not persuaded I'm wrong or that the law needs to be changed, and the few voices that seem to get all the media attention telling me that my April vote was cowardly, homophobic, akin to racism, or that I'll be voted out at the next election is not persuasive. If I had to rely only on what I hear in the media, I would be very discouraged. Thankfully, the vast majority of voices I have heard from have been thoughtful and respectful even though they may disagree with me. I want to thank all the people who took the time to send me their emails or to call me or talk to me at the courthouse about their thoughts on this issue. Whatever the end result of this matter, I am encouraged that this profession is populated by good and well-meaning people. I have read all the submissions we've received, and again we've received very few. And the majority of these tells me to stand firm or reverse our decision, yet the majority of the membership that I have spoken with directly tell us we need to move on, get this issue off, off the Bencher table and the best way to do this is by referendum. And I've heard this from both people, from both sides of the issue. I also hear that it's not you, we don't dislike you, we don't dislike, we know you have a job to do, but we just think you shouldn't be the final arbiters of this. This should be moved to the court. In my view, a referendum now is the best of all the available options. If the referendum succeeds, this matter will be moved out of this political realm into the courts which are immune from such considerations, if it fails, then we wait for this matter to unfold in other

jurisdictions. Obviously, we will be following whatever the Supreme Court of Canada decides when this issue finally gets there, however it gets there. With respect to Trinity Western, I feel that this, that they cannot possibly win in the court of public opinion [inaudible] level playing field in the courts. I reject the notion that we as Benchers should not hold referendum because the membership has already spoken and those that did not show up to vote on June 10th had forfeited their right to be heard. Frankly, I think this is discriminatory to our rural lawyers. And what is the wrong, what is wrong with more democracy especially with an issue that is clearly very important to everybody. I adopt the submissions of Professor Foster at the University of Victoria Law School who said the reason [inaudible] in good faith and based on the law as it presently stands is to be reversed, better be by substantial majority of those eligible to vote, not the fraction that voted to reverse on June 10th. I [inaudible] that those who suggest that a referendum is too costly should ask about the cost of litigation. We just spent this morning talking about our budget and how we need to be concerned about rising costs. Well litigation would make our costs go up. If costs were truly a concern, we would be doing nothing and waiting for Ontario, Nova Scotia, and the other litigation to unfold. So one final thing I'd like to add, and I don't think it's been talked about much. I am a descendent of a small Christian minority that has been in existence for almost 500 years. For many years in Europe, my ancestors suffered through persecution, torture, and murder for their beliefs. Fortunately, they had good skills and they were good farmers. In the 1870s, the Canadian government invited and provided many incentives for my forefathers and mothers to immigrate to Canada to settle and farm this land. They were promised by the government of the day that they could follow their religion without government interference. For 40 years all was well. My ancestors lived in peace, they prospered and contributed to the growth and wealth of this country. Then suddenly, society changed. Overnight, public opinion turned against them. Before, my ancestors were viewed as industrious and hardworking, and suddenly they were viewed by the general public as aliens with peculiar habits and dangerous ideas. They were viewed with suspicion, as unpatriotic and disloyal.

They did not share the same values as everyone else. Derogatory statements were made in parliament about them, editorials in the newspapers of the day advocated for the confiscation of their property, the ban on any further immigration, and other discriminatory practices. The government acted on this and while their land was not taken from them, they were no longer permitted to immigrate to this country for many years, especially when they mostly needed it when they became refugees in Europe. In fact, in this province, from 1931 to 1948, my ancestors were not allowed to vote. Now what was the [inaudible] of this insignificant bunch of farmers that was such a threat to this country? They believed and still do that it is morally wrong to kill another human being so they would not enlist and fight in World War 1, they were pacifists. It seems to be popular today to see Christianity as the dominant and sometimes oppressive religion in this country because Trinity Western is identified as Christian, it must therefore be part of the majority. My ancestors were Christian but they were certainly not a part of the majority. The special meeting June 10th, I believe, shows that Trinity Western is not a part of the majority either. It has been argued that since 2001 society has changed and the Charter values should change with it. Well then what do we need a Charter for if we can decide the rights of all by public opinion? In every age, the majority always believes it's acting in the best interests of everyone. What we need is a Charter that will protect rights and freedoms precisely because public opinion changes. If we have a referendum, there may be an ironic result. The more successful one is, the more it may show that Trinity Western is a needed protection from us. Some has said that the integrity of the profession is at stake in this issue, I agree it is. But ask yourself what will the integrity of the profession look like if at the end of the day the Supreme Court of Canada disagrees with the majority of lawyers in this province and in this country? What if the court finds that we have acted in a discriminatory manner and upholds its decision of 2001? How will this look to the public? Saying to the membership there are consequences to your vote, please continue to think about it and take great care. Thank you Madame President.

JL: Thank you Mr. Doerksen. Mr. Finch and Mr. Petrisor and Ms. Matthews and Ms. Morellato.

MF: Thank you Madame President. At this hour, it's a good lesson in learning to put your hand up early. I have to compliment my friend Mr. Doerksen for his most recent comments which I believe are very thoughtful about the situation we find ourselves in. This is a historic process in which we've been engaged and it wasn't a single step or a single day that would determine this matter. And we have made a decision, we made that decision predicated upon careful consideration of expert opinion and our own efforts as lawyers to discern the law. Following upon our decision, we found that our membership drew [inaudible] vote made clear that not all were in accordance with our view. This has occasioned amongst the members of the bar and the general public, and certainly in the media, an extraordinary level of focus on the Benchers and the conduct of the Benchers. It draws into question governance, certainly not the general governance, but governance on this particular question as to how we as a group of lawyers elected by our colleagues, will attempt to do what I daresay seems impossible. How do we square the circle? How do we here resolve the, what has clearly been accepted as an impossible task of accurately predicting with certainty the future? We cannot know what the Supreme Court of Canada will do and no matter what we do from here forth, it will still be out of our hands at the end of the day. The proper answer to this question isn't then what is what the Supreme Court of Canada will do. The answer isn't driven by a particular moral persuasion or religious persuasion of belief. It is simply the need for us, as a group of governors, to recognize and respond to the strong voice of our membership. I'm a new Bencher, and I was surprised at the very strong and voluminous responses that our membership made following our decision. I, along with the rest of you, have received numerous emails, I've had the benefit of talking with our colleagues, I've been struck by the passion of the thought, I've been struck by their sometimes dispassionate thought, and I've also been struck occasionally with their complete disregard and disrespect for what has become a very, very difficult question for the entire membership and the public at large. I want at this time to remark to the

membership that as a new Bencher, I have been extraordinarily impressed by the dedication, the determination, and the continued energetic effort to try to resolve this problem of squaring the circle, satisfying all, and finding the right thing that I've witnessed each of you attempt to do, and I want the membership to know that the people at this table have clearly worked very hard and struggled to find the right answer, knowing that there is no right answer and that only the Supreme Court of Canada will have an answer. I'm very proud of being at this table with you [inaudible]. The motion to delay is an attractive motion, it's a motion which is consonant with careful, considered steps, but I cannot agree with that motion today. I would like to and I deeply respect the thought that went in to it and as you may recall, I was the first person that actually voiced that option, but I don't believe that's the right motion for these times. These are times where we must, as governors, be responsive to the membership and the public. We may, on our own, enjoy the capacity for calm reflection and patience. I don't believe though, excuse me, I don't believe though that all quarters would have those qualities and I think it is important that the membership know that they are respected and that the matter is moving forward [inaudible]. I have listened to the suggestions that not passing motion one would constitute disrespect to the membership, and with respect, I cannot agree with that. I say that because I have practiced in the interior of this province, I've been out in places like Alexis Creek and [inaudible] and up in the north where you get stuck in the snow and you can't get out. I've been in places where you were late for court because of delays inherent in the geography of our province. I've been stuck in traffic in the city of Vancouver and been late for court. I know that lawyers don't all have the ability to attend to a meeting or an election when they would like to. I have also observed that that election resolution was not ever indicated to have been binding. I credit our members with having an appropriate level of dispassionate objectivity allowing them to stand back perhaps and observe the process. As a result, I think that a referendum is the only mechanism available that will satisfy the need to be seen to be moving forward and to actually move forward. And I don't believe that asking the membership as a whole to consider the matter further is in any way disrespectful.

It [inaudible] a brilliance to democracy and Madame President, I will take my additional moments at this time and not have further [inaudible]. The referendum as I say…

JL: Mr. Finch, just to be clear, you already have taken your eight minutes.

MF: Oh, I'm sorry, then I will conclude [inaudible]. I believe that the voice of our membership will speak most loudly and I agree with the remarks of Mr. Riddell and Mr. Wilson. Thank you.

JL: Sorry, thank you Mr. Finch. Mr. Petrisor then Ms. Matthews, Ms. Morrelato and Mr. [inaudible]. Mr. Petrisor?

GP: Thank you Madame President. I'm speaking in support of Mr. Mossop's motion [inaudible]. When this matter came before us in April we had, for our consideration, a good deal of thoughtful and well-reasoned submissions and opinions. We also had, speaking for myself, consideration of the academic program and its approval by the Federation of Law Societies of Canada, our obligations under the National [??] Agreement and also our obligations under the provincial agreement on internal trade. Since then, since our decision in April, we've had some further submissions, but more importantly, the results of the special general meeting which I agree with Mr. Wilson's description, was unprecedented and overwhelming. The results of that meeting made two things very clear I think. First, our members think, a significant number of our members think we decided this wrongly. Second, a significant number of our members are very upset with us. I don't think a referendum is needed to make those points again. I think this matter will ultimately be decided by the courts. Central to my analysis was the current state of the law and the BC teachers' case, and I think it's fair to say that uncertainty regarding whether that decision still applies, whether that judicial authority will change, is really the central issue that's still under debate and subject of disagreement within our group of Benchers and within the profession as a whole. In my view, the petition that's currently before the Supreme Court of British Columbia does squarely address Trinity Western University covenant and its affect on GLBT people. A decision from a court, from

our Supreme Court certainly would be an important factor for me in any consideration or reconsideration of our decision in April. And I think it's fair to say that it could safely be expected that that decision and other decisions will come well in advance of a statutory requirement to deal with the results from the special general meeting. And that decision, or those decisions may ultimately and effectively answer the differences of opinion around this table and in the profession as well. I think we should wait for those decisions or at least a decision. Mr. Mossop's motion, I think, allows for us to consider new developments that probably will come in the law and likewise the motion doesn't deprive the membership of its say but it allows any future decisions to be based on the best available information and that is good governance. And I think that's consistent with the unprecedented openness and transparency that this entire process is [inaudible] and I think your efforts, Madame President, have been a large part of that and I thank you for that, and those are my comments.

JL: Thank you Mr. Petrisor. Ms. Matthews, sorry, Ms. Matthews.

SM: Thank you very much Madame President, and thank you for allowing me to participate. I have a better reason for not being there than Mr. Crossin, my plans were made over a year ago and I'm enjoying a holiday or the end of a holiday which involves cycling in Provence and drinking wine in Bordeaux, so you can all [inaudible] in a hotel room. I have three points to make about the debate today, and I'm going to start with a quote from one of our members who like many around the table, around our table [inaudible] letters supporting TWU's accreditation despite his views on the covenant. And that member said, had written and said those who will invoke religious freedom as an excuse to discriminate should not assume they will forever enjoy the protection of our law. And I think what we have seen [inaudible] that our members have spoken loudly and clearly and they have overwhelmingly said that so far as they are concerned, the time to end discrimination is now. [Inaudible] you and the vision of our profession is well within our mandate under Section 3 of the Legal Profession Act, and it is my view that we should accept it. It has been said, and this is my second point, that the members' resolution is the popular or politically correct

thing to do, and to this I say to you, we should not belittle the history of hatred and discrimination which the LBGTQ persons have endured and still endure [inaudible] the will of the profession to stand against further discrimination as popular or politically correct. In saying this, I recognize that TWU is certain that it is the victim of discrimination, and I just do not accept that although there [inaudible] historical and [inaudible] examples of discrimination based on religion and Mr. Doerksen has poignantly described one. This issue is not an issue of discrimination against TWU. I cannot find any impingement of a religious belief or right if TWU removes the portions of the covenant which effectively exclude LGBTQ persons from the proposed law school. [Inaudible] they would ask if they would consider doing that and the answer was in the negative, very firmly in the negative. Third, I hope the [inaudible] is not [inaudible] because SGM vote was nonbinding. That is not the way I read the room I was in at the SGM. There was no talk of a nonbinding vote. Anyone who attended any of the SGM meeting rooms, meeting locations know that the members took it seriously and they behaved as though they were involved in a historic motion, not one to be dismissed as nonbinding. So in the end, of our three resolutions [inaudible] my mind [inaudible]. Number one takes us forward, we will fulfill our duty to lead in a manner which is consistent with our legislative mandate. Motion number two is flawed because it causes us to sidestep our responsibility to address the conflict between our decision and the members' special resolution head on. Motion number three is fatally flawed as it is an abdication of our responsibility which I believe jeopardizes our actual and moral authority to lead a self-governing profession. Just because we are permitted to wait a year does not mean it is the right thing to do. So for these reasons, I support the resolution brought by Mr. McLaren and seconded by Ms. Bains. Thank you Madame President.

JL: Thank you Ms. Matthews, thank you for taking the time to be, out of your holiday, to be with us in spirit at least, or at least [inaudible]. Ms. Morellato then Mr. Van Ommen, Ms. Rowbotham and Mr. Lloyd. And that's the end of my list.

MM: Madame Chair and Benchers, the issue before us is a fundamental and very important question of constitutional law. This is not a political question and it

ought not be, and is more than a governance issue. At stake is the protection of Charter values and principles that lie at the heart of our democracy, a democracy that embraces diversity and protects competing minority rights. As challenging as the last few months have been, the good news is that this question has mobilized and engaged our profession in a good way in this very important sense. On June 10th, a very significant majority of the members in attendance spoke out about the importance of protecting the rights of gay and lesbian persons. This support and this concern reflects the strength and the integrity of our members and our profession. Also on June 10th, many persons spoke out about the importance of religious freedom and freedom of association. This also speaks to the strength and integrity of our members and our profession. [Inaudible] around this table on April the 11th, regardless of how each of us voted on that day, it is patent that we are all dedicated to upholding the Charter rights of gay and lesbian persons as well as the religious freedom of TWU and its students. This much is clear. The palpable irony here is despite sharing this important common ground, division exists within the profession and around this table regarding how we actually balance competing minority rights and how we accommodate them. The Benchers have had the privilege, the benefit and the responsibility of hearing from our members on June 10th and since, and their voices have been heard and indeed that's what today is all about. We are and will continue to be responsive and to lead in this regard. The challenge we now face is how we faithfully apply the law in ways that honors the spirit and intent and the substance of Charter rights and values. What is also very clear is that minority rights cannot be determined by majority rule. Minority rights such as those of gay and lesbian law students and the freedom of religion of TWU's students must be protected as a matter of constitutional law and principle. This is not a question, in my view, that can be decided by a referendum. The courts will and must ultimately decide the question and it is a legal one. I am also of the view that allowing minority rights to be determined by majority rule would be in violation of our statutory duty. That's why we have Charter rights to protect minority rights. The Supreme Court of Canada in 2001 said that one Charter right cannot trump another and that there's

no hierarchy of rights and that they must be balanced. I have read the applicable case law, I've read all the many submissions, good submissions, persuasive decisions, and rather submissions, on both sides of the equation, on the debate, and I have also read various legal opinions from scholars and very bright, experienced experts in constitutional law, and these have all really informed our decision, informed my decision [inaudible] for them and helped in the discernment process. And I remain of the view, at the end of the day, that the 2001 TWU decision is binding. This is not to say that I do not respect the views of my colleagues who disagree with me, I very much respect your views. That's not to say I don't respect the views of the members who voted on June 10th against the accreditation of TWU, I very much respect your views and I respect the process. And we are all committed here to [inaudible] of that diversity as is the staff and leadership of the Law Society and the Benchers around this table. And many of use have spent a good deal of our professional lives working towards the advancement and protection of minority rights. In this light, and particularly in lgiht of the June 10th meeting, the most sensible and pragmatic approach is not in my view to have yet another vote, but rather to diffuse the divisiveness about how we balance these rights, to honor each other's views, to disagree without being disagreeable, and to allow the courts to do their good and necessary work. That's why the court is there. Ultimately, this issue will be decided by the Supreme Court of British Columbia and probably by the Supreme Court of Canada, but once the Supreme Court of British Columbia issues its decision it will be the law and we are honor-bound by it and it will provide guidance. We've heard from our members and so I support the third motion, I adopt the comments of Mr. Mossop and Mr. Walker and [inaudible] I believe our members and our Benchers will benefit from the decision and reasons of a Supreme Court judgment. I believe that our members will be given a voice in light of that judgment, and I would ask my fellow Benchers not to preempt their opportunity to benefit from that Supreme Court decision. Let's take a bit of a timeout, let's reflect, let's see what the court says and then let's try to work out some form of consensus. And who knows, when we take that pause, then perhaps it'll provide an opportunity for a

conciliation resolution in a way that is not adversarial. Perhaps the Christian way will see a resolution. So that's, those are my comments, I really would, I do want to underscore how much I respect the leadership around the table of our president, and all of my fellow Benchers, even though we passionately disagree. I am proud to be a lawyer today and I do believe that the rights of minority groups in this country is in good and safe hands and that we'll continue to push for protecting the rights of all minorities. Thank you.

JL: Thank you Ms. Morellato. Mr. Van Ommen, Ms. Rowbotham, Mr. Lloyd and then Ms. Merrill. And that's my list. Mr. Van Ommen.

HVO: Thank you. I will be brief. I support sending this to a binding referendum. In April I voted in support of TWU. Since then, it's, a significant number of our members have made it clear to us that a law school operating with this type of covenant is intolerable, that in their view, it is not in the public interest for us to permit that. To me that is a very significant factor for us to consider. The decision we made around this table has to be a decision made in the public interest, not solely on our personal view. I'm not able to go as far as Mr. Arvay and Mr. McLaren wish us to go today, not out of lack of respect for all those members who attended those meetings and spoke and voted. It is more out of respect to the people who didn't show up and didn't vote on those days that I hold back. Many people that have, that I have spoken with did not attend. They were unable to vote for many reasons, and you may criticize them for that, that was their opportunity to express their views and they should have gone but they didn't. But in fairness to them, it was never intended to be a binding process, and that's what they relied on. I do not think it's fair to say now it was in effect a referendum because it was not. We will have a referendum if this resolution passes, and I will have no difficulty implementing that resolution. I think it will be a powerful expression of the profession's view that the public interest requires that in the area of legal education discrimination must, must take a greater, or let me put it the other way, that freedom of religion must yield to the right to be not discriminated against. I think that will also, if the referendum passes, that will be a factor that will weigh in the court's decisions because the legal profession will have considered this

issue, will have said in our view, the public interest require that there not be any discrimination in legal education. I will have no difficulty implementing that. I support the idea of the referendum. Thank you.

JL: Thank you Mr. Van Ommen. Ms. Rowbotham.

ER: Thank you Ms. Lindsay. I will be brief [inaudible]. I have read all the submissions and materials and I respect the views expressed in the submissions. My comments today are mine alone. I just want to make one clear comment before turning to the motions. I would like to correct a misapprehension of the April 11th vote, since it's reaffirmed in the TWU submissions. I found the issue before us on April 11th nuanced and complex and I ultimately, based on views expressed by others and, both in favor and against, I ultimately voted against approving TWU's faculty of law. I appreciate that I'm quoted as saying that [inaudible] is the law in Canada, I should have said it appears to be the law. I have many comments I have written down but frankly anything I have to say has been ably and eloquently expressed by my fellow Benchers today and I do not believe I have anything further or useful to add. Thank you.

JL: Thank you Ms. Rowbotham. Mr. Lloyd.

PL: Madame President, my fellow Benchers, friends. I shall first detour into the world of marine mammals. Recently, the Vancouver Parks Board engaged in a debate about whether they should prohibit the Vancouver Aquarium from keeping whales in captivity. Submissions were called for and passionate opinions expressed on both sides. A compromise was reached. Mammals could be kept in captivity but not allowed to breed. [Inaudible] to that. A fine compromise you might think but on reflection, as with many compromises in matters of principle, it satisfies nobody. Worse, the only effective way of achieving this compromise is to separate the boy whales from the girl whales, that's very different from their social group in the wild. The reality is there is no compromise possible in that debate about whales in captivity. And so it is with us. I very much respect the architects of the referendum motion for attempting to find a compromise. But our members have already made their views known. But asking them in effect make

this decision for us through a referendum is just not on. We are either appointed or elected to make these difficult decisions in the public interest and we should not try to abdicate that responsibility. On that basis, I must ask you to oppose the motion number two. Now the delay motion is simply that, yes there will be a court decision in one or two places, but how will that decision better inform us when bluntly it's just a speed bump on the road to Ottawa. It's our decision to make and delaying that decision is no solution at all. So likewise I would ask you to vote against motion three. A recent past president, Gordon Turiff, advocated strongly for the independence of lawyers and their right to self-governance. I support that position but lawyers need to carry the trust and respect of ordinary citizens if they are to continue to enjoy that independence and self-governance. The work of this Law Society as a regulator is a key component in maintaining this trust and respect for lawyers and judges, and in particular of course we are responsible for the training of new lawyers. I do not dispute that many law students who might be trained at TWU might turn out to be excellent lawyers. After all, we have some wonderful members who trained in apartheid era South Africa, even perhaps in Canada in an era where women, as an example, did not enjoy equality. But that is not an argument for the Law Society itself to endorse an institution which openly discriminates against group in society. Many of you in April talked of your abhorrence of TWU's mandatory covenant, nevertheless you felt bound by legal precedent to allow TWU accreditation. What's changed since then? Well over 4000 of our members attended the special meeting in person, and by the way, as has been said, that would be considered a very good number of members voting even in a mailed in referendum. We're not bound by their vote, nor should we be. But surely we can be informed by the opinion delivered by 77 percent of that very large gathering of lawyers. There is no compromise here. I'm going to conclude as I did in April. This is 2014, this is Canada, and we at the Law Society of British Columbia do not tolerate discrimination. Thank you.

JL: Thank you Mr. Lloyd. Ms. Merrill?

NM: Thank you Madame President. I was not able to attend the April 11th meeting. Had I been able to attend, I would have voted not to approve Trinity Western Law

School. I do not see it as being in the public interest. I also cannot condone or endorse their community covenant and I do not want to see religion equated with intolerance, and certainly I never understood religious freedom to be synonymous with this [inaudible]. Having said that, I am in favor of the referendum motion. I have every confidence in the members that they will participate in a referendum and will guide us further. The results will come back to this table to be ratified. For me, the appeal of the referendum is that it allows all of the members of the Law Society an opportunity to be heard. As Mr. Crossin has said, this should be the voices of the many and not the few, and as Mr. Lawton has said, the process must be fair and complete. And in my view, the referendum option meets these ends and I support it. Thank you.

JL: Thank you Ms. Merrill. Sorry, anymore who weren't on the list? I have Ms. Dhaliwal, Mr. Corey, Ms Dhaliwal?

JD: Thank you Madame President. I was trying to go for the recency effect which is why I thought I would be last but I truly will be brief. I really don't have anything to add and I am taken by all of your comments and they all resonate with me in some respect. We are all doing our best here to come to a decision that will be the right decision based on the constraints that we find ourselves within today. I don't expect, personally, that the referendum, if passed and if proceeded with, will amount to any difference in where we are today. I fully expect the referendum not to be different. But I do believe in following the process that's set out in our [inaudible] legislation. What I can do today is to try to expedite that process and it's for that reason that I'll be putting my support behind [inaudible] motion. Thank you Madame President.

JL: Thank you Ms. Dhaliwal. Mr. Corey.

DC: Thank you Madame Chair. My comments will be briefed. It appears that I may be the last to speak and perhaps that is not by accident, just like the meeting in April. I've listened with an open mind to the various comments that have been made today. Like Mr. Finch I'm appreciative of and respect, sorry, I'm appreciative of and impressed by the passion, depth and respectful debate that has been applied to

this very important issue. I found compelling arguments made in support of all three motions. That said, in my end analysis, my thoughts remain aligned with the comments made by Mr. Wilson, Ms. Kresivo and Mr. Crossin, and accordingly I will be supporting Mr. Wilson's motion. Thank you Madame Chair.

JL: Thank you Mr. Corey. Do I have any more speakers for the first list? I see none. I'm going to open it to, open this for second speeches. Now some have used some or all of their time and so it seems we'll get into a little bit of a measure, but it is only 10 after 12 and I'm going to remind people we do have an in camera list as well, but I have Mr. McLaren already for the second list. Anyone else want to put their name on the list? Mr. Arvay, Mr. Wilson, all right. Mr. McLaren then Mr. Arvay then Mr. Wilson.

JM: Thank you Madame President, in the first [inaudible] my submissions I covered what I thought was the legal issues at play, and now I suggest, I propose to consider some practical implications. So what has transpired since April 11th and give you cause to reconsider our prior decision to accredit TWU's proposed law school. Well, thanks to the initiative of our members, you're provided with a massive learning moment in the form of the special general meeting. We have provided a clear window to reality outside of this room. The reality is that public opinion about LGBTQ relationships has made a quantum leap since 2001. A lesbian woman was elected premier of Ontario. City halls throughout the country fly rainbow flags without a whiff of descent. Same sex marriage has been legalized in conservative American states. Here, 3210 of our members took an hour or more out of their busy workday to cast a ballot condemning TWU's discriminatory covenant. Think of the opportunity costs of such an historic expression of democracy. It amounts to a few million dollars in lost billable time for the win side alone. That tells us all we need to know about our members' resolve in the face of threatening litigation. The higher cost has already been borne. There is something close to universal acknowledgement that the issue of TWU law's accreditation will eventually rise to the Supreme Court of Canada. Implicit in this acknowledgment is the realization that this case is substantially different from the college of teachers' case of 2001. So [inaudible] to go there

regardless of what we decide today, is it not better to choose a path of inclusion and equality, that is to say the non-abhorrent path and thus position the Law Society on the right side of history. We were elected to steer this ship so I urge all of us to grab the wheel and steer. Thank you.

JL: Thank you Mr. McLaren. Now we have two minutes left for Mr. Arvay, is that fair?

JA; Yes, as long as Mr. Wilson has only 30 seconds.

[Several speak at once – inaudible]

JL: [Inaudible] two minutes.

JA: Pardon me?

JL: Our records are that you each have two minutes.

JA: Your records are incorrect, with respect. Mr. Wilson used everything except 30 seconds, I wrote it down.

JL: All right.

TW: I didn't keep track [inaudible] Joe.

JL: Anyway, two minutes Mr. Arvay.

JA: Thank you. I'd like to think about what's going to happen at the Supreme Court of Canada and what our role's going to be. Presumably, we're going to want to be there, applying to intervene or we may be there as a respondent because whatever happens, we're going to be sued, notwithstanding what Mr. Doerksen said. But let's think about what's going to happen at the Supreme Court of Canada. What is our position going to be before the Supreme Court of Canada? Is our position going to be that TWU should be approved or not? We should know that now, what our position's going to be. And I would like to think, given the collective conscience around this table about the abhorrence of that community covenant, that our position before the Supreme Court of Canada is going to be not to approve TWU. And if that's going to be our position, then surely we should make that decision now, not a few years from now. For one thing, we will be very poor

advocates if we go to the Supreme court of Canada and argue against TWU having found in favor of them here. At the Supreme Court of Canada, you don't start off by saying that you need to reverse yourself. You start off by saying you need to distinguish the earlier decision, and if you can't distinguish it then reverse yourself. I would like to think, as a member of this table, that we all agree that when this, we go to the Supreme Court of Canada, we are going to argue in favor, we are going to take the position that TWU should not be approved, and if that's going to be our position, then that should be the decision now. And I have to say that I would hate to think that we would take any other position at the Supreme Court of Canada. I find it quite ironic that some of you have argued, I think it was Mr. Riddell, that the referendum meets the spirit of the Act, well it doesn't meet the letter of the Act. What also met the spirit of the Act was the June meeting. Why are we giving effect to one spirit but not the other one? There's only two, there's only two legal options and that's number three or number one, number two is not a legal option. Number one is the only principled option. Thank you.

JL: Thank you Mr. Arvay. Well Mr. Wilson, off you go.

TW: Off I go.

JA: I'd like to see the clock changed please.

TW: Oh Joe.

JL: Sorry, I should rule. I don't know whether, I don't know whether anyone else kept time. We were keeping time, Mr. Arvay is disputing our record of time. Mr. Wilson, can you keep it to a minute?

TW: I will split the difference in the interest of the Bencher [inaudible]?

JL: Thank you.

TW: I would say this, when we were having our meetings in June, the person I talked to almost the most other than Ms. Kresivo is Jamie McLaren, and he and I were trying to work out some solution to this because we all know how difficult it was in June. And I saw that there was a spirit between us of working together and trying to resolve that. And I would simply invite the people who are in support of

motion one, if that does not pass, please come on board the referendum motion because I believe the referendum will [inaudible] all votes and you're going to get the same result in 35 days. Thank you.

JL: All right. [Inaudible]. No other speakers, no other hands? That portion of the discussion is over. We come to voting and I need to get myself to where I need to be. Sorry. We have an email vote and it passed by two thirds but the order of voting would be in the order that the motions were presented and so accordingly, I'm going to call for the vote on motion number one which is the [inaudible] referred to as the McLaren motion, be it resolved that the Benchers implement the resolution of the members passed at the June 10 special general meeting and declare that the proposed law school at Trinity Western University is not an approved faculty of law for the purposes of the Law Society's admission program. What I'm going to do is call for those in favor. I am going to record the votes, sorry the names, I will call out and record the names of the hands that are up, parties that belong to the hands that are up, and then I will call for those opposed, and I will call for abstentions. I want 31 on each vote because I count everyone...

New Speaker: Are you planning to vote?

JL: Oh, I'm not voting, 30 on each vote. All right. Motion number one, those in favor, please raise your hands and hold them high. Mr. Harskins, Lee Ongman, Cameron Ward, Elizabeth Rowbotham, Tom Fellhauer, Peter Lloyd, Joe Arvay, Satwinder Bains, Jamie McLaren. Have I called everyone's name?

New Speaker: What about Sharon?

JL: Oh, sorry, those on line, Sharon?

SM: [Inaudible].

JL: Number one. Mr. Mossop?

DM: Motion number one I vote no.

JL: And Mr. Crossin?

DC: [Inaudible].

JL: I heard opposed. So now we're going to count the votes for opposed. Did you get Ms. Matthews as in favor?

New Speaker: Yes.

JL: All right, those opposed to motion number one, please hold up your hand. Ken Walker, Miriam Kresivo, Claude Richmond, Pinder Cheema, Lynal Doerksen, Jeevyn Dhaliwal, Herman Van Ommen, Greg Petrisor, Phil Riddell, this is a test of my knowledge. Tony Wilson, Haydn Acheson, Nancy Merrill, Sarah Westwood, David Corey, Maria Morellato, Dean Lawton, Craig Ferris, Claude Richmond, no, that's Ben Meisner. Sorry Ben, and Martin Finch, also online Mr. Mossop and Mr. Crossin was opposed. So the, the tally for Mr. Harskins, nine in favor, 21 opposed, the motion fails, sorry, no abstentions because those two add up to 30. Motion number two, the Wilson motion. Be it resolved that a referendum, the referendum be conducted of all members of the Law Society of British Columbia, the Law Society, to vote on the following resoltuion: 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 purposes of the Law Society's admissions program. Yes and no. The resolution will be binding and will be implemented by the Benchers if at least one third of all members in good standing of the Law Society vote in the referendum and B, two thirds of those will vote in favor of the resolution. The Benchers hereby determine that implementation of the resolution does not constitute a breach of their statutory duties, regardless of the results of the referendum for the referendum should be conducted as soon as possible and that the results of the referendum be provided to the members by no later than October 30, 2014. That's the motion, everyone understands, those in favor, please raise your hand.

New Speaker: In favor?

JL: In favor. Yeah, Miriam Kresivo, Pinder Cheema, Lynal Doerksen, Lee Ongman, Jeevyn Dhaliwal, Herman Van Ommen, Phil Riddell, Tony Wilson, Elizabeth

Rowbotham, Tom Fellhauer, Haydn Acheson, Nancy Merrill, Sarah Westwood, David Corey, Dean Lawton…

DL: Thank you Madame President.

JL: I'm failing the test. Craig Ferris, Jamie McLaren, Ben Meisner, Martin Finch, and online, Ms. Matthews?

SM: Opposed.

JL: Mr. Crossin?

DC: I'm in favor.

JL: And Mr. Mossop?

DM: Opposed.

JL: Now I'll call for those opposed. So we have Ms. Matthews and Mr. Mossop opposed, all those opposed to motion two? Mr. Walker, Ken Walker, Claude Richmond, Greg Petrisor, Cameron Ward, Peter Lloyd, Joe Arvay, Satwinder Bains, Maria Morellato, that's the hands I've counted. Mr. Harskins has 20 to 10, that totals 30, no abstentions, the motion carries. Now, do we need to vote on the third motion?

KW: David would you be, David, I think in view of that, I think our motion fails, do you agree? And so we should just pull, agree to pull the motion off, what do you think David?

DM: [Inaudible] take a different point of view, I think it's [inaudible].

KW: [Inaudible].

JL: Right, so just to confirm, that the mover and seconder of the third motion are prepared, intent to withdraw the motion and we won't be voting on it. All right. Let me just try to say a few words. I am again so pleased and proud with all of the hard work that everyone has put into this discussion and debate, [inaudible] of debate but it was a good discussion. It's clear that everyone is doing their best, trying to do the right thing, and we're all engaged in the rights and freedoms of all people and we, all of you have passionately expressed your views. I want to just

repeat some of Maria's comments only because, I can't get to them but that we are all doing our best, we're trying to do the right thing, that these are issues and topics on which we feel passionately and clearly so do the members, so does the profession and so does the public. It is in the best traditions of our profession that we can advocate different points of view, and even opposing points of view and still remain respectful with those who disagree. Our decision to hold a referendum will ensure that all members, those who came out to the special meeting and those who were unable to attend the special meeting and those who didn't come out because of, because they appreciated that the result was not binding will now have a chance to be heard and provide direction to the Benchers. We all recognize that the issue before us today will ultimately be decided by the courts. I still want to thank each and every one of you for the work that you put into today and for the last several months and for your contribution to the discussion. Thank you. All right. Should we take a little break or should we – can we reconvene very quickly? Is five minutes enough? Five minutes.

[Transcription resumes at 4:11:55]

JL: Okay. I did find my notes of Maria's [inaudible] and I just wanted to repeat that we've clearly seen the population or the membership and the public engaged on this issue and that is indeed the good news. We're going to go in camera and so the webcast has come to an end.

[redacted]

The Law Society of British Columbia

Minutes

This is Exhibit "R" referred to in the affidavit of Timothy E. McGee, QC sworn before me at Vancouver this 26th day of January 20 15

A Commissioner for taking Affidavits for British Columbia

Benchers

Date: Friday, October 31, 2014

Present:

Jan Lindsay, QC, President
Ken Walker, QC, 1st Vice-President
David Crossin, QC, 2nd Vice-President
Haydn Acheson
Joseph Arvay, QC
Satwinder Bains
Pinder Cheema, QC
David Corey
Jeevyn Dhaliwal
Lynal Doerksen
Thomas Fellhauer
Craig Ferris
Martin Finch, QC
Miriam Kresivo, QC
Dean Lawton
Peter Lloyd, FCA
Jamie Maclaren
Sharon Matthews, QC
Ben Meisner
Nancy Merrill
Maria Morellato, QC
David Mossop, QC
Lee Ongman
Greg Petrisor
Claude Richmond
Phil Riddell
Elizabeth Rowbotham
Herman Van Ommen, QC
Cameron Ward
Sarah Westwood
Tony Wilson

Excused: Not applicable

Staff Present:

Tim McGee, QC
Deborah Armour
Taylore Ashlie
Lance Cooke
Su Forbes, QC
Andrea Hilland
Jeffrey Hoskins, QC
Michael Lucas
Bill McIntosh
Jeanette McPhee
Doug Munro
Alan Treleaven
Adam Whitcombe

Guests:	Dom Bautista	Executive Director, Law Courts Center
	Johanne Blenkin	Chief Executive Officer, Courthouse Libraries BC
	Kevin Boonstra	Legal Counsel, Trinity Western University
	Kari Boyle	Executive Director, Mediate BC Society
	Anne Chopra	Equity Ombudsperson, Law Society of BC
	barbara findlay, QC	Member, Law Society of BC
	Ron Friesen	CEO, Continuing Legal Education Society of BC
	Richard Fyfe, QC	Deputy Attorney General of BC, Ministry of Justice, representing the Attorney General
	Jeremy Hainsworth	Reporter, Lawyers Weekly
	Gavin Hume, QC	Law Society of BC Member, Council of the Federation of Law Societies of Canada
	Tamara Hunter	Board Chair, Law Foundation of BC
	Bob Kuhn	President, Trinity Western University
	Dominique Marcotte	Director, BC Paralegal Association
	Michael Mulligan	Member, Law Society of BC
	Lorna O'Grady	Director of Administration, Human Resources and Public Programs, Canadian Bar Association, BC Branch
	Earl Phillips	Executive Director, Trinity Western University
	Wayne Robertson, QC	Executive Director, Law Foundation of BC
	Alan Ross	Board Chair, Courthouse Libraries BC
	Alex Shorten	Vice President, Canadian Bar Association, BC Branch
	Geoffrey Trotter	Member, Law Society of BC
	Prof. Jeremy Webber	Dean of Law, University of Victoria

CONSENT AGENDA

1. Minutes

a. Minutes

The minute of the September 17, 2014 email authorization was approved as circulated.

The minute of the meeting held on September 26, 2014 was approved as circulated.

The *in camera* minute of the meeting held on September 26, 2014 was approved as circulated.

b. Resolutions

The following resolutions were passed unanimously and by consent.

- Federation of Law Societies of Canada: Deferral of National Requirement for Joint and Dual Law Degree Programs until 2017

  BE IT RESOLVED to approve the deferral of the application of the National Requirement to joint and dual law degree programs to January 2017.

- Land Title and Survey Authority of BC Board of Directors: Law Society Nomination

  BE IT RESOLVED to re-nominate William (Bill) Cottick for appointment to the Land Title and Survey Authority Board of Directors, for a second three-year term commencing April 1, 2015.

- Proposed Rules Amendments (Cloud Computing and Retention and Security of Records)

  BE IT RESOLVED to amend the Law Society Rules as follows:

  1. In Rule 1, by adding the following definitions:

  "**metadata**" includes the following information generated in respect of an electronic record:

  (a) creation date;

  (b) modification dates;

  (c) printing information;

  (d) pre-edit data from earlier drafts;

(e) identity of an individual responsible for creating, modifying or printing the record;

"record" includes metadata associated with an electronic record;.

2. ***By adding the following rule:***

Failure to produce records on complaint investigation

3-5.01(1) Subject to subrules (2) and (3), a lawyer who is required under Rule 3-5 *[Investigation of complaints]* or 4-43 *[Investigation of books and accounts]* to produce and permit the copying of files, documents and other records, provide information or attend an interview and answer questions and who fails or refuses to do so is suspended until he or she has complied with the requirement to the satisfaction of the Executive Director.

(2) When there are special circumstances, the Discipline Committee may, in its discretion, order that

(a) a lawyer not be suspended under subrule (1), or

(b) a suspension under this Rule be delayed for a specified period of time.

(3) At least 7 days before a suspension under this Rule can take effect, the Executive Director must deliver to the lawyer notice of the following:

(a) the date on which the suspension will take effect;

(b) the reasons for the suspension;

(c) the means by which the lawyer may apply to the Discipline Committee for an order under subrule (2) and the deadline for making such an application before the suspension is to take effect.

3. ***By rescinding Rule 3-43.1 and substituting the following:***

Standards of financial responsibility

3-43.1 Instances in which a lawyer has failed to meet a minimum standard of financial responsibility include, but are not limited to, the following:

(a) a monetary judgment is entered against a lawyer who does not satisfy the judgment within 7 days after the date of entry;

(b) a lawyer is an insolvent lawyer;

(c) a lawyer does not produce and permit the copying of records and other evidence or provide explanations as required under Rule 3-79(2)(b) *[Compliance audit of books, records and accounts]*;

(d) a lawyer does not deliver a trust report as required under Rule 3-72 *[Trust report]* or 3-75(4) *[Report of accountant when required]*;

(e) a lawyer does not report and pay the trust administration fee to the Society as required under Rule 2-72.2 *[Trust administration fee]*;

(f) a lawyer does not produce electronic accounting records when required under the Act or these Rules in a form required under Rule 10-4(2) *[Records]*.

4. In Rule 3-59:

(a) by adding the following subrules:

(0.1) In this Rule, **"supporting document"** includes

(a) validated deposit receipts,

(b) periodic bank statements,

(c) passbooks,

(d) cancelled and voided cheques,

(e) bank vouchers and similar documents,

(f) vendor invoices, and

(g) bills for fees, charges and disbursements.

(2.1) A lawyer who maintains accounting records, including supporting documents, in electronic form, must ensure that

(a) all records and documents are maintained in a way that will allow compliance with Rule 10-4(2) *[Records]*,

(b) copies of both sides of all paper records and documents, including any blank pages, are retained in a manner that indicates that they are two sides of the same document, and

(c) there is a clear indication, with respect to each financial transaction, of

(i) the date of the transaction,

(ii) the individual who performed the transaction, and

(iii) all additions, deletions or modifications to the accounting record and the individual who made each of them.*;*

(b) in subrule (2), by rescinding the preamble and paragraph (c) and substituting the following:

(2) A lawyer must maintain accounting records, including supporting documents, in

(c) an electronic form in compliance with subrule (2.1)., ***and***

(c) by rescinding subrule (4) and substituting the following:

(4) A lawyer must retain all supporting documents for both trust and general accounts.

5. In Rule 3-61.1:

(a) in subrule (2) by:

(i) striking out "and" *at the end of paragraph (a)(ii),*

(ii) striking out the period at the end of paragraph (b)(v) and substituting ", and"*, and*

(iii) adding the following paragraph:

(c) indicate all dates on which the receipt was created or modified.*, and*

(b) in subrule (3) by:

(i) striking out "and" *at the end of paragraph (d),*

(ii) striking out the period at the end of paragraph (e) and substituting ", and"*, and*

(iii) adding the following paragraph:

(f) all dates on which the receipt was created or modified.

6. In Rule 3-62(1), by adding the following paragraph:

(a.1) indicating all dates on which the bill was created or modified,.

7. In Rule 3-65, by rescinding subrule (3) and substituting the following:

(2.1) Each monthly trust reconciliation prepared under subrule (1) must include the date on which it was prepared.

(3) A lawyer must retain for at least 10 years

(a) each monthly trust reconciliation prepared under subrule (1), and

(b) the detailed listings described in subrule (2) as records supporting the monthly trust reconciliations.

8. By rescinding Rule 3-68 and substituting the following:

Retention of records

3-68 (0.1) This Rule applies to records referred to in Rules 3-59 to 3-62.

(1) A lawyer must keep his or her records for as long as the records apply to money held in trust and for at least 10 years from the final accounting transaction.

(2) A lawyer must keep his or her records, other than electronic records, at his or her chief place of practice in British Columbia for as long as the records apply to money held in trust and, in any case, for at least 3 years.

9. In Rule 4-43, by adding the following subrule:

(1.4) A request under subrule (1.1) must be refused unless the records in question are retained in a system of storage of electronic records that permits the segregation of personal information in a practical manner in order to comply with the request.

10. By adding the following rules:

Records

10-4 (1) In this Rule, **"storage provider"** means any entity storing or processing records outside of a lawyer's office, whether or not for payment.

(2) When required under the Act or these Rules, a lawyer must, on demand, promptly produce records in any or all of the following forms:

(a) printed in a comprehensible format;

(b) accessed on a read-only basis;

(c) exported to an electronic format that allows access to the records in a comprehensible format.

(3) A lawyer who is required to produce records under the Act or these Rules must not alter, delete, destroy, remove or otherwise interfere with any record that the lawyer is required to produce, except with the written consent of the Executive Director.

(4) A lawyer must not maintain records, including electronic records, with a storage provider unless the lawyer

(a) retains custody and control of the records,

(b) ensures that ownership of the records does not pass to another party,

(c) is capable of complying with a demand under the Act or these Rules to produce the records and provide access to them,

(d) ensures that the storage provider maintains the records securely without

(i) accessing or copying them except as is necessary to provide the service obtained by the lawyer,

(ii) allowing unauthorized access to or copying or acquisition of the records, or

(iii) failing to destroy the records completely and permanently on instructions from the lawyer, and

(e) enters into a written agreement with the storage provider that is consistent with the lawyer's obligations under the Act and these Rules.

(5) If the Executive Committee declares, by resolution, that a specific entity is not a permitted storage provider for the purpose of compliance with this Rule, no lawyer is permitted to maintain records of any kind with that entity.

Security of records

10-5(1) A lawyer must protect his or her records and the information contained in them by making reasonable security arrangements against all risks of loss, destruction and unauthorized access, use or disclosure.

(2) A lawyer must immediately notify the Executive Director in writing of all the relevant circumstances if the lawyer has reason to believe that

(a) he or she has lost custody or control of any of the lawyer's records for any reason,

(b) anyone has improperly accessed or copied any of the lawyer's records, or

(c) a third party has failed to destroy records completely and permanently despite instructions from the lawyer to do so.

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

Ms. Lindsay noted that the work of the Cloud Computing Working Group is now completed. The Benchers then decided by consensus to dissolve the Cloud Computing Working Group.

- Ethics Committee: Rule 4.2-6 – Possible Elimination of Rule

BE IT RESOLVED to rescind Law Society Rule 4.2-6:

~~**Former firm of current judge or master**~~

4.2-6 [rescinded10/2014]~~A lawyermustnotstateonanyletterheadorbusinesscardorinany other marketingactivitythenameofajudgeormasterasbeingapredecessororformermember ofthelawyer's firm.~~

DISCUSSION/ DECISION

2. Consideration of the October 30, 2014 Referendum Result

Ms. Lindsay reported that a referendum of the members of the Law Society has been conducted on the following resolution:

> *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.*

On October 30, 2014 the votes on 8,039 valid ballots were counted, with 5,951 (74%) in favour and 2,088 (26%) opposed. Thirteen thousand, five hundred thirty practising, non-practising and retired lawyers were entitled to vote.

Ms. Lindsay referred the Benchers to a letter dated October 30, 2014 from Trinity Western University (TWU) President Robert Kuhn, received by email (with a number of attachments) following communication of the referendum results to TWU, and circulated by Ms. Lindsay's email (with the attachments) to the Benchers during the evening of October 30. Ms. Lindsay confirmed that subject to a request by a Bencher or Benchers for additional time to review and consider the TWU letter and attachments, a motion to implement the referendum result will be presented on behalf of the Executive Committee.

Mr. Crossin moved (seconded by Mr. Van Ommen) that the Benchers declare, pursuant to Law Society Rule 2-27 (4.1), Trinity Western University's proposed School of Law is not an approved faculty of law.

Mr. Crossin invited TWU President Robert Kuhn to address the Benchers. Mr. Kuhn declined the invitation. Mr. Crossin confirmed that the Benchers' duty is to determine the appropriate response of the Law Society to any issue that may arise, such that the public interest in the administration of justice is protected.

Mr. Crossin also confirmed that the Law Society remains ready and willing to enter into discussion with TWU regarding amendment of TWU's community covenant.

There being no further discussion, Ms. Lindsay called for a vote on the motion by show of hands.

The following Benchers voted for the motion: Haydn Acheson, Joseph Arvay, QC, Satwinder Bains, Pinder Cheema, QC, David Corey, David Crossin, QC, Jeevyn Dhaliwal, Lynal Doerksen, Thomas Fellhauer, Craig Ferris, Martin Finch, QC, Miriam Kresivo, QC, Dean Lawton, Peter Lloyd, FCA, Jamie Maclaren, Sharon Matthews, QC, Ben Meisner, Nancy Merrill, Lee Ongman,

Phil Riddell, Elizabeth Rowbotham, Herman Van Ommen, QC, Cameron Ward, Sarah Westwood and Tony Wilson.

The following Bencher voted against the motion: Claude Richmond.

The following Benchers abstained: Maria Morellato, QC, David Mossop, QC, Greg Petrisor and Ken Walker, QC.

The motion was carried (25 in favour, one opposed and four abstained).

3. Governance Committee Recommendations: Amendments to General Meeting Rules Regarding Webcasting and Electronic Voting

Governance Committee Chair Miriam Kresivo, QC briefed the Benchers on the Committee's recent review of the Rules and procedures governing the Law Society's conduct of general meetings. She noted that a number of complaints have been received by the Law Society from BC lawyers in relation to various restrictions in the current Rules regarding participation and voting at general meeting—including the requirement to attend at one of the designated meeting locations to participate in discussions and to vote on motions and resolutions.

Ms. Kresivo confirmed the Governance Committee's recommendation that the strongly positive results of a 1993 referendum of the Law Society membership can and should be relied upon by the Benchers as authority to request the Act and Rules Committee to proceed with appropriate Rules amendments to permit online participation and electronic voting at general meetings. Ms. Kresivo also confirmed the Committee's recommendations that:

- those changes will be in addition to the current Rules regarding in-person attendance at designated general meeting locations, and telephone connection of satellite locations to the main meeting
- following further deliberation, the Committee expects to report to the Benchers in early 2015 regarding seeking member approval for amendments to provide for only one physical location for general meetings and electronic distribution of notices and other meeting materials

The Benchers agreed with the Committee's recommendations.

GUEST PRESENTATIONS

4. Law Foundation of BC Annual Review

Board Chair Tamara Hunter briefed the Benchers on the affairs of the Law Foundation of BC. She reviewed the Foundation's history, financial situation, governance structure, grant-making principles and strategic priorities. Ms. Hunter noted the Law Society's financial contribution to the Foundation's support for the provision of pro bono legal services in BC.

Ms. Hunter's PowerPoint presentation is attached as Appendix 1 to these minutes.

Ms. Lindsay thanked Ms. Hunter for her presentation, and for her valuable contributions to the governance of the Foundation as Chair of the Board of Governors for the past year, as a Governor since 2010. Ms. Lindsay also noted the distinguished service record of the Law Foundation's Executive Director, Wayne Robertson, QC.

5. Courthouse Libraries BC (CLBC) Biennial Review

CLBC Board Chair Alan Ross addressed the Benchers, providing historical background and context and then an assessment of CLBC's current financial situation.

Mr. Ross stressed the significance of the imminent 18% reduction of the Law Foundation's annual operating grant to CLBC for 2015, which will reduce CLBC's funding envelope by about $500,000 (from $4.7 million to $4.2 million). He outlined a number of cost-reduction measures already implemented by CLBC and confirmed that further reductions will require cutting core services. CEO Johanne Blenkin added that CLBC eliminated 142 print editions from its service offering in 2014; she pointed out that many of those are not available as digital editions.

Mr. Ross confirmed that in 2015 CLBC will request the Law Society to increase the current CLBC levy of $190 in the annual practice fee for 2016. He noted that replacing the lost Law Foundation funding would require a levy increase of about $50.

Mr. Ross commented on the importance of the access to justice aspect of CLBC's work, noting that about half of the service requests received by CLBC in 2014 were from the public.

REPORTS

6. 2015-2017 Strategic Planning Update

Mr. McGee updated the Benchers on progress in development of the 2015-2015 Strategic Plan. He noted that the Executive Committee has reviewed the results of the Benchers' September 25 environmental scan session, referring to his memorandum (at page 127 of the agenda package) for an outline of four thematic areas and related potential initiatives identified at that session. Mr. McGee outlined the Executive Committee's plan to have staff circulate a survey to the Benchers following the October 31 meeting: asking them to identify their top two or three strategies and initiatives under each of these four themes:

- Access to Legal Services
- Alternative Business Structures (ABSs)
- Public opinion of/confidence in the justice system
- Admission program reform

Mr. McGee noted that the Executive Committee recognizes that the Benchers may have additional ideas, and that the survey will include a 'verbatim comments' section. He confirmed that the Executive Committee will review the Benchers' survey responses at their November 20 meeting, and that staff will then develop a draft 2015-2017 Strategic Plan for the Benchers' consideration at their December 5 meeting.

7. Interim Report of the Tribunal Program Review Task Force

Ken Walker, QC briefed the Benchers as Chair of the Tribunal Program Review Task Force. After introducing the task force members and Law Society staff contact,[1] Mr. Walker outlined issues that the task force has been considering, including difficulties experienced by the Law Society's Hearing Administrator in overcoming Bencher conflicts in setting hearing panels, and the challenges encountered endeavouring to enhance both continuity and renewal of the membership of hearing panel pools.

Mr. Walker noted that all current hearing panel pools will dissolve at the end of 2014. He will present the task force's written interim report at the December 5 Bencher meeting, including a recommendation to extend the current pools through 2015. Mr. Walker expects the task force will also recommend that in the event a panel is reduced from three members to two, the two remaining panel members may carry on at the discretion of the President.

[1] Benchers: Ken Walker, QC (Chair)Haydn Acheson, Pinder Cheema, QC and David Mossop, QC. Non-Benchers: David Layton and Linda Michaluk. Staff contact: Jeffrey Hoskins, QC.

8. Financial Report to September 30, 2014 – Q3 Year-to-date Financial Results

Finance and Audit Committee Chair Ken Walker, QC referred the Benchers to the written report prepared by Jeanette McPhee, CFO & Director of Trust Regulation (at page 133 of the agenda package) and asked Ms. McPhee to provide highlights.

Ms. McPhee reported that the Law Society's 2014 operating expenses to September 30 total $654,000 (4.5% over budget): due primarily to costs associated with the TWU law school application process as well as higher than expected external counsel fees. These excess costs were partially offset by compensation and staff-related savings and forensic accounting fee savings. Ms. McPhee also reported that Law Society's 2014 revenue to September 30 is $346,000 (2.2% ahead of budget): due to an increase in PLTC students, unbudgeted recoveries, and increased interest income, offset by lower than expected practice fees.

Ms. McPhee confirmed that the Law Society is forecasting a 2014 negative variance of $430,000 for the General Fund (excluding capital and the Trust Administration Fee). She noted that explanatory notes for that forecast are included in her written report—at page 134 of the agenda package:

> Operating Revenue
>
> Revenues are projected to be ahead of budget by $255,000 (1.3%). Practicing membership revenue is projected at 11,115 members, 75 below the 2014 budget, a negative variance of $105,000. PLTC revenues are projected at 470 students, a positive variance of $50,000. We are also projecting higher recoveries of $155,000 and $40,000 of additional interest income.
>
> Lease revenues will have a positive variance of approximately $100,000 for the year, with a new lease on the third floor of 835 Cambie and the renewal of the atrium café lease.
>
> Operating Expenses
>
> Operating expenses are projected to have a negative variance to budget of $684,000 (3.4%). This variance excludes those expenses that were to be funded from the reserve in 2014, as approved by the Benchers during the 2014 budgeting process.
>
> There are three main areas of unanticipated costs:

1) The unbudgeted costs related to the TWU application process are projected at $366,000, including meeting costs, legal opinions, and referendum costs.

2) External counsel fees are projected at $575,000 over budget, with the increase due to a number of factors. There have been a higher percentage of complex files, including an increased number of 4-43 forensic files. In addition, there have been a number of files handled by the investigations and discipline departments that have been much more challenging than normal, causing a significant increase in workload for a number of staff members. Also, with the staff vacancies that occurred in 2013, and into 2014, there were a number of professional conduct files sent out to external counsel to ensure file timelines were addressed. The increase in external counsel fees is also reflective of the projected increase in number of hearing/review days in 2014. For 2014, the estimate is 80 hearing/review days, compared to an average of 44 per year over the past four years.

3) Building occupancy costs have increased, mainly related to an increase in property taxes and utilities.

We should note that some of these costs will be partially offset by savings related to staff compensation savings of $175,000 and forensic accounting fee savings of $155,000.

Mr. McGee noted that projecting external counsel fees for the coming year is an exercise in judgment, and is a core element of the budgeting process. He also confirmed that management always assesses carefully whether in-house counsel capacity can carry more load, and that assessment will be a key aspect of the 2016 budget-setting process to be conducted next year.

9. President's Report

Ms. Lindsay reported on various Law Society matters which have arisen since the last Bencher meeting, including:

a. Federation of Law Societies of Canada Conference and Council Meeting (October 7 – 10, Halifax)

i. Conference Theme: Access to Legal Services

Ms. Lindsay asked Mr. Riddell to brief the Benchers regarding his participation in a poverty simulation exercise and a tour of legal service provider organizations in the Halifax area. He did so, noting that considerable innovation and resourcefulness was evident in the operations he visited.

ii. National Committee on Accreditation (NCA)

Ms. Lindsay noted the value of NCA in assessing law schools and the quality of their curricula.

iii. 2014 Annual General Meeting (AGM) Member Resolution

Ms. Lindsay confirmed that the Executive Committee is considering the issues raised by the member resolution passed at the 2014 AGM, and will report to the Benchers in that regard at an upcoming meeting:

> *BE IT RESOLVED THAT the Law Society of British Columbia require all legal education programs recognized by it for admission to the bar to provide equal opportunity without discrimination on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, gender expression, gender identity, age or mental or physical disability, or conduct that is integral to and inseparable from identity for all persons involved in legal education – including faculty, administrators and employees (in hiring continuation, promotion and continuing faculty status), applicants for admission, enrolled students and graduates of those educational programs.*

Dean Jeremy Webber of the University of Victoria Faculty of Law commented on the pace of development, range and urgency of issues currently faced by the Federation of Law Societies.

iv. 2014 International Bar Association (IBA) Annual Conference (October 19 – 24, Tokyo, Japan)

Ms. Lindsay represented the Law Society at the 2014 IBA Annual Conference. Ms. Lindsay briefed the Benchers on several policy sessions she attended, on topics including:

- retention of lawyers in the profession, focusing on both generational and gender issues
- access to justice and legal services issues
- substance abuse in the legal profession
- legal regulation and compliance issues
- human rights in Zimbabwe

- Rule of Law issues, focusing on freedom of expression and freedom of the press

10. CEO's Report

Mr. McGee provided highlights of his monthly written report to the Benchers (attached as Appendix 2 to these minutes) including the following matters:

- Introduction
- Federation of Law Society Matters
- Update on Process for Developing New 2015 – 2017 Strategic Plan
- International Institute of Law Association Chief Executives – Annual Conference

11. Briefing by the Law Society's Member of the Federation Council

Gavin Hume, QC reported as the Law Society's member of the FLSC Council. He briefed the Benchers on matters addressed at the October 10 Council meeting in Halifax, including:

a. National Requirement Review Committee

The Federation Council has approved the establishment of a National Requirement Review Committee, with a mandate to consider, among other issues, whether a "non-discrimination" provision should be included in the National Requirement for approving law degrees.

b. Standing Committee on the *Model Code of Professional Conduct*

The Standing Committee presented a number of Model Code amendments for the Council's approval, on topics including: conflicts of interest, short-term legal services and incriminating physical evidence in criminal law. The Federation's member societies now need to consider if they should implement the changes made to the Model Code. The Standing Committee is consulting with the Federation's member law societies—among other bodies—on various topics, including consulting with witnesses, and duty to report.

c. Federation Budget Review

The Council approved an increase of $3.50 in the Federation's annual full-time fee equivalent assessment to the law societies, from $25.00 to $28.50.

d. Federation Governance Review Committee

A major review of the Federation's governance policies, processes and structure is underway. Considerable consultation with the Federation's member societies will be entailed in the review.

e. Report by the National Committee on Accreditation (NCA)

The NCA processes about 1,300 applications per year. Significant progress has been made toward aligning the NCA's curriculum with the Federation's national standards, with, more work still to be done in that regard.

f. National Admission Standards

Work continues on implementation of the Federation's national competency indicators by the member law societies. Work also continues on the challenging process of developing standards for the "good character" requirement set out in the enabling legislation of the Federation's various member societies.

12. Report on the Outstanding Hearing & Review Reports

Written reports on outstanding hearing decisions and conduct review reports were received and reviewed by the Benchers.

The Benchers discussed other matters *in camera*.

WKM
2014-11-24

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Trinity Western University v. The Law Society of British Columbia,* 2015 BCSC 2326

Date: 20151210
Docket: 149837
Registry: Vancouver

Between:

Trinity Western University and Brayden Volkenant

Petitioners

And

The Law Society of British Columbia

Respondent

And

Attorney General of Canada, The Association For Reformed Political Action (ARPA) Canada, Canadian Council of Christian Charities, Christian Legal Fellowship, Evangelical Fellowship of Canada, Christian Higher Education Canada, Justice Centre For Constitutional Freedoms, The Roman Catholic Archdiocese of Vancouver, The Catholic Civil Rights League, The Faith and Freedom Alliance, Seventh-Day Adventist Church in Canada, West Coast Women's Legal Education and Action Fund, Outlaws UBC, Outlaws UVIC, Outlaws TRU and Qmunity

Interveners

Corrected Judgment: The text of the judgment was corrected at page 1 where a change was made on December 17, 2015;

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for Petitioners: K.L. Boonstra, J.B. Maryniuk and K. Sawatsky

Counsel for Respondent: P. Gall, Q.C., D.R. Munroe, Q.C. B. Oliphant and S. Gyawali

Counsel for Intervener, Attorney General of Canada:	D. Roberts, Q.C.
Counsel for Intervener, Association for the Reformed Political Action (ARPA) Canada:	E.L. Vandergriendt, A.M. Schutten
Counsel for Intervener, The Roman Catholic Archdiocese of Vancouver, The Catholic Civil Rights League, The Faith and Freedom Alliance:	G. Allison
Counsel for Intervener, West Coast Women's Legal Education and Action Fund:	J. Winteringham, Q.C. and R. Trask
Counsel for Intervener, Justice Centre For Constitutional Freedoms	J. Cameron
Place and Date of Trial/Hearing:	Vancouver, B.C. August 24–26, 2015
Place and Date of Judgment:	Vancouver, B.C. December 10, 2015

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Introduction

[1] The petitioners seek judicial review of the respondent's decision that the proposed law school at Trinity Western University is not an approved faculty of law for the purpose of the respondent's admissions program.

The Parties

[2] Trinity Western University ("TWU") is a private religious educational community with an evangelical Christian mission. It was founded to be, and remains, an educational arm of the Evangelical Christian Church. Its mission statement is:

> The mission of Trinity Western University, as an arm of the Church, is to develop godly Christian leaders: positive, goal-oriented university graduates with thoroughly Christian minds; growing disciples of Christ who glorify God through fulfilling the Great Commission, serving God and people in the various marketplaces of life.

[3] In 1962, the predecessor to TWU was created as a junior college under the *Societies Act*, R.S.B.C. 1960, c. 362. It was continued by the British Columbia Legislature as Trinity Junior College in 1969, under the *Trinity Junior College Act*, S.B.C. 1969, c. 44. In 1984, the predecessor to TWU was accepted as a member of the Association of Universities and Colleges of Canada. In 1985, the Legislature passed *An Act to Amend the Trinity Western College Act*, S.B.C. 1985, c. 63, which changed the name of the institution, and authorized it to grant graduate degrees.

[4] TWU is the largest privately-funded Christian University in Canada, with approximately 4,000 students attending per year and over 24,000 alumni.

[5] The petitioner, Brayden Volkenant ("Mr. Volkenant") has deposed that he is a committed evangelical Christian and that his "identity is entirely defined" by his relationship with Jesus Christ. He also deposed that his Christian faith is the "foundation" for his life, and that he tries to do "everything" in light of his "faith and [his] Christian identity". He graduated from TWU in 2012 with "Great Distinction", receiving a Bachelor of Arts (Business Administration) degree with a cumulative grade point average of 3.77.

[6] The respondent Law Society of British Columbia ("LSBC") is a self-governing body created and authorized by the *Legal Profession Act*, S.B.C. 1998, c. 9 [*LPA*]. The Benchers are the governing council of the LSBC, and the *LPA* provides for the election of 25 Benchers by the LSBC's members and for the appointment of five "lay Benchers".

[7] The object and duty of the LSBC is set out in s. 3 of the *LPA*:

> 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, and
>
> (e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

The Interveners

[8] The Attorney General of Canada has intervened in these proceedings pursuant to the *Constitutional Question Act*, R.S.B.C. 1996, c. 68. The Attorney General of Canada argues that the LSBC's decision, which declares that the proposed law school at TWU is not an approved faculty of law for the purposes of the LSBC's admission program, is *ultra vires* the authority conferred to the LSBC under the *LPA*, and is unconstitutional because it unjustifiably infringes s. 2(a) of the *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 [*Charter*].

[9] The following parties supporting the petitioners were granted intervener standing in these proceedings, and permitted to file written submissions:

- Attorney General of Canada;

- The Association For Reformed Political Action (“ARPA”) Canada;
- Canadian Council of Christian Charities;
- Christian Legal Fellowship;
- Evangelical Fellowship of Canada;
- Christian Higher Education Canada;
- Justice Centre For Constitutional Freedoms;
- The Roman Catholic Archdiocese of Vancouver;
- The Catholic Civil Rights League;
- The Faith and Freedom Alliance; and
- Seventh-Day Adventist Church in Canada.

[10] ARPA Canada is a not-for-profit and non-partisan organization devoted to educating, equipping, and assisting members of Canada's Reformed Churches (“Reformed Christians") and the broader Christian community as they seek to participate in the public square. Reformed Christians are a distinct subset of the broader evangelical Christian community.

[11] The Canadian Council of Christian Charities is an umbrella organization of some 3,300 religious charities and organizations that are engaged in a wide variety of activities such as operating local churches, denominational offices, schools, universities, food banks, and shelters. Its entities operate within an environment that is governed by the religious beliefs and practises of their respective constituencies. Religious codes of conduct are a commonly adhered to by its members in carrying out their work.

[12] The Christian Legal Fellowship is a national non-profit association of lawyers, law students, professors, retired judges, friends and other professionals who share a commitment to the Christian faith. The Christian Legal Fellowship was founded in the mid-1970s and incorporated in 1978, and has nearly 600 members representing more than 30 Christian denominations. The Christian Legal Fellowship represents that it seeks to “encourage and facilitate among Christians in the vocation of law the integration of a biblical faith with contemporary legal, moral, social and political

issues", inform the Christian community about legal issues that affect it, and advocate a Christian world view of law and justice in the public sphere.

[13] The Evangelical Fellowship of Canada is a national association that represents protestant evangelical Christians from affiliates of 40 protestant denominations and over 100 other organizations and 36 Christian post-secondary education institutions.

[14] Christian Higher Education Canada is a national association of 34 Christian accredited degree-granting universities, seminaries, graduate schools, bible colleges and Christian liberal arts colleges, which together serve over 14,000 undergraduate students and 3,500 graduate students. Christian Higher Education Canada's mission is to advance the efficiency and effectiveness of Christian higher education at member schools and to raise public awareness of the value of Christian higher education in Canada.

[15] The Justice Centre for Constitutional Freedoms is an independent, non-partisan, registered charity that advocates for *Charter* rights and freedoms, particularly the freedoms granted by s. 2 of the *Charter*. The Justice Centre for Constitutional Freedoms was established as a non-profit corporation by way of letters patent issued in October 2010 under the *Canada Corporations Act*, R.S.C. 1970, c. C-32.

[16] The Roman Catholic Archdiocese of Vancouver ("RCAV") has been serving Catholics in British Columbia since 1908, with pastoral responsibility for 430,000 baptized Catholics. Within the boundaries of the RCAV are 50 Catholic schools, four hospitals, three colleges, a seminary and more than 80 organizations, associations, ministries and clubs. The RCAV has significant and deep roots in the public sphere in British Columbia.

[17] The RCAV is supported in its intervention by the Catholic Civil Rights League, which advocates for law and policy that supports the presence of Christian beliefs in the public sphere and a rich conception of multiculturalism and religious tolerance. The RCAV is also supported by the Freedom and Faith Alliance, which seeks to

promote a Gospel-inspired conception of freedom of religion, conscience and expression, under constitutional and human rights legislation across the country.

[18] The Seventh-day Adventist Church ("Adventists") operates the second largest education network in the world (7804 institutions) and has a worldwide membership of approximately 18 million adherents. In Canada, Adventists operate 46 Christian schools, from kindergarten and grade schools to a provincially-accredited university in Alberta. Adventists promote the dignity and value of every person and oppose discrimination under human rights legislation, the constitution or otherwise. Much of the theology of Adventists corresponds to evangelical Christian teachings, such as a belief in the trinity and the inspiration of scripture.

[19] The following parties supporting the respondent were granted intervener standing in these proceedings, and permitted to file written submissions:

- West Coast Women's Legal Education and Action Fund;
- OUTlaws UBC;
- OUTlaws UVIC;
- OUTlaws TRU; and
- Qmunity.

[20] West Coast Women's Legal Education and Action Fund ("West Coast LEAF") was created in 1985 and is an incorporated not-for-profit society in British Columbia. West Coast LEAF's mission is to achieve equality by changing historic patterns of systemic discrimination against women through three main program areas: equality rights litigation, law reform, and public legal education.

[21] OUTlaws Canada describes itself as an organization of queer law student associations in Canada. There are OUTlaws chapters at 15 Canadian law schools, including at the University of British Columbia ("UBC"), the University of Victoria ("UVic"), and Thompson Rivers University ("TRU"). OUTlaws chapters hold events at law schools to promote a supportive community for lesbian, gay, bisexual, transgendered and queer ("LGBTQ") law students and awareness of LGBTQ issues.

[22] Qmunity was founded in 1979 and is a charitable, not-for-profit, community-based organization. Its mission is "to make queer lives better by proactively supporting [their] peers and strengthening [their] communities as [they] move equality forward.

[23] I determined that I would hear oral submissions from the Attorney General of Canada, ARPA Canada, the RCAV, the Justice Centre for Constitutional Freedoms and West Coast LEAF but would not hear oral submissions from the Canadian Council of Christian Charities, the Christian Legal Fellowship, the Evangelical Fellowship of Canada, the Adventists, the OUTlaws (UBC, UVic, and TRU) and Qmunity.

Background

[24] Evangelicalism is a distinct branch of Christianity within the protestant tradition and represents a minority religious subculture in Canada, with approximately 11–12% of the Canadian population being associated with communities reflecting evangelical Christian beliefs and practices. The limitation of sexual intimacy to opposite-sex marriage is considered by evangelical Christians to be a direct reflection of the moral boundaries delineated by their underlying religious beliefs.

[25] In an affidavit filed in support of the petition, Mr. William Taylor, the Executive Director of the Evangelical Free Church of Canada ("EFCC"), explained how the EFCC and TWU understand the content of an education that reflects a Christian philosophy and viewpoint:

> University education was historically intended to educate the whole person, including students' characters. The EFCC and TWU continue with this intention, in the context of TWU's Christian ethos. We view education as a holistic attempt to produce graduates who are well formed in character; good citizens who will take their area of study/expertise and apply that knowledge, through good character in a way that redemptively addresses the evil and injustice of this world, consistent with our understanding of biblical truth.

[26] Mr. Taylor also explained that the EFCC is closely affiliated with the Evangelical Free Church of America which in turn is associated with Trinity International University. This university has a law school in Santa Ana, California that is accredited by the Committee of Bar Examiners of the State Bar of California.

[27] TWU requires that those who attend a course of study at the University sign a "Community Covenant" which provides in part that:

> In keeping with biblical and TWU ideals, community members voluntarily abstain from the following actions:
>
> - communication that is destructive to TWU community life and inter-personal relationships, including gossip, slander, vulgar/obscene language, and prejudice [Colossians 3:8; Ephesians 4:31.]
> - harassment or any form of verbal or physical intimidation, including hazing
> - lying, cheating, or other forms of dishonesty including plagiarism
> - stealing, misusing or destroying property belonging to others [Exodus 20:15; Ephesians 4:28]
> - sexual intimacy that violates the sacredness of marriage between a man and a woman [Romans 1:26-27; Proverbs 6:23-35]
> - the use of materials that are degrading, dehumanizing, exploitive, hateful, or gratuitously violent, including, but not limited to pornography
> - drunkenness, under-age consumption of alcohol, the use or possession of illegal drugs, and the misuse or abuse of substances including prescribed drugs
> - the use or possession of alcohol on campus, or at any TWU sponsored event, and the use of tobacco on campus or at any TWU sponsored event.

[28] At least 20 years ago, TWU decided that it wished to establish a faculty of law and grant degrees to graduates of that faculty pursuant to the *Degree Authorization Act*, S.B.C. 2002, c. 24 [*DAA*]. TWU's proposed faculty of law would offer a three-year Juris Doctor ("*JD*") common law degree program equivalent to programs offered by the 20 publically-funded secular law schools that are already operating throughout Canada.

[29] In 2010, all Canadian Law Societies approved and adopted a uniform national requirement that gave the Approval Committee of the Federation of Law Societies of Canada ("FLS") responsibility for reviewing new law degree programs to ensure that they prepare law school graduates for law society admission programs. The LSBC agreed with all other Canadian law societies to change its requirements to accept the FLS's approval based on the national requirement. The national requirement is administered by the FLS.

[30] In order to obtain the approval of the Minister of Advanced Education ("Minister") to establish its proposed faculty of law and authorize it to grant degrees to its graduates, TWU was required by the Minister to first obtain the approval for the proposed faculty and its ability to grant the *JD* degrees from the FLS and from the LSBC.

[31] The LSBC's Rules[1] require that Canadian law school graduates complete its admissions program before being admitted to the practice of law in B.C. Enrollment in the program requires an applicant to demonstrate "academic qualification". Until the fall of 2013, "academic qualification" under the LSBC 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".

[32] In September 2013, Rule 2-27 was amended by the LSBC to require that common law degree programs come from an "approved" faculty of law. Under the amended Rule 2-27, a faculty of law was approved where it received approval from the FLS, unless the Benchers adopt a resolution declaring that it was not or had ceased to be approved.

[33] On December 16, 2013, the FLS's Approval Committee granted preliminary approval of the proposed *JD* program at TWU. The Special Advisory Committee of the FLS concluded there was no public interest bar to the approval of TWU's

[1] The LSBC's Rules were revised and consolidated and the new *Law Society Rules 2015* came into effect on July 1, 2015. In these reasons for judgment, references to the LSBC's Rules relate to the previous rules that were in effect until June 30, 2015.

proposed law school or to the admission of its future graduates to the bar admission programs of Canadian law societies.

[34] As a result of the FLS's preliminary approval, TWU's proposed law school became an approved faculty of law for the purposes of enrolment in the LSBC's admissions program, subject to any future resolution adopted by the Benchers under LSBC Rule 2-27(4.1). Therefore, on December 17, 2013, the Minister approved the establishment of TWU's proposed faculty of law and authorized TWU to grant *JD* degrees to its graduates.

[35] On February 28, 2014, the Benchers determined that they would vote at a meeting scheduled for April 11, 2014 on a motion (the "April Motion") stating:

> 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 at Trinity Western University is not an approved faculty of law.

[36] In preparation for the April 11, 2014 meeting, the LSBC sought and obtained an opinion on Rule 2-27(4.1) from Mr. Geoff Gomery, Q.C., a barrister and solicitor and member of the LSBC. In his opinion dated March 15, 2014, Mr. Gomery advised that "Rule 2-27(4.1) does not contemplate the Benchers disapproving a faculty of law... on a ground that is unrelated to the question of academic qualification".

[37] On April 11, 2014, the Benchers considered the April Motion, and ultimately voted to defeat the motion. Following the vote, the President of the LSBC stated that the LSBC had "decided to approve" the academic qualifications of TWU graduates.

[38] After the defeat of the April Motion, a Special General Meeting of LSBC members ("SGM") was requisitioned by some of the members of the LSBC pursuant to its Rule 1-9(2).

[39] LSBC members were asked to consider a resolution (the "SGM Resolution") on the basis that TWU's faculty of law would not "promote and improve the standard of practice by lawyers". The resolution was that:

> 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.

[40] The LSBC sent a "Notice to the Profession" of the SGM to all of its members. Enclosed with that Notice was a letter dated April 23, 2014, from a proponent of the SGM Resolution. The letter stated:

> As you probably aware, there has been an application by Trinity Western University for approval by the Law Society of British Columbia for a new faculty of law.
>
> Trinity Western University requires students and faculty to enter into a covenant that includes a provision prohibiting "sexual intimacy that violates the sacredness of marriage between a man and a woman." Violation of this covenant can lead to discipline or expulsion from the university.
>
> Section 28 of the *Legal Profession Act* confers authority on the Law Society to promote and improve the standard of practice by lawyers by, amongst other things, establishing and maintaining a system of legal education. In furtherance of this, Law Society Rule 2-27(4.1) permits the Benchers to deny approval to a faculty of law even where it may have been found to meet basic academic requirements.
>
> On April 11, 2014, a majority of the Benchers of the Law Society voted to approve the application by Trinity Western University despite the covenant that discriminates on the basis of sexual orientation.
>
> The granting of approval to an institution founded on an offensive and discriminatory policy will not serve to promote or improve the standard of practice of lawyers in the province. A proper assessment as to what will serve to benefit the standard of practice of lawyers requires consideration of the long-term interests of the profession including its reputation and core values.
>
> The discriminatory principles reflected in the Trinity Western University covenant would appear to be inconsistent with one of the core principles reflected in the Barristers' and Solicitors' oath: that barristers and solicitors uphold the rights and freedoms of all persons according to the laws of Canada and British Columbia.
>
> Several of the Benchers who voted in favour of approval for Trinity Western University did so on the basis of the Supreme Court of Canada overturning the British Columbia College of Teachers (BCCT) with respect to the approval of the university to graduate teachers. See *Trinity Western University* v. *British Columbia College of Teachers* [2001] 1 S.C.R. 772. This case turned on the absence of evidence before the BCCT concerning the impact of the university's discriminatory practices.
>
> The *Legal Profession Act* does not require approval absent a conclusion that the proposed change to the system of legal education would promote or improve the standard of practice of lawyers. Accordingly, approval ought to be withheld absent an evidentiary basis to conclude that the approval of this

> university would have the effect of improving the standard of practice of lawyers in the province.
>
> Unfortunately the current decision of the Law Society countenances intolerance, will be detrimental to the profession, and firmly places us on the wrong side of an important issue of principle. Moreover, there does not seem to be a sufficient evidentiary basis to conclude that the approval of the university will meet the objectives of section 28 of the *Legal Profession Act.*
>
> This is one of the rare occasions when a decision of the Benchers requires reconsideration by the members of the Law Society.
>
> Pursuant to requests from in excess of 1,100 members, a special general meeting has now been called in order to deal with this issue.
>
> Please consider attending in order to participate and vote on the resolution.
>
> The outcome of the meeting will have an impact on the future of the profession and hopefully position it on the right side of the continuing difficult struggle against unacceptable discriminatory attitudes.

[41] The LSBC refused TWU's request to also enclose a letter from its spokesperson to LSBC members with the Notice to the Profession of the SGM.

[42] The SGM was held on June 10, 2014. Members were not required to be present during the member speeches in order to vote. The SGM Resolution passed on that date by a vote of 3,210 to 968.

[43] At their September 26, 2014 meeting (the “September Meeting”), the Benchers voted on two motions. The first motion was for the Benchers to implement the SGM Resolution and thereby reject TWU graduates. This motion was defeated by a vote of 21-9.

[44] The second motion (the “September Motion”) resolved to hold a referendum of LSBC members, to be “conducted as soon as possible”, on implementing the following resolution:

> 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”).

[45] The September Motion also stated the referendum results would be binding on and be implemented by the Benchers if at least one-third of LSBC members voted and two-thirds of members voted in favour of the resolution, and 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."

[46] The Benchers passed the September Motion by a vote of 20-1. A third motion that would have delayed further action until the courts had ruled on matters pertaining to the proposed faculty of law was then withdrawn.

[47] The referendum was then held among LSBC members pursuant to LSBC Rule 1-37 (the "October Referendum"). The October Referendum was conducted by mail-in ballot throughout the month of October. The LSBC released the results of the October Referendum on October 30, 2014. 5,951 (74%) members of the LSBC voted in favour of the Referendum Question and 2,088 (26%) voted against it.

[48] At a meeting held on October 31, 2014, without any substantive debate or discussion, the Benchers treated the October Referendum as binding and voted 25-1, with four abstentions, to implement the SGM Resolution based solely on the results of the October Referendum (the "Decision"), reversing their earlier approval of the law school and refusing to approve TWU's *JD* degrees pursuant to LSBC Rule 2-27(4.1).

[49] On December 11, 2014, the Minister withdrew his approval for the proposed faculty of law at TWU.

Relief Sought

[50] Mr. Volkenant aspires to practice law in British Columbia. It was his plan to attend TWU's proposed law school, but he has chosen not to do so because his *JD* degree from TWU would not be recognized by the LSBC, and he would thus not be considered qualified to be admitted to the LSBC and could not become a practicing lawyer in this province.

[51] Mr. Volkenant and TWU seek judicial review of LSBC's refusal to recognize *JD* degrees of graduates from TWU for the purpose of admission to the LSBC, pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996. c. 241. Specifically, the petitioners seek a declaration that the Decision is *ultra vires* the LSBC and invalid, and that it unjustifiably infringes on their *Charter* rights. They also seek orders in the nature of *certiorari*, *mandamus*, and prohibition.

[52] The petitioners seek an order declaring that TWU's proposed law school be considered "approved" for the purposes of the LSBC's Rule 2-27(4.1), and that such a declaration prohibits the LSBC from adopting a further resolution such as the Decision. In the alternative, if this Court quashes the Decision and remits it back to the Benchers, the petitioners seek an order prohibiting the LSBC from taking steps to implement a further resolution such as the Decision for any reason related to TWU's Community Covenant.

[53] The petitioners also seek their costs of this petition, to be assessed.

Other Litigation Respecting TWU's Community Covenant

a) British Columbia College of Teachers

[54] In 1985, TWU established a teacher education program, the final year of which was spent at another university. Students attending TWU, including those taking teacher training, were then required to sign a "Community Standards" document, the predecessor to TWU's present Community Covenant, that contained the following paragraph:

> REFRAIN FROM PRACTICES THAT ARE BIBLICALLY CONDEMNED. These include but are not limited to drunkenness (Eph. 5:18), swearing or use of profane language (Eph. 4:29, 5:4; Jas 3:1-12), harassment (Jn 13:34-35; Rom. 12:9-21; Eph. 4:31), all forms of dishonesty including cheating and stealing (Prov. 12:22; Col. 3:9; Eph. 4:28), abortion (Ex. 20:13; Ps. 139:13-16), involvement in the occult (Acts 19:19; Gal. 5:19), and sexual sins including premarital sex, adultery, homosexual behaviour, and viewing of pornography (I Cor. 6:12-20; Eph. 4:17-24; I Thess. 4:3-8; Rom. 2:26-27; I Tim. 1:9-10). Furthermore married members of the community agree to maintain the sanctity of marriage and to take every positive step possible to avoid divorce.

[55] In 1987, TWU applied to B.C.'s Minister of Education for permission to assume full responsibility for the teacher education program. In January of 1995, TWU applied to the British Columbia College of Teachers ("BCCT") for the approval of its education program.

[56] The object of the BCCT is set out in s. 4 of the *Teaching Profession Act*, R.S.B.C. 1996, c. 449 [*TPA*]:

> It is the object of the college to establish, having regard to the public interest, standards for the education, professional responsibility and competence of its members, persons who hold certificates of qualification and applicants for membership and, consistent with that object, to encourage the professional interest of its members in those matters.
>
> [Emphasis added.]

[57] On May 17, 1996, the Council of the BCCT denied TWU's application on two grounds: TWU did not meet the criteria stated in the BCCT bylaws and policies; and approval would not be in the public interest because of the "discriminatory practices" of the institution, referring to the "requirement for students to sign the contract of 'Responsibilities of Membership in the Trinity Western University Community'" and the effect that signing the Community Standards document had on lesbian, gay and bisexual students.

[58] TWU applied for a reconsideration of its application. After obtaining a legal opinion on the issue, the BCCT confirmed its denial of the application on June 29, 1996.

[59] Mr. Justice Davies heard TWU's application for judicial review of the BCCT's decision and in reasons reported at (1997), 41 B.C.L.R. (3d) 158, found that it was not within the BCCT's jurisdiction to consider whether the program followed discriminatory practices under the public interest component of the *TPA*, and concluded that there was no reasonable foundation to support the decision of the BCCT with regard to discrimination. Davies J. made an order in the nature of *mandamus* that the BCCT approve TWU's teacher training program. His decision was affirmed by a majority of the Court of Appeal ((1998), 59 B.C.L.R. (3d) 241).

[60] On further appeal to the Supreme Court of Canada, indexed at *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 at para. 8 [*TWU v. BCCT*], Mr. Justice Iacobucci and Mr. Justice Bastarache, for the majority, held that the question of whether the BCCT exceeded its jurisdiction when it denied approval to TWU's five-year B.Ed. program by taking into account TWU's discriminatory practices was a question of law, to which the standard of correctness applied. Iacobucci and Bastarache JJ. further held that if the BCCT was entitled to consider "discriminatory practices", the test was whether the BCCT's decision was patently unreasonable.

[61] Iacobucci and Bastarache JJ. determined that the power to establish standards provided for in s. 4 of the *TPA* had to be interpreted in light of the general purpose of the statute. In particular, they found that it would be incorrect to limit the scope of the section to a determination of skills and knowledge, and found that the BCCT had jurisdiction to consider discriminatory practices in dealing with TWU's application.

[62] Iacobucci and Bastarache JJ. accepted at para. 13 that "suitability for entrance into the profession of teaching [had to] take into account all features of the education program at TWU", referring to the earlier decision of the Court in *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, where it was accepted that teachers are a medium for the transmission of values, and that:

> [13] …the pluralistic nature of society and the extent of diversity in Canada are important elements that must be understood by future teachers because they are the fabric of the society within which teachers operate and the reason why there is a need to respect and promote minority rights.

[63] Iacobucci and Bastarache JJ. acknowledged at para. 25 that although the Community Standards were expressed as a code of conduct rather than an article of faith, "a homosexual student would not be tempted to apply for admission, and could only sign the so-called student contract at a considerable personal cost". However, they determined that the admissions policy of TWU was not in itself sufficient to establish discrimination under s. 15 of the *Charter*. They noted that TWU is a private

institution to which the *Charter* does not apply and that is exempted, in part, from B.C.'s human rights legislation.

[64] Iacobucci and Bastarache JJ. went on to conclude that:

> [25] …[t]o 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, which co-exist with the right to equality.

However, they accepted that concerns about equality were appropriately considered by the BCCT under the public interest component of s. 4 of the *TPA*.

[65] At paras. 28, 29 and 31, Iacobucci and Bastarache JJ. held that the BCCT was required to consider issues of religious freedom:

> [28] …Section 15 of the *Charter* protects equally against "discrimination based on ... religion". Similarly, s. 2(a) of the *Charter* guarantees that "[e]veryone has the following fundamental freedoms: ... freedom of conscience and religion". British Columbia's human rights legislation accommodates religious freedoms by allowing religious institutions to discriminate in their admissions policies on the basis of religion. The importance of freedom of religion in Canadian society was elegantly stated by Dickson J., as he then was, writing for the majority in *Big M Drug Mart*, supra, at pp. 336-37:
>
> > A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of 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. But the concept means more than that.
> >
> > Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or

> refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.
>
> What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards religious minorities from the threat of "the tyranny of the majority".

It is interesting to note that this passage presages the very situation which has arisen in this appeal, namely, one where the religious freedom of one individual is claimed to interfere with the fundamental rights and freedoms of another. The issue at the heart of this appeal is how to reconcile the religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.'s public school system, concerns that may be shared with their parents and society generally.

[29] In our opinion, this is a case where any potential conflict should be resolved through the proper delineation of the rights and values involved. In essence, properly defining the scope of the rights avoids a conflict in this case. Neither freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute. As L'Heureux-Dubé J. stated in *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141, at p. 182, writing for the majority on this point:

> As the Court has reiterated many times, freedom of religion, like any freedom, is not absolute. It is inherently limited by the rights and freedoms of others. Whereas parents are free to choose and practise the religion of their choice, such activities can and must be restricted when they are against the child's best interests, without thereby infringing the parents' freedom of religion.
>
> …

[31] …the *Charter* must be read as a whole, so that one right is not privileged at the expense of another. As Lamer C.J. stated for the majority of this Court in *Dagenais v. Canadian Broadcasting Corp*., [1994] 3 S.C.R. 835, at p. 877:

> A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict ... *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.

[66] Iacobucci and Bastarache JJ. concluded that the BCCT erred by failing to weigh the rights involved in its assessment of the alleged discriminatory practices of TWU, because it did not take into account the impact of its decision on the right to freedom of religion of TWU's members. The BCCT's appeal was dismissed, and the Court upheld the *mandamus* order made by the trial judge.

b) Other Law Societies

[67] The Nova Scotia Barristers' Society ("NSBS") and the Law Society of Upper Canada ("LSUC") each determined that they would not recognize graduates of TWU's proposed faculty of law for the purposes of admission to the bars of Nova Scotia or Ontario. TWU sought judicial review of both law societies' decisions.

i) Nova Scotia

[68] Section 4(1) of the *Legal Profession Act*, S.N.S. 2004, c. 28 describes the purpose of the NSBS as follows:

> 4(1) The purpose of the Society is to uphold and protect the public interest in the practice of law.

[69] In reasons indexed at *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25 [*TWU v. NSBS*], Mr. Justice Campbell found that the NSBS did not have the authority to do what it did, and in the alternative, it did not exercise its authority in a way that reasonably considered TWU's concerns for religious freedom and liberty of conscience.

[70] Campbell J. reasoned at para. 166:

> [166] The purpose of the NSBS under the *Legal Profession Act* is to "uphold and protect the public interest in the practice of law. It is not an expansive mandate to oversee the public interest generally, or all things to which the law relates. It is a mandate to regulate lawyers and the practice of law as a profession within Nova Scotia. In order to have any authority over a subject matter, a person or an institution, that subject, matter, person or institution has to relate to or affect the practice of law. Both the federal income tax reporting requirements and the *Civil Procedure Rules* affect lawyers and the practice of law but they are not part of regulation of the profession. In order for the NSBS to take action pertaining to TWU, that institution must in some way affect the practice or the profession of law in Nova Scotia.

[71] At para. 270, Campbell J. concluded that the impact of the NSBS's refusal would have on religious freedom:

> [270] …would be to require it to be undertaken in a way that significantly diminishes its value. TWU's character as an Evangelical Christian University where behavioural standards are required to be observed by everyone would be changed. Replacing a mandatory code with a voluntary one would mean that students who wanted to be assured that they could study in a strictly Evangelical Christian environment would have to look elsewhere if they want to practice in Nova Scotia. That impact is direct. The NSBS resolution and regulation infringe on the freedom of religion of TWU and its students in a way that cannot be justified. The rights, *Charter* values and regulatory objectives were not reasonably balanced within a margin of appreciation.

[72] The decision of Campbell J. has been appealed to the Nova Scotia Court of Appeal, with the appeal set to be heard in April 2016: *Trinity Western University v. Nova Scotia Barristers' Society* (28 August 2015), Halifax 438894 (N.S.C.A.), per Bourgeois J.A.

ii) Ontario

[73] Ontario's *Law Society Act*, R.S.O. 1990, c. L.8 [*LSA*] vests control over licensing, education, admission, discipline and unauthorized practice of lawyers in the LSUC. Section 4.2 of the *LSA* states, in part that:

> In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:
>
> 1. The Society has a duty to maintain and advance the cause of justice and the rule of law.
>
> 2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.
>
> 3. The Society has a duty to protect the public interest.

[74] Before an applicant can take the required licensing examination or examinations set by the LSUC to obtain a Class LI licence to practice law in Ontario, he or she must have a bachelor of laws or *JD* degree from a law school in Canada that was, at the time the applicant graduated from the law school, a law school accredited by the LSUC, or a certificate of qualification issued by the National Committee on Accreditation appointed by the FLS and the Council of Law Deans.

[75] On April 24, 2014, the LSUC's Convocation voted to reject the accreditation of TWU's faculty of law. TWU sought judicial review of the decision. In *Trinity Western University v. The Law Society of Upper Canada*, 2015 ONSC 4250 [*TWU v. LSUC*], the Ontario Divisional Court upheld the LSUC's decision to refuse to recognize graduates of TWU's proposed faculty of law.

[76] TWU has sought leave to appeal the decision of the Divisional Court. Leave to appeal has been granted by the Court of Appeal for Ontario: *Trinity Western University v. The Law Society of Upper Canada* (11 September 2015), M45342 (Ont. C.A.).

Discussion

[77] While I accept and adopt some of the reasoning of the Divisional Court in *TWU v. LSUC,* I am unable to agree with all of that reasoning. For example, the Divisional Court found that there has been an evolution in human rights jurisprudence since the decision in *TWU v. BCCT*, and that this shift, among other factors, limits the application of *TWU v. BCCT* to its judicial review of the LSUC's decision. The Divisional Court observed that in *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 42, McLachlin C.J.C. said:

> [42] …Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.

[78] I am not persuaded that the circumstances or the jurisprudence respecting human rights have so fundamentally shifted the parameters of the debate as to render the decision in *TWU v. BCCT* other than dispositive of many of the issues in this case.

a) Standards of Review

[79] The two standards for judicial review of administrative decision are reasonableness and correctness: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at

para. 34 [*Dunsmuir*].[2] In applying the former, the court gives the administrative body a measure of deference; in applying the latter, the court evaluates the decision without deference for the administrative body, and, if necessary, substitutes its own judgment in place of the original decision.

[80] The deference doctrine operates under a two-step framework for assessing whether a tribunal's decision is owed deference. The first step is to see whether the jurisprudence has already satisfactorily determined the standard of review with respect to a particular question. Where the first inquiry proves unfruitful, the court must proceed to the second step and consider the factors in *Dunsmuir* to identify the standard of review that should be applied.

[81] The Court in *Dunsmuir* described a review for reasonableness at para. 47:

> [47] …A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[82] The Court's approach to applying the correctness standard was explained at para. 50:

> [50] …When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[83] The LSBC submits that reasonableness is the applicable standard of review to be applied to its decision not to approve TWU's proposed law school, both in terms of the scope of its powers under the *LPA* and its balancing of *Charter* rights in the exercise of its statutory duty.

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[2] A third standard of review, patent unreasonableness, remains alive in British Columbia only through the application of certain provisions of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, which do not apply to the decision under review in this petition.

[84] TWU contends that the standard of review on the administrative law issues raised in the petition is correctness, because those issues engage the LSBC's "jurisdiction" to pass the Resolution.

[85] A reviewing court can apply different standards of review for different aspects of a decision that attract differing levels of scrutiny. I will therefore examine the appropriate standards of review for the various aspects of the decision under review.

i) Jurisdiction

[86] It is well established that where an administrative decision-maker is interpreting and applying its home statute, and *a fortiori* the rules passed thereunder, there is a strong presumption that the reasonableness standard of review applies: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 [*Alberta v. ATA*].

[87] In *TWU v. NSBS,* the Nova Scotia Supreme Court acknowledged that the question under review would previously have been considered a "jurisdictional" question and would have been subject to the correctness standard of review. However, at paras. 154 – 156, Campbell J. adopted the modern approach to judicial review and rejected TWU's argument that a correctness standard should apply because the issue was "jurisdictional".

[88] The Supreme Court of Canada has recently confirmed that the category of "true jurisdictional" questions is now very small. At para. 34 of *Alberta v. ATA* the Court observed:

> [34] … in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.

[89] As such, in *TWU v. NSBS*, Campbell J. found, like the Ontario Divisional Court later found in *TWU v. LSUC*, that the standard of reasonableness applies to the question of whether a law society had the statutory authority to refuse to accredit TWU.

[90] Despite the decisions of Campbell J. and the Divisional Court, I consider myself bound by *TWU v. BCCT* to apply the standard of correctness to the question of the LSBC's jurisdiction to disapprove of TWU's proposed faculty of law.

ii) Procedural Fairness

[91] The Supreme Court of Canada has long recognized that both the process and the outcome of an administrative decision must conform to the rationale of the statutory regime set up by the legislature. As Mr. Justice Le Dain wrote for the unanimous Court in *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at 653 [*Cardinal*], "there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges, or interests of an individual". Le Dain J.'s remarks in *Cardinal* were recently reaffirmed by a unanimous Court in *Mission Institution v. Khela*, 2014 SCC 24 at para. 82 [*Khela*].

[92] Once it has been established that a duty of procedural fairness is owed, the content and extent of that duty is determined through a consideration of the factors set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [*Baker*].

[93] The LSBC contends that it owed the petitioners little or no duty of procedural fairness because the Decision was "quasi-legislative in nature" and was discretionary, policy-oriented, and "involved broad considerations of public policy". The petitioners argue that the LSBC had a duty to act fairly because the decision was administrative and affected the petitioner's rights, privileges and interests.

[94] As will be discussed further, I do not accept that the Decision was quasi-legislative, and that therefore no duty of fairness was owed by the LSBC.

Furthermore, the Decision had a direct impact on the petitioners' rights, privileges, and interests. As the Court said in *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11 at para. 75 [*Moreau-Bérubé*], "[t]he duty to comply with the rules of natural justice and to follow rules of procedural fairness extends to all administrative bodies acting under statutory authority."

[95] The breach of a duty of procedural fairness is an error in law: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 22.

[96] I find that the standard of review for determining whether a decision-maker complied with its duty of procedural fairness is correctness: *Khela* at para. 79. Thus, no deference is owed to the administrative decision-maker in this stage of the analysis: *Moreau-Bérubé* at para. 74. Therefore, in my view, the issue of whether the LSBC complied with its duty of procedural fairness is to be reviewed on the standard of correctness.

iii) Sub-delegation and the Fettering of Discretion

[97] Fettering of discretion occurs when, rather than exercising its discretion to decide the individual matter before it, an administrative body binds itself to policy or to the views of others: *Hospital Employees Union, Local 180 v. Peace Arch District Hospital* (1989), 35 B.C.L.R. (2d) 64 (C.A.). Although an administrative decision-maker may properly be influenced by policy considerations and other factors, he or she must put his or her mind to the specific circumstances of the case and not focus blindly on a particular policy to the exclusion of other relevant factors: *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 129 B.C.A.C. 32 at para. 62 [*Halfway River*].

[98] An allegation that an administrative body has improperly fettered its discretion is reviewable on a standard of correctness: *Okomaniuk v. Canada (Citizenship and Immigration)*, 2013 FC 473 at para. 20; *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198 at para. 33, leave to appeal to SCC ref'd [2007] S.C.C.A. No. 394.

[99] As Mr. Justice Finch (as he then was) explained in *Halfway River* at para. 58, the fettering of discretion is an issue of procedural fairness, which is an area where the court owes an administrative decision-maker no deference:

> [58] The learned chambers judge held that the process followed by the District Manager offended the rules of procedural fairness in four respects: he fettered his discretion by applying government policy…[.] These are all matters of procedural fairness, and do not go to the substance or merits of the District Manager's decision. There is, therefore, no element of curial deference owed to that decision by either the chambers judge or by this Court.

[100] Mr. Justice Smith explained the relationship between fettering and improper delegation in *B.C. College of Optics Inc. v. The College of Opticians of B.C.*, 2014 BCSC 1853 at para. 24:

> [24] Improper delegation and fettering of discretion are separate concepts, but in many cases have the same practical result. In either case the discretion is not in fact exercised by the decision maker the legislation has designated…

[101] In my view, sub-delegation is also an issue of process that subsumes the fettering of discretion and is reviewable on the standard of correctness.

b) Application of the Appropriate Standards of Review

i) Jurisdiction

[102] The petitioners do not challenge the LSBC's Rules. They argue that in making the Decision, the Benchers acted outside of their jurisdiction and erred within their jurisdiction. They contend that the Decision should be set aside on all of the following grounds:

> (a) The Benchers acted outside of their authority in making the Decision:
>
> The Law Society has no jurisdiction over universities and the Benchers have no authority to sub-delegate their decision under Rule 2-27(4.1) to the members of the Law Society;
>
> The Benchers fettered their discretion and allowed the members of the Law Society to dictate the outcome of the exercise of discretion afforded to the Benchers under Rule 2-27(4.1); and

> The Law Society failed to in its duty to provide procedural fairness.
>
> (b) The Decision, even if made within the Benchers' authority, was incorrect and unreasonable and must be set aside:
>
> (i) It is arbitrary, inconsistent, unjustifiable, non-transparent, made without evidence, and falls outside the range of acceptable outcomes defensible on the facts and law; and
>
> (ii) The Benchers completely failed to balance the statutory objectives of the *LPA* with the impacted *Charter* rights, including the freedom of religion, freedom of expression, freedom of association and equality rights.

[103] In *TWU v. LSUC*, the Divisional Court explored the jurisdiction of the LSUC to consider more than whether TWU's proposed law school would graduate competent lawyers and concluded at para. 58 that "the principles that are set out in s. 4.2, and that are to govern the respondent's exercise of its functions, duties and powers under the *Law Society Act*, are not restricted simply to standards of competence." The Divisional Court held that those functions, duties and powers "engage the respondent in a much broader spectrum of considerations with respect to the public interest, including whether or not to accredit a law school."

[104] On that reasoning, at para. 129, the Divisional Court declined to follow the decision of Campbell J., in part, on the basis that there were:

> [129] … important differences between the case that had to be decided in Nova Scotia and the one that falls to be determined here. The most significant of those differences is the fact that the NSBS did not have the broad statutory authority, under its governing statute, that the respondent has here. In particular, the NSBS did not have an express mandate "to maintain and advance the cause of justice and the rule of law". The NSBS also did not have the degree of control over legal education requirements for admission to the Bar that the respondent has historically exercised in Ontario.

[105] The relevant provisions of LSBC Rules 2-27(3)(b), 2-27(4) and 2-27(4.1) provide:

> (3) An applicant [for Articles] may make an application under subrule (1) by delivering to the Executive Director the following:
>
> …

> (b) proof of academic qualification under subrule (4)
>
> …
>
> (4) Each of the following constitutes academic qualification under this Rule:
>
> > (a) 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;
>
> …
>
> (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.

[106] The LSBC asserts that it has not only the discretion, but the statutory duty, to consider the public interest in the course of exercising its statutory powers regulating admission to the Bar, and in applying the Rules validly enacted pursuant to those powers.

[107] In its written argument, the LSBC confirmed that the Decision was not based on concerns that TWU's graduates would not be competent to practice law or would engage in discriminatory conduct in the future:

> The [Decision] is not premised upon an assertion, and indeed the [LSBC] does not assert, that graduates of TWU would be incompetent to practice law, or that they would be reasonably expected to engage in discriminatory conduct in the future.

[108] I find that, like the LSUC, the LSBC has a broad statutory authority that includes the object and duty to preserve and protect the rights and freedoms of all persons. I also find that a decision to refuse to approve a proposed faculty of law on the basis of an admissions policy is directly related to the statutory mandate of the LSBC and its duties and obligations under the *LPA*. I conclude that the LSBC correctly found that it has the jurisdiction to use its discretion to disapprove the academic qualifications of a common law faculty of law in a Canadian university, so long as it follows the appropriate procedures and employs the correct analytical framework in doing so.

ii) Procedural Fairness

a) Lack of Reasons for the Decision

[109] While it might have been useful for the purposes of the petition to have had reasons from the LSBC for its disapproval of TWU's proposed faculty of law, I accept that the LSBC was not obliged to provide such reasons.

[110] I adopt the view of the Divisional Court in *TWU v. LSUC*, at para. 49 that:

> [49] In the absence of reasons, what is important, when considering the appropriate standard of review, is whether it is possible for this court, on a review, to understand the basis upon which the decision was reached, and the analysis that was undertaken in the process of reaching that decision. We have no difficulty in concluding that this court can achieve that understanding on the record that is before us.

[111] Like the Divisional Court, I have no difficulty in concluding that I can achieve the required understanding of the Decision on the record before me.

b) Sub-delegation and the Fettering of Discretion

[112] The petitioners submit that, in reaching the Decision, the Benchers improperly delegated their authority to the members of the LSBC, thus fettering their discretion.

[113] In contrast, the LSBC contends that the Benchers were informed by the views of the membership, but exercised their independent judgment to reach the Decision.

[114] As discussed in the standard of review analysis above, fettering of discretion occurs when a decision-maker does not genuinely exercise independent judgment in a matter. This can occur, for example, if the decision-maker binds itself to a particular policy or another person's opinion. If a decision-maker fetters its discretion by policy, contract, or plebiscite, this can also amount to an abuse of discretion. Similarly, it is an abuse of discretion for a decision-maker to permit others to dictate its judgment. As Mr. Justice Gonthier said for the Court in *Therrien (Re)*, 2001 SCC 35 at para. 93:

> [93] It is settled law that a body to which a power is assigned under its enabling legislation must exercise that power itself and may not delegate it to one of its members or to a minority of those members without the express or

> implicit authority of the legislation, in accordance with the maxim hallowed by long use in the courts, *delegatus non potest delegare*: *Peralta v. Ontario*, [1988] 2 S.C.R. 1045, aff'g (1985), 49 O.R. (2d) 705…

[115] While Gonthier J. referred to a minority of the members of a body, I see no reason not to apply the same reasoning even to a majority of the members of a body like the LSBC whose elected or appointed representatives are assigned a power that requires the weighing of factors that the majority have not weighed.

[116] The September Motion stated that the October Referendum would be binding on the Benchers in the event that (a) 1/3 of all members in good standing of the LSBC voted on the Referendum Question; and (b) 2/3 of those voting voted in favour of implementing the SGM Resolution. It also included the statement that the "Benchers hereby determine that implementation of the Resolution does not constitute a breach of their statutory duties, regardless of the results of the Referendum".

[117] In *Oil Sands Hotel (1975) Ltd. v. Alberta (Gaming and Liquor Commission)*, 1999 ABQB 218 at paras. 36 – 37, Madam Justice Sulyma considered the circumstances where a statutory decision-maker acted upon a plebiscite:

> [36] The second issue, then, is whether the Commission, in terminating the Retailer Agreements, has acted outside its jurisdiction. The cases and texts are replete with caution governing the exercise of discretionary powers. In *Roncarelli v. Duplessis* (*supra*), Mr. Justice Martland determined that although the commission in question had the discretion to cancel a permit, that its cancellation must be related to the administration and enforcement of the statute. He stated at p. 742:
>
> > The appellant further contends that, in exercising this discretion, the rules of natural justice must be observed and points out that no notice of the intention of the Commission to cancel his permit was ever given to the appellant, nor was he given a chance to be heard by the Commission before the permit was cancelled.
> >
> > With respect to this latter point, it would appear to be somewhat doubtful whether the appellant had a right to a personal hearing ... However, regardless of this, it is my view that the discretionary power to cancel a permit given to the Commission by the *Alcoholic Liquor Act* must be related to the administration and enforcement of that statute. <u>It is not proper to exercise the power of cancellation for reasons which are</u>

> unrelated to the carrying into effect of the intent and purpose of the *Act*. The association of the appellant with the Witnesses of Jehovah and his furnishing of bail for members of that sect, which were admitted to be the reasons for the cancellation of his permit and which were entirely lawful, had no relationship to the intent and purposes of the *Alcoholic Liquor Act*.

[Emphasis by Sulyma J.]

[37] I further note a summary of the general principles governing the exercise of discretionary powers is contained in J. M. Evans, DeSmith's, *Judicial Review of Administrative Action* (Stevens & Sons Limited, London 4th Ed., 1980) at p. 285:

> In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it; it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act and (it) must not act arbitrarily or capriciously.

[118] In its written submissions, the LSBC contended that:

> As the history of the issue surrounding TWU's discriminatory Covenant shows, the legal profession in British Columbia, and the Benchers, were and remain deeply divided. Although the Law Society membership as a whole spoke in a clear voice, and emphatically determined that the Law Society should not approve TWU's proposed law school, the complexity and difficulty of the issue cannot be doubted.
>
> …
>
> Although, the decision was made with reference to a single institution, TWU's proposed school of law, it was a decision reached through the thoughtful and repeated deliberations of a self-governing body, and in consultation with the democratic wishes of the Law Society as a whole.
>
> [Emphasis added.]

[119] I am unable to accept the LSBC's submissions that the Benchers were informed by the views of the members but ultimately exercised their individual judgment in reaching the Decision. The evidence is clear, both from the wording of the September Motion and from the nearly unanimous vote on the Decision (which was reached without substantive discussion despite the fact that it was a complete

reversal of the Benchers' vote just six months prior), that the Benchers allowed the members to dictate the outcome of the matter.

[120] I conclude that the Benchers permitted a non-binding vote of the LSBC membership to supplant their judgment. In so doing, the Benchers disabled their discretion under the *LPA* by binding themselves to a fixed blanket policy set by LSBC members. The Benchers thereby wrongfully fettered their discretion.

[121] I decline to draw the inference urged upon me by the LSBC that the Benchers in favour of the September Motion had collectively determined that both approving TWU and refusing to accredit would be consistent with their statutory duties, in that both decisions would be a reasonable exercise of the LSBC's powers under the *LPA*. To do so would ignore the Benchers' obligation to apply the proportionate balancing of the *Charter* protections at play, to be discussed in greater detail below.

c) Required Procedure

[122] The LSBC contends that in the Decision it was deciding whether to approve a proposed law school that discriminates on the basis of prohibited grounds, thereby impeding equal access to the legal profession. It contends that in the result its process was quasi-legislative, attracting little or no duty of procedural fairness. The LSBC submits that even if it had some duty of procedural fairness to the petitioners, TWU was kept informed throughout the process, allowed to have its representatives attended the Benchers' meetings, and given considerable and extensive participatory rights throughout, including at least three opportunities to make written submissions: prior to the April 11, 2014 meeting, which it did; following the SGM; and following the September 26th motion. The LSBC asserts that these accommodations more than met any duty of fairness it may have owed.

[123] I am unable to accept this contention. The degree to which a person affected by a decision may participate depends on the circumstances. The more important the decision is to the interested parties, the more stringent the procedural protections that will be mandated. High procedural fairness is owed when a decision affects one's ability to practice their profession: *Baker* at para. 25; or their religion:

Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village), 2004 SCC 48 at para. 30.

[124] At the heart of the doctrine of procedural fairness is the aim of ensuring that a party with a legitimate interest in proceedings has a reasonable opportunity to present its case, *with the assurance that the evidence will be considered fairly and fully by the decision-maker*: *Baker* at paras. 22 & 28.

[125] I accept the assertion of the petitioners that they were entitled to, and find that they were deprived of, a meaningful opportunity to present their case fully and fairly to those who had the jurisdiction to determine whether the *JD* degrees of the proposed law school's graduates would be recognized by the LSBC.

c) Consideration of the Charter

[126] The LSBC is required to exercise its statutory discretion in accordance with the *Charter*: *Doré v. Barreau du Québec*, 2012 SCC 12 [*Doré*].

[127] Section 2 of the *Charter* provides that:

> 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.

[128] Section 15 of the *Charter* provides that:

> (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.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[129] In *Doré*, the Court reviewed a decision rendered by the Disciplinary Council of the Barreau du Québec and commented at para. 47 that "(a)n administrative decision-maker exercising a discretionary power under his or her home statute, has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values". The approach courts should take reviewing such decisions was explained at para. 56 – 57 as follows:

> [56] … the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the *Oakes* context. As this Court recognized in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160, "courts must accord some leeway to the legislator" in the *Charter* balancing exercise, and the proportionality test will be satisfied if the measure "falls within a range of reasonable alternatives". The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of *Dunsmuir*, "falls within a range of possible, acceptable outcomes" (para. 47).
>
> [57] On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play. As LeBel J. noted in *Multani,* when a court is faced with reviewing an administrative decision that implicates *Charter* rights, "[t]he issue becomes one of proportionality" (para. 155), and calls for integrating the spirit of s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives.

[130] This approach was further refined by the Court in *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at para. 37:

> [37] On judicial review, the task of the reviewing court applying the *Doré* framework is to assess whether the decision is reasonable because it reflects a proportionate balance between the *Charter* protections at stake and the relevant statutory mandate: *Doré*, at para. 57. Reasonableness review is a contextual inquiry: *Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 S.C.R. 5, at para. 18. In the context of decisions that implicate the *Charter*, to be defensible, a decision must accord with the fundamental values protected by the *Charter*.

[131] The relevance of *Charter* considerations in this type of case was emphasized by the Court in *TWU v. BCCT*, which recognized that TWU is still associated with the EFCC and that "it can reasonably be inferred that the BC legislature did not consider that training with a Christian philosophy was in itself against the public interest since it passed five bills in favour of TWU between 1969 and 1985".

[132] The BC legislature expressly mandated TWU to teach from a Christian perspective under the *Trinity Junior College Act*, S.B.C. 1969, c. 44, s. 3(2):

> The objects of the University shall be to provide for young people of any race, colour, or creed, university education in the arts and sciences with an underlying philosophy and viewpoint that is Christian.

[133] The LSBC operates under a statutory framework that is similar to the BCCT's framework under the *TPA*, as discussed in *TWU v. BCCT.* As with any administrative authority, the LSBC is obliged to conduct its procedures fairly and within its statutory framework.

[134] In *TWU v. LSUC,* the Divisional Court reasoned that the issue raised before it and the issue raised before the Court in *TWU v. BCCT* involved different facts, a different statutory regime, and a fundamentally different question, and that the evidence in *TWU v. BCCT* did not show that any person had been denied admission to TWU's teachers' program because of a refusal to sign the Community Standards document.

[135] While it is true that Iacobucci and Bastarache JJ. did not find that homosexual students would be refused admission to TWU's proposed faculty of education, they did conclude, as discussed above, that homosexual students would be strongly deterred from applying for admission to TWU, and that such students could only sign the Community Standards document at a considerable personal cost.

[136] However, Iacobucci and Bastarache JJ. also accepted that under what was then s. 19 of the *Human Rights Act*, S.B.C. 1984, c. 22, a religious institution was not considered to breach the *Act* where it preferred adherents of its religious constituency, and that it could not be reasonably concluded that private institutions

are protected but that their graduates are *de facto* considered unworthy of fully participating in public activities. At paras. 35 – 36 they wrote:

> [35] … In this particular case, it can reasonably be inferred that the B.C. legislature did not consider that training with a Christian philosophy was in itself against the public interest since it passed five bills in favour of TWU between 1969 and 1985. While homosexuals may be discouraged from attending TWU, a private institution based on particular religious beliefs, they will not be prevented from becoming teachers. In addition, there is nothing in the TWU Community Standards that indicates that graduates of TWU will not treat homosexuals fairly and respectfully. Indeed, the evidence to date is that graduates from the joint TWU-SFU teacher education program have become competent public school teachers, and there is no evidence before this Court of discriminatory conduct by any graduate. Although this evidence is not conclusive, given that no students have yet graduated from a teacher education program taught exclusively at TWU, it is instructive. 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. Clearly, the restriction on freedom of religion must be justified by evidence that the exercise of this freedom of religion will, in the circumstances of this case, have a detrimental impact on the school system.
>
> [36] Instead, the proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them. 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. The BCCT, rightfully, does not require public universities with teacher education programs to screen out applicants who hold sexist, racist or homophobic beliefs. For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society.

[137] In *TWU v. LSUC*, the Divisional Court accepted that the decision of Convocation implicated two *Charter* rights that the Court described as the religious freedom of TWU and Mr. Volkenant on the one hand, and on the other hand, the rights of both current and future members of the LSUC to equal access, on a merit basis, to membership that the LSUC had a duty to protect. Clearly those two *Charter* rights are equally implicated before me.

[138] Although the LSBC contends that the Decision does not infringe TWU's right to freedom of religion, the evidence in this case and the relevant precedents conclusively establish that the Decision does infringe the petitioners' *Charter* right to

freedom of religion: *TWU v BCCT* at para. 32, *TWU v. LSUC* at para. 81, *TWU v. NSBS* at para. 237.

[139] The petitioners and several of the interveners argue that the Decision infringes not just the petitioners' *Charter* right to freedom of religion, but also their rights to freedom of association, freedom of expression, and equality under s. 15.

[140] In contrast, the LSBC and West Coast LEAF contend that because the Community Covenant includes an obligation to uphold the "God-given worth" of all persons "from conception to death", the Community Covenant has the effect of prohibiting women from accessing safe and legal abortion services, which have been held to be constitutionally protected.

[141] I have not been referred to any evidence of statements made by or before the April 11, 2014 meeting concerning what have been described as abortion rights, but I see no indication that this issue was considered by either the LSBC's membership when they voted on the Referendum Question or by the Benchers when they voted on the Decision. If the Benchers did consider the issue on April 11, 2014, then it would have been weighed in the decision of that date. If not, I find that it is not an issue that should be considered at first instance by me on the hearing of this petition. For the same reason, I decline to consider the infringements of freedom of association, freedom of expression, and equality alleged by the petitioners.

[142] In *TWU v. LSUC*, after accepting that the decision of Convocation engaged both rights, the Divisional Court proceeded to apply the proportionate balancing of the *Charter* protections at play as set out by the Court in *Doré* at para. 58:

> [58] If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.

[143] Importantly, the Divisional Court rejected the argument that the applicants' religious rights were "ignored" by Convocation in reaching its decision, finding that a fair reading of the speeches made by the Benchers during the course of the Convocation held to consider the issue made it clear that the applicants' freedom of

religion was one of the concerns with which the Benchers were wrestling. The Court found that the rights of TWU and Mr. Volkenant to religious freedom had been infringed by the decision of the Law Society, but that TWU's Community Covenant was contrary to the equality rights of its future members, who include members from two historically disadvantaged minorities (LGBTQ persons and women), and was thus discriminatory.

[144] At para. 124, the Divisional Court wrote:

> [124] We conclude that the respondent did engage in a proportionate balancing of the Charter rights that were engaged by its decision and its decision cannot, therefore, be found to be unreasonable. We reach that conclusion based on a review of the record undertaken in accordance with the procedure set out in Newfoundland Nurses. In so doing, we have considered the speeches given at Convocation by the Benchers as a whole - not in isolation, one from the other. In determining whether a proportionate balancing was undertaken, it is only fair, in our view, to consider the interchange between the Benchers, not whether the individual speeches of each Bencher reflect that balance. In that regard, it is important to remember that the Benchers were speaking in reaction to what others had said, including what TWU itself had said. They were not speaking in a vacuum.

[145] Given the competing *Charter* rights involved in reaching the Decision, I find that the LSBC had the constitutional obligation to consider and balance those interests.

[146] On the evidence before me, it appears that before and during the April 11, 2014 meeting, the discussions of the Benchers canvassed a wide variety of legal and policy-based arguments for and against giving the LSBC's approval to TWU's proposed faculty of law, including the *Charter* rights in issue before me.

[147] For example, Bencher David Crossin, Q.C. stated at the April meeting:

> It is no doubt true that some or many or most find the goals of TWU in the exercise of this fundamental right to be out of step and offensive... but... that does not justify a response that sidesteps that fundamental Canadian freedom in order to either punish TWU for its value system or force it to replace it. In my view, to do so would risk undermining freedom of religion for all and to do so would be a dangerous over-extension of institutional power.

[148] As noted above, the goal of procedural fairness is to ensure that affected parties have the opportunity to present their case to the ultimate decision-maker, with the assurance that the evidence presented will be considered fully and fairly: *Baker* at para. 28. By refusing to allow TWU to present its case to the members of the LSBC on the same footing as the case against it was presented, the LSBC deprived TWU of the procedural fairness to which it was entitled.

[149] The fact that a democratic process was followed in the October Referendum proceedings does not protect the Decision from scrutiny. As Bastarache J. explained in his concurring judgment in *M. v. H.*, [1999] 2 S.C.R. at para. 315:

> [315] Another helpful criterion which is used in determining the proper attitude of deference is the source of the rule. Although I would be reluctant to place significant weight on this factor alone, it can be used as a helpful indicator of the quality of the decision. Rules that are the product of common law development, or which are made by unelected decision-makers, ought to be accorded less deference in the absence of other factors. Delegated decision-makers are presumptively less likely to have ensured that their decisions have taken into account the legitimate concerns of the excluded group, while a legislative expression of will presumptively indicates that all interests have been adequately weighted (see M. Jackman, "Protecting Rights and Promoting Democracy: Judicial Review Under Section 1 of the Charter" (1996), 34 *Osgoode Hall L.J.* 661, at pp. 668-69). If, as Professor J. H. Ely (*Democracy and Distrust* (1980)) and Professor R. Dworkin (*Freedom's Law* (1996)) suggest, one of our principal preoccupations in the equality guarantee is to ensure that the rights of all have been taken into account in the decision-making process, then processes which are more procedurally careful and open deserve greater deference. That presumption will certainly not immunize legislation from review. The specific refusal by the Alberta legislature to include sexual orientation as a prohibited ground of discrimination of the *Individual's Rights Protection Act* did not prevent this Court from finding that distinction to be a violation of the equality guarantee (*Vriend*, *supra*, at para. 115; see also *Romer v. Evans*, 116 S.Ct. 1620 (1996), where even an amendment by plebiscite was struck down as a patent infringement on the right to equality). In those cases, despite the democratic nature of the processes, there was no significant justification for the distinction given in the course of the deliberations. Rather than a guarantee that equal consideration has been given, a democratic procedure merely gives greater weight to the facts, and the interpretation of facts, upon which the legislator has relied and that are open to reasonable disagreement.
>
> [Emphasis added.]

[150] There is no basis upon which a conclusion could be drawn on any evidence from the SGM or the October Referendum proceedings that the LSBC's membership

considered, let alone balanced, the petitioners' *Charter* rights against the competing rights of the LGBTQ community. While TWU's submissions were reviewed and considered by the Benchers prior to their April 11, 2014 decision, posted online, and available to the LSBC membership, I find that the material, while available on its website, was unlikely to have been read by many of the LSBC's members. I find that it is less likely that as many members of the LSBC read TWU's submissions as read the letter from the proponent of the SGM Resolution, which was included within the Notice to the Profession inviting members to vote on the Referendum Question, and advocated strongly for the adoption of the SGM Resolution without any mention of freedom of religion.

[151] While the Benchers clearly weighed the competing *Charter* rights of freedom of religion and equality before voting on the April Motion, the record does not permit such a conclusion to be reached with respect to the Benchers' vote of October 31, 2014. As the respondent had bound itself to accept the referendum results of its members, I am unable to find that the vote of the LSBC's members or the impugned decision considered, let alone balanced, the two implicated *Charter* rights. Further support for this conclusion comes from the fact that opposite results were reached by the Benchers' votes of April 11 and October 31, 2014, despite the October 31, 2014 vote being conducted without any substantive discussion or debate.

[152] In summary, I find that the Benchers improperly fettered their discretion and acted outside their authority in delegating to the LSBC's members the question of whether TWU's proposed faculty of law should be approved for the purposes of the admissions program. Even if I am wrong, and the Benchers had the authority to delegate the Decision to the members, I find that the Decision was made without proper consideration and balancing of the *Charter* rights at issue, and therefore cannot stand.

[153] Given my decision with respect to the invalidity of the Decision, it is unnecessary for me to resolve the issue of the collision of the relevant *Charter* rights.

Remedy

[154] The Petitioners seek a declaration that the Decision is *ultra vires* and invalid and that it unjustifiably infringes on their *Charter* rights. Although I have concluded that the LSBC inappropriately fettered its discretion, because the October Referendum did not attempt to resolve the collision of the competing *Charter* interests, I am not prepared to make such a declaration.

[155] For the same reason, I also decline to grant the orders in the nature of *certiorari*, *mandamus* and prohibition sought by the petitioners.

[156] I find that given inappropriate fettering of its discretion by the LSBC and its failure to attempt to resolve the collision of the competing *Charter* interests in the October Referendum or the Decision, the appropriate remedy is to quash the Decision and restore the results of the April 11, 2014 vote, and I so order.

"The Honourable Chief Justice Hinkson"

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

AND:

ATTORNEY GENERAL OF CANADA, THE ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA, CANADIAN COUNCIL OF CHRISTIAN CHARITIES, CHRISTIAN LEGAL FELLOWSHIP, EVANGELICAL FELLOWSHIP OF CANADA, CHRISTIAN HIGHER EDUCATION CANADA, JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS, THE ROMAN CATHOLIC ARCHDIOCESE OF VANCOUVER, THE CATHOLIC CIVIL RIGHTS LEAGUE, THE FAITH AND FREEDOM ALLIANCE, SEVENTH-DAY ADVENTIST CHURCH IN CANADA, WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND, OUTLAWS UBC, OUTLAWS UVIC, OUTLAWS TRU AND QMUNITY

INTERVENORS

ORDER

BEFORE	THE HONOURABLE CHIEF JUSTICE HINKSON	Dec. 10, 2015

THE HEARING OF THE PETITION of Trinity Western University and Brayden Volkenant coming on for hearing at the Vancouver Supreme Court located at 800 Smithe Street, Vancouver, British Columbia, on August 24, 25, and 26, 2015 AND ON HEARING Kevin L. Boonstra, Jonathan B. Maryniuk, and Kevin Sawatsky, counsel for the Petitioners, AND ON HEARING Peter A. Gall, Q.C., D.R. Munroe, Q.C., Benjamin Oliphant, and Selina Gyawali, counsel for the

Respondent, AND ON HEARING Darrell W. Roberts, Q.C., counsel for the Intervenor, Attorney General of Canada, AND ON HEARING Eric L. Vandergriendt and André Schutten, counsel for the Intervenor, Association for the Reformed Political Action (ARPA) Canada, AND ON HEARING Gwendoline Allison, counsel for the Intervenors, The Roman Catholic Archdiocese of Vancouver, The Catholic Civil Rights League and The Faith and Freedom Alliance, AND ON HEARING Janet Winteringham, Q.C. and Robyn Trask, counsel for the Intervenor, West Coast Women's Legal Education and Action Fund AND ON HEARING Jay Cameron, counsel for the Intervenor, Justice Centre For Constitutional Freedoms; and on judgment being reserved to this date;

THIS COURT ORDERS that:

1. The decision of the Law Society of British Columbia ("LSBC") made on October 31, 2014, that Trinity Western University is not an approved faculty of law for the purpose of the LSBC's admission program is quashed, and the result of the LSBC's decision made on April 11, 2014 is restored.

2. The LSBC shall pay the costs of the Petitioners in this proceeding.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Signature of
[ ] party [x] lawyer for Trinity Western University and Brayden Volkenant

Kevin L. Boonstra

Signature of
[ ] party [x] lawyer for The Law Society of British Columbia

Peter A. Gall, Q.C.

Signature of
[ ] party [x] lawyer for Attorney General of Canada

Darrell W. Roberts, Q.C.

Digitally signed by Hinkson, CJSC

By the Court.

Digitally signed by Arnaut, Maja

Registrar

Endorsements Attached

Respondent, AND ON HEARING Darrell W. Roberts, Q.C., counsel for the Intervenor, Attorney General of Canada, AND ON HEARING Eric L. Vandergriendt and André Schutten, counsel for the Intervenor, Association for the Reformed Political Action (ARPA) Canada, AND ON HEARING Gwendoline Allison, counsel for the Intervenors, The Roman Catholic Archdiocese of Vancouver, The Catholic Civil Rights League and The Faith and Freedom Alliance, AND ON HEARING Janet Winteringham, Q.C. and Robyn Trask, counsel for the Intervenor, West Coast Women's Legal Education and Action Fund AND ON HEARING Jay Cameron, counsel for the Intervenor, Justice Centre For Constitutional Freedoms; and on judgment being reserved to this date;

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Signature of
[ ] party [x] lawyer for Trinity Western University and Brayden Volkenant

Kevin L. Boonstra

Signature of
[ ] party [x] lawyer for The Law Society of British Columbia

Peter A. Gall, Q.C.

D.W. Roberts

Signature of
[ ] party [x] lawyer for Attorney General of Canada

Darrell W. Roberts, Q.C.

No. S-149837
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

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PETITIONERS

AND

THE LAW SOCIETY OF BRITISH COLUMBIA

RESPONDENT

AND

ATTORNEY GENERAL OF CANADA, THE ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA, CANADIAN COUNCIL OF CHRISTIAN CHARITIES, CHRISTIAN LEGAL FELLOWSHIP, EVANGELICAL FELLOWSHIP OF CANADA, CHRISTIAN HIGHER EDUCATION CANADA, JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS, THE ROMAN CATHOLIC ARCHDIOCESE OF VANCOUVER, THE CATHOLIC CIVIL RIGHTS LEAGUE, THE FAITH AND FREEDOM ALLIANCE, SEVENTH-DAY ADVENTIST CHURCH IN CANADA, WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND, OUTLAWS UBC, OUTLAWS UVIC, OUTLAWS TRU AND QMUNITY

INTERVENORS

ORDER

Kevin L. Boonstra
Kuhn LLP
Legal Counsel
100 - 32160 South Fraser Way
Abbotsford, B.C.
V2T 1W5

File #: 123-0040

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Trinity Western University v. The Law Society of British Columbia,* 2016 BCCA 423

Date: 20161101
Docket: CA43367

Between:

Trinity Western University and Brayden Volkenant

Respondents
(Petitioners)

And

The Law Society of British Columbia

Appellant
(Respondent)

And

Association for Reformed Political Action (ARPA) Canada, Canadian Council of Christian Charities, Christian Legal Fellowship, Evangelical Fellowship of Canada, Christian Higher Education Canada, Justice Centre for Constitutional Freedoms, Roman Catholic Archdiocese of Vancouver, Catholic Civil Rights League, Faith and Freedom Alliance, Seventh-Day Adventist Church in Canada, West Coast Women's Legal Education and Action Fund, Canadian Secular Alliance, British Columbia Humanist Association, The Advocates' Society, Outlaws UBC, Outlaws UVic, Outlaws TRU and QMUNITY

Intervenors

Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Willcock
The Honourable Madam Justice Fenlon

On appeal from: An order of the Supreme Court of British Columbia, dated December 10, 2015 (*Trinity Western University v. The Law Society of British Columbia*, 2015 BCSC 2326, Vancouver Docket No. 149837).

Counsel for the Appellant:	P.A. Gall, Q.C. D.R. Munroe, Q.C.
Counsel for the Respondents:	K.L. Boonstra K. Sawatsky J.B. Maryniuk
Counsel for the Intervenor, Association for Reformed Political Action (ARPA) Canada	E.L. Vandergriendt A. Schutten
Counsel for the Intervenor, Canadian Council of Christian Charities	B.W. Bussey
Counsel for the Intervenor, Christian Legal Fellowship	D.B.M. Ross
Counsel for the Intervenors, Evangelical Fellowship of Canada and Christian Higher Education Canada	G. Trotter
Counsel for the Intervenor, Justice Centre for Constitutional Freedoms	R.J. Cameron
Counsel for the Intervenors, Roman Catholic Archdiocese of Vancouver, Catholic Civil Rights League, and Faith and Freedom Alliance	G.C. Allison M. Wolfson, Articled Student
Counsel for the Intervenor, Seventh-Day Adventist Church in Canada	G.D. Chipeur, Q.C.
Counsel for the Intervenor, West Coast Women's Legal Education and Action Fund	J. Winteringham, Q.C. R. Trask J.R. Lithwick
Counsel for the Intervenors, Canadian Secular Alliance, and British Columbia Humanist Association	T. Dickson C. George
Counsel for the Intervenor, The Advocates' Society	M. Pongracic-Speier
Counsel for the Intervenors, Outlaws UBC, Outlaws UVic, Outlaws TRU and QMUNITY (the "LGBTQ Coalition")	E.R.S. Sigurdson K. Brooks
Place and Date of Hearing:	Vancouver, British Columbia June 1, 2, and 3, 2016

Written Submissions Received	July 18, 25, and 29, 2016
Place and Date of Judgment:	Vancouver, British Columbia November 1, 2016

Written Reasons of the Court

Table of Contents

Summary:

The Law Society decided not to approve a law school at TWU because students attending TWU must sign a Community Covenant which does not recognize same-sex marriage. TWU sought judicial review. The decision was set aside by the chambers judge. The Law Society appealed. Held: Appeal dismissed.

The issue on appeal is whether the Law Society met its statutory duty to reasonably balance the conflicting Charter rights engaged by its decision: the sexual orientation equality rights of LGBTQ persons and the religious freedom and rights of association of evangelical Christians. The Benchers initially voted to approve TWU's law school. That decision was met with a backlash from members of the Law Society who viewed it as endorsement of discrimination against LGBTQ persons. The Benchers decided to hold a referendum and to be bound by the outcome. A majority of lawyers voted against approval. The Benchers then reversed their earlier position and passed a resolution not to approve TWU's law school.

In doing so, the Benchers abdicated their responsibility to make the decision entrusted to them by the Legislature. They also failed to weigh the impact of the decision on the rights engaged. It was not open to the Benchers to simply adopt the decision preferred by the majority. The impact on Charter rights must be assessed concretely, based on evidence and not perception.

The evidence before the Law Society demonstrated that while LGBTQ students would be unlikely to access the 60 additional law school places at TWU's law school if it were approved, the overall impact on access to legal education and hence to the profession would be minimal. Some students who would otherwise have occupied the remaining 2,500 law school seats would choose to attend TWU, resulting in more options for all students. Further, denying approval would not enhance access to law school for LGBTQ students.

In contrast, a decision not to approve TWU's law school would have a severe impact on TWU's rights. The qualifications of students graduating from TWU's law program would not be recognized and graduates would not be able to apply to practise law in British Columbia. The practical effect of non-approval is that TWU cannot operate a law school and cannot therefore exercise fundamental religious and associative rights that would otherwise be guaranteed under s. 2 of the Charter.

In a diverse and pluralistic society, government regulatory approval of entities with differing beliefs is a reflection of state neutrality. It is not an endorsement of a group's beliefs.

The Law Society's decision not to approve TWU's law school is unreasonable because it limits the right to freedom of religion in a disproportionate way — significantly more than is reasonably necessary to meet the Law Society's public interest objective.

Reasons for Judgment of the Court:

I. INTRODUCTION

[1] This case raises important issues about tolerance and respect for differences in a diverse and pluralistic society. Trinity Western University (TWU) wishes to operate a law school. The Law Society of British Columbia (the Law Society) refused to approve TWU's proposed law school because TWU's Community Covenant does not recognize same-sex marriage.

[2] The question before the Court is whether the Law Society's decision was reasonable. Answering that question requires us to consider conflicting and strongly-held views, and to reconcile competing rights. On one side are the rights, freedoms and aspirations of lesbian, gay, bisexual, transgendered and queer (LGBTQ) persons and their place in a progressive and tolerant society; on the other are the religious freedom and rights of association of evangelical Christians who sincerely hold the beliefs described in the Covenant and nurtured by TWU.

[3] In a speech given in 2002, Chief Justice McLachlin spoke of the "clash of commitments" in our country between the "prevailing ethos" of the rule of law and the claims of religion ("Freedom of Religion and the Rule of Law" (René Cassin Lecture, McGill University, 11 October 2002), published in Douglas Farrow, ed., *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (McGill-Queen's University Press, 2004). The Chief Justice called this a "dialectic of normative commitments" at 21-22:

> What is good, true and just in religion will not always comport with the law's view of the matter, nor will society at large always properly respect conscientious adherence to alternate authorities and divergent normative, or ethical, commitments. Where this is so, two comprehensive worldviews collide. It is at this point that the question of law's treatment of religion becomes truly exigent. The authority of each is internally unassailable. What is more, both lay some claim to the whole of human experience. To which system should the subject adhere? How can the rule of law accommodate a worldview and ethos that asserts its own superior authority and unbounded scope? There seems to be no way in which to reconcile this clash; yet these clashes do occur in a society dedicated to protecting religion, and a liberal state must find some way of reconciling these competing commitments.

[4] For reasons explained in greater detail below, we have determined that the Law Society's decision not to approve TWU's law school was unreasonable.

II. BACKGROUND

1. The TWU Initiative

[5] TWU is a private, evangelical Christian, postsecondary institution incorporated by act of the Provincial Legislature in 1969: *An Act Respecting Trinity Western University*, S.B.C. 1969, c. 44 (as amended). It is the successor to a postsecondary institution that has been in existence since 1962.

[6] In June 2012 TWU submitted a proposal to establish a law school with a Juris Doctor degree program to the Federation of Law Societies of Canada (the Federation) and to the British Columbia Ministry of Advanced Education for their approval. The proposal contemplated the enrolment of 60 students in the school's first year of operation, which was then contemplated to be the 2016-17 academic year, increasing to a full complement of 170 students over three years. TWU also advised the Canadian Council of Law Deans, the British Columbia law deans and the Law Society of its proposal.

[7] The Federation established a special advisory committee to provide it with advice on one issue — TWU's requirement that students enter into a community covenant (the Covenant) regulating their conduct as a condition of admission. After considering submissions, that committee concluded there was no valid public interest reason to refuse approval of the TWU proposal.

[8] On December 16, 2013 the Federation granted "preliminary approval" of the proposal and the establishment of TWU's law school. The Federation concluded that the proposal was "comprehensive and is designed to ensure the students acquire each competency included in the national requirement". The Federation expressly considered whether the religious policy underlying the Covenant would constrain appropriate teaching. In approving the proposal the Federation took into account TWU's statements that it was committed to fully and properly addressing ethics and professionalism; that it recognized and acknowledged its duty to teach equality and

meet its public obligations with respect to promulgating non-discriminatory principles in its teaching of substantive law, ethics and professionalism; and that it acknowledged that human rights laws and s. 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* protect against discrimination on the basis of sexual orientation.

[9] The Minister of Advanced Education comprehensively reviewed the TWU proposal pursuant to the *Degree Authorization Act*, S.B.C. 2002, c. 24. The proposal was submitted to the Degree Quality Assessment Board and reviewed by an expert panel consisting of academics including former deans of the law faculties of the University of Alberta, Queen's, UBC and Windsor. On April 17, 2013 the expert review panel provided a report to the Ministry and, in confidence, to TWU. On December 17, 2013 the Minister granted approval to the TWU Juris Doctor program.

2. The April 11, 2014 Benchers' Resolution

[10] Upon being advised that the Federation had granted preliminary approval of TWU's proposal, and upon taking legal advice, the Benchers of the Law Society gave notice to the profession on January 24, 2014 of their intention to consider the following resolution at their April 11, 2014 meeting:

> 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.

[11] Rule 2-27(4.1) (now Rule 2-54(3)) was in that part of the Law Society Rules that addresses admission to the practice of law:

> 2-54 (1) An applicant may apply for enrolment in the admission program at any time by delivering to the Executive Director the following:
>
> > (a) a completed application for enrolment in a form approved by the Credentials Committee, including a written consent for the release of relevant information to the Society;
> >
> > (b) proof of academic qualification under subrule (2);
> >
> > (c) an articling agreement stating a proposed enrolment start date not less than 30 days from the date that the application is received by the Executive Director;

> (d) other documents or information that the Credentials Committee may reasonably require;
>
> (e) the application fee specified in Schedule 1.
>
> (2) Each of the following constitutes academic qualification under this rule:
>
> (a) 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;
>
> (b) a Certificate of Qualification issued under the authority of the Federation of Law Societies of Canada;
>
> (c) approval by the Credentials Committee of the qualifications of a full-time lecturer at the faculty of law of a university in British Columbia.
>
> (3) 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.
>
> [Emphasis added.]

[12] Prior to its consideration of that resolution, the Law Society received from TWU a consolidated proposal for the establishment of the law school, a brochure containing information about TWU, and a complete copy of the Covenant.

[13] The Covenant is a five-page document which includes the following relevant provisions:

> Trinity Western University (TWU) is a Christian University of the liberal arts, sciences and professional studies with a vision for developing people of high competence and exemplary character who distinguish themselves as leaders in the marketplaces of life.
>
> …
>
> The University's mission, core values, curriculum and community life are formed by a firm commitment to the person and work of Jesus Christ as declared in the Bible. This identity and allegiance shapes an educational community in which members pursue truth and excellence with grace and diligence, treat people and ideas with charity and respect, think critically and constructively about complex issues, and willingly respond to the world's most profound needs and greatest opportunities.
>
> …
>
> The community covenant is a solemn pledge in which members place themselves under obligations on the part of the institution to its members, the members to the institution, and the members to one another. In making this pledge, members enter into a contractual agreement and a relational bond. By doing so, members accept reciprocal benefits and mutual responsibilities, and strive to achieve respectful and purposeful unity that aims for the

advancement of all, recognizing the diversity of viewpoints, life journeys, stages of maturity, and roles within the TWU community. It is vital that each person who accepts the invitation to become a member of the TWU community carefully considers and sincerely embraces this community covenant.

…

The TWU community covenant involves a commitment on the part of all members to embody attitudes and to practise actions identified in the Bible as virtues, and to avoid those portrayed as destructive. Members of the TWU community, therefore, commit themselves to:

- cultivate Christian virtues, such as love, joy, peace, patience, kindness, goodness, faithfulness, gentleness, self-control, compassion, humility, forgiveness, peacemaking, mercy and justice
- live exemplary lives characterized by honesty, civility, truthfulness, generosity and integrity

  …
- treat all persons with respect and dignity, and uphold their God-given worth from conception to death

  …
- observe modesty, purity and appropriate intimacy in all relationships, reserve sexual expressions of intimacy for marriage, and within marriage take every reasonable step to resolve conflict and avoid divorce
- exercise careful judgment in all lifestyle choices, and take responsibility for personal choices and their impact on others

  …

In keeping with biblical and TWU ideals, community members voluntarily abstain from the following actions:

- communication that is destructive to TWU community life and inter–personal relationships, including gossip, slander, vulgar/obscene language, and prejudice

  …
- sexual intimacy that violates the sacredness of marriage between a man and a woman

  …

People face significant challenges in practicing biblical sexual health within a highly sexualized culture. A biblical view of sexuality holds that a person's decisions regarding his or her body are physically, spiritually and emotionally inseparable. Such decisions affect a person's ability to live out God's intention for wholeness in relationship to God, to one's (future) spouse, to others in the community, and to oneself. Further, according to the Bible, sexual intimacy is reserved for marriage between one man and one woman, and within that marriage bond it is God's intention that it be enjoyed as a means for marital intimacy and procreation. Honouring and upholding these principles, members of the TWU community strive for purity of thought and

> relationship, respectful modesty, personal responsibility for actions taken, and avoidance of contexts where temptation to compromise would be particularly strong.
>
> [Footnotes omitted.]

[14] In support of the provisions relating to sexual behaviour, the Covenant refers in footnotes to passages from the Bible in support of the drafters' conception of virtuous and destructive practices.

[15] We note that it is the Covenant's definition of marriage "between a man and a woman" that is in issue in these proceedings. The Covenant prohibits all expressions of sexual intimacy outside of marriage, regardless of sexual orientation; in that respect, all students are treated equally. However, the Covenant recognizes the marriage of heterosexual couples only; expressions of sexual intimacy between same-sex married couples remain prohibited. It is in this respect that LGBTQ persons are treated unequally.

[16] Prior to their April 11, 2014 meeting, the Benchers provided TWU with a copy of the transcript of a February 28, 2014 Benchers' meeting and copies of input subsequently received from the profession and the public. TWU was invited to provide written submissions to the Benchers and to attend and be heard at the April 11, 2014 meeting.

[17] Before that meeting the Benchers sought the following information:

a) BC Human Rights Commission Annual Reports of complaints and its statistics on areas of discrimination;

b) the Law Society's Equity Ombudsperson's 2011 report on areas of discrimination;

c) information from Canadian law deans regarding "any trouble [that] they have had with Trinity Western graduates, in particular in the area of anti-gay activities";

d) information on the American Bar Association's anti-discrimination policy and details and background regarding exemptions for religious law schools;

e) details of Law Society discipline matters regarding anti-gay activity; and

f) information from TWU with respect to the number of people disciplined for engaging in prohibited activities and a breakdown and details of areas of discipline.

[18] In its written submission dated April 3, 2014, TWU advised the Benchers that in the ten years preceding the application there had been an average of fewer than three instances per year of sexual misconduct by students, including reports of unwelcome sexual advances. In two instances students had withdrawn from TWU, and there had been "occasional" suspensions of students or placement of students on probation. No case had resulted in expulsion from the University. Two faculty/staff had been disciplined for instances of sexual harassment.

[19] On April 8, 2014 the President of the Law Society asked the President of TWU, on behalf of a Bencher, whether TWU would consider an amendment to the Covenant with respect to sexual intimacy. In response TWU advised the Law Society:

> [The Covenant] is an expression of the religious beliefs of TWU and its community that is necessary for TWU to live out its purposes as a Christian university. It is critical for TWU, as a private religious educational community, to be able to define its important religious values consistent with its biblical beliefs. TWU is a Christian university that primarily serves the evangelical Christian community (and that may include others that are prepared to learn in an environment of which the Community Covenant is an important part).
>
> The religious beliefs about marriage and human sexuality are important enough to TWU's community to be included in the Community Covenant. It speaks of the sacredness of marriage, not for civic purposes but for religious purposes. …
>
> It should be beyond question that these beliefs were not created to communicate anything disparaging about members of the LGBTQ communities. The Community Covenant speaks to that most strongly in terms of treating all persons with "respect and dignity, and uphold their God-given worth". This is equally a fundamental aspect of TWU's religious beliefs.

> TWU's sincerely held religious beliefs about marriage and human sexuality may not be widely held by others in society. As a result, these beliefs may not be valued, or even seen as legitimate. This is precisely why s. 2(a) and s. 15 of the *Charter* shield TWU's community from interference. The *Charter* shields TWU and allows it to define its own religious beliefs and values.
>
> …
>
> TWU cannot simply disavow those beliefs in the hope or expectation of a positive result from the Benchers and should not be asked to do so.

[20] The transcript of the meeting of the Benchers on April 11, 2014 reflects a conscientious consideration of the motion before the Benchers and of legal opinions sought by the Law Society and the submissions of members of the Society, the public and TWU. Seven Benchers voted in favour of the resolution to declare that TWU was not an approved faculty of law. Twenty Benchers voted against the motion. The motion was therefore defeated.

3. The June 10, 2014 Members' Resolution

[21] Following the meeting of April 11, 2014 the Executive Director of the Law Society received a written request pursuant to what was then Rule 1-9(2) of the Law Society Rules. It required the Benchers to convene a special general meeting of the Law Society to consider a resolution in the following terms:

> WHEREAS:
>
> -Section 28 of the *Legal Profession Act* permits the Benchers to take steps to promote and improve the standard of practice by lawyers, including by the establishment, maintenance and support of a system of legal education;
>
> -Trinity Western University requires students and faculty to enter into a covenant that prohibits "sexual intimacy that violates the sacredness of marriage between a man and woman";
>
> -The Barristers' and Solicitors' Oath requires Barristers and Solicitors to uphold the rights and freedoms of all persons according to the laws of Canada and of British Columbia;
>
> -There is no compelling evidence that the approval of a law school premised on principles of discrimination and intolerance will serve to promote and improve the standard of practice of lawyers as required by section 28 of the *Legal Profession Act*; and
>
> -The approval of Trinity Western University, while it maintains and promotes the discriminatory policy reflected in the covenant, would not serve to promote and improve the standard of practice by lawyers;

> THEREFORE:
>
> 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.

[22] Members of the Law Society received notice of a Special General Meeting and a message from the Benchers providing the following advice about their April 11, 2014 decision:

> The decision was made after a thoughtful and sometimes emotional expression of views and careful consideration of two Federation reports on the Trinity Western University application, nearly 800 pages of submissions from the public and the profession and a submission from TWU, and after thoroughly considering the judgment of the Supreme Court of Canada in *Trinity Western University v. British Columbia College of Teachers* 2001 SCC 31… and its applicability to the TWU application. In addition, the Benchers considered a memorandum from former Chief Justice Finch on the relevant considerations and additional legal opinions as follows:
>
> 1. Finch/Banks - Overview Brief re: Relevant Considerations for the Law Society in Relation to the Proposed Faculty of Law at TWU
> 2. Laskin Opinion on Applicability of SCC Decision in *TWU v. BCCT*
> 3. Gomery Opinion on Academic Qualifications
> 4. Gomery Opinion on Application of the Charter
> 5. Gomery Opinion on Scope of Law Society's Discretion under Rule 2-27 (4.1)
> 6. Thomas/Foy Opinion on Application of the *Labour Mobility Act* and the *Agreement on Internal Trade*.

Those materials were made available to members on the Law Society website.

[23] By notice to the profession dated June 2, 2014 the Benchers stated they would refrain from speaking to the resolution at the Special General Meeting because they had already considered the issue on April 11, 2014 and wished to have members' voices, "both for and against, fully heard."

[24] The Special General Meeting took place on June 10, 2014 at 16 locations across the province; 3,210 members of the Law Society voted for the resolution and 968 against.

4. The September 26, 2014 Benchers' Resolution

[25] The Benchers next scheduled a meeting for September 26, 2014 to consider the resolution of the members. TWU was notified that the Benchers intended to consider three motions:

a) a motion to implement the June 10, 2014 resolution of the members;

b) a motion to call for a referendum to consider a resolution that would be binding on the Benchers; and

c) a motion to postpone consideration of the approval of the TWU accreditation until after judgment in one of the then-pending cases before the superior courts of British Columbia, Ontario or Nova Scotia.

[26] In response, TWU took the position that there was no legal basis upon which the Benchers could adopt the members' June 10, 2014 resolution or call for a binding referendum, and that to do so would be a breach of the Benchers' statutory duties and an inappropriate delegation of their responsibilities.

[27] At their meeting of September 26, 2014 the Benchers resolved to be bound by a referendum on the following terms:

> BE IT RESOLVED THAT:
>
> 1. A referendum … be conducted of all members of the Law Society of British Columbia (the "Law Society") to vote on the following resolution:
>
>   "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."
>
> 2. The Resolution will be binding and will be implemented by the Benchers if at least:
>
>   a) 1/3 of all members in good standing of the Law Society vote in the Referendum; and
>
>   b) 2/3 of those voting vote in favour of the Resolution.
>
> 3. The Benchers hereby determine that implementation of the Resolution does not constitute a breach of their statutory duties, regardless of the results of the Referendum.

> 4. The Referendum be conducted as soon as possible and that the results of the Referendum be provided to the members by no later than October 30, 2014.
>
> [Emphasis added.]

The other motions before the Benchers were defeated.

[28] Members of the Law Society were permitted to vote on the referendum until October 29, 2014. On October 30, 2014 TWU was advised of the referendum results: 5,951 lawyers were in favour of declaring that the proposed law school was not an approved faculty of law; 2,088 lawyers voted against the resolution. There were 8,039 valid ballots cast. A total of 13,350 practising, non-practising and retired lawyers had been entitled to vote.

5. The October 31, 2014 Benchers' Resolution

[29] The Benchers met on October 31, 2014 to consider the outcome of the referendum. A letter to the Law Society written by the President of TWU and additional affidavits were presented to the Benchers. The President of the Law Society confirmed that "subject to a request by a Bencher or Benchers for additional time to review and consider the TWU letter and attachments, a motion to implement the referendum result will be presented on behalf of the Executive Committee."

[30] A Bencher then moved for the adoption of a declaration that "pursuant to Law Society Rule 2-27 (4.1), Trinity Western University's proposed School of Law is not an approved faculty of law". The minutes of the Benchers' meeting following the motion read as follows:

> Mr. Crossin [David Crossin, Q.C., the 2nd Vice President of the Law Society] invited TWU President Robert Kuhn to address the Benchers. Mr. Kuhn declined the invitation. Mr. Crossin confirmed that the Benchers' duty is to determine the appropriate response of the Law Society to any issue that may arise, such that the public interest in the administration of justice is protected.
>
> Mr. Crossin also confirmed that the Law Society remains ready and willing to enter into discussion with TWU regarding amendment of TWU's community covenant.
>
> There being no further discussion, Ms. Lindsay called for a vote on the motion by show of hands.

The motion was carried with 25 Benchers in favour, one opposed and four abstaining.

6. Revocation of Ministerial Consent

[31] On December 11, 2014 the Minister of Advanced Education, having considered submissions of TWU, informed the President of TWU of the Minister's decision to revoke his consent to the proposed law program at TWU under the *Degree Authorization Act* (*DAA*). The Minister stated:

> Section 4(1) of the *DAA* requires me to be satisfied that an applicant meets the published criteria in granting consent. In this case, one of the published criteria (credential recognition) is no longer met given the decisions of provincial law societies not to approve the TWU law faculty. The objective of the *DAA* in protecting students through the quality assurance review would be defeated if I was unable to act on post-consent events that undermine the conditions of consent.
>
> …
>
> At this point in time, I am not making any final determination as to whether consent for the proposed law program at TWU should be forever refused because of the lack of regulatory body approval. Instead, I am making an interim determination that steps must be taken to protect the interests of prospective students until TWU's legal challenge to the decision of the Law Society of BC (as well as challenges to law societies in other provinces) have been resolved.…The merits of TWU's challenge are for the court to address; my concern is simply to protect the interests of prospective students while the challenge is being pursued.

7. Concurrent Consideration of TWU Accreditation

[32] As the Minister indicated, accreditation of the TWU law school has been considered in a number of jurisdictions concurrently with the proceedings in British Columbia.

[33] The Law Society of Alberta advised its members by newsletter in December 2013 that it had delegated to the Federation of Law Societies of Canada the authority to approve Canadian common law degrees and that the Federation had granted preliminary approval to the proposed TWU law program.

[34] At a meeting in February 2014 the Benchers of the Law Society of Saskatchewan, in response to the Federation's preliminary approval of the TWU law

school, considered an amendment to their rules which delegate approval of common law programs to the Federation. The proposed amendment would have permitted the Benchers to adopt a resolution declaring the law school was not or had ceased to be an approved faculty of law. That proposed resolution was defeated.

[35] At their April 10 and April 24, 2014 convocations, the Benchers of the Law Society of Upper Canada voted against the accreditation of the proposed TWU law school.

[36] On April 25, 2014 the Nova Scotia Barristers' Society adopted the following motion:

> Council accepts the Report of the Federation Approval Committee that, subject to the concerns and comments as noted, the TWU program will meet the national requirement;
>
> Council resolves that the Community Covenant is discriminatory and therefore Council does not approve the proposed law school at Trinity Western unless TWU either:
>
> i) exempts law students from signing the Community Covenant; or
>
> ii) amends the Community Covenant for law students in a way that ceases to discriminate.
>
> Council directs the Executive Director to consider any regulatory amendments that may be required to give effect to this resolution and to bring them to Council for consideration at a future meeting.

[37] In May 2014 the Benchers of the Law Society of Manitoba decided not to engage in a local approval process and to continue to delegate to the Federation the task of approving Canadian common law programs.

[38] In June 2014 the Benchers of the Law Society of Newfoundland and Labrador resolved to place in abeyance the question whether graduates of the TWU law school would be accepted for admission to that law society.

[39] In the spring of 2014 the Yukon Law Society accepted the Federation's decision regarding preliminary approval of the TWU law program.

[40] In June 2014 the Council of the New Brunswick Law Society voted to accredit TWU's proposed law school program.

8. Judicial Review Elsewhere

[41] The decisions taken by the Nova Scotia Barristers' Society and the Law Society of Upper Canada have been challenged.

8.1 Nova Scotia

[42] In *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25, Campbell J. of the Supreme Court of Nova Scotia held:

> 181 The NSBS did not act reasonably in interpreting *the Legal Profession Act* to grant it the statutory authority to refuse to accept a law degree from TWU unless TWU changed it[s] Community Covenant. It had no authority to pass the [impugned] resolution or the regulation.

and:

> 270 The NSBS resolution and regulation infringe on the freedom of religion of TWU and its students in a way that cannot be justified.

[43] On July 26, 2016 the Nova Scotia Court of Appeal, for reasons indexed at 2016 NSCA 59, dismissed the appeal of the Barristers' Society without commenting on *Charter* issues. The Court held the Barristers' Society did not have the statutory authority to enact a regulation permitting the Society to refuse to recognize law degrees granted by universities with discriminatory admission or enrollment policies, nor the authority to adopt a resolution disapproving the TWU program:

> [38] … [T]he Amended Regulation is *ultra vires* the *Legal Profession Act*. So the Amended Regulation, and the Resolution that depends on it, are invalid. That disposes of the matter. This Court will not comment on either (1) Trinity Western's claimed infringement of s. 2(a) of the *Charter* or (2) whether such an infringement, if it exists, would be either justified under s. 1 and *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, or proportionate under *Doré v. Barreau du Québec*, 2012 SCC 12 (CanLII), [2012] 1 S.C.R. 395 and *Loyola High School v. Québec (Attorney General)*, 2015 SCC 12 (CanLII), [2015] 1 S.C.R 613.

[44] The Council of the Barristers' Society was held to have "determined" that TWU "unlawfully discriminates" contrary to the *Charter* or Nova Scotia *Human Rights Act*. The Court found that in doing so the Council had employed a criterion "completely unrelated to the Council's regulation-making authority under the *Legal Profession Act*" (at para. 67).

8.2 Ontario

[45] The decision of the Benchers of the Law Society of Upper Canada of April 24, 2014 was challenged on a judicial review heard by the Divisional Court of the Superior Court of Justice of Ontario on June 1-4, 2015: *Trinity Western University v. The Law Society of Upper Canada*, 2015 ONSC 4250. The Divisional Court held the Law Society had the jurisdiction to make the challenged decision:

> [58] For all of these reasons, therefore, we conclude that the principles that are set out in s. 4.2, and that are to govern the respondent's exercise of its functions, duties and powers under the *Law Society Act*, are not restricted simply to standards of competence. Rather, they engage the respondent in a much broader spectrum of considerations with respect to the public interest when they are exercising their functions, duties and powers, including whether or not to accredit a law school.

It rejected TWU's *Charter* challenge:

> [123] Simply put, in balancing the interests of the applicants to freedom of religion, and of the respondent's members and future members to equal opportunity, in the course of the exercise of its statutory authority, the respondent arrived at a reasonable conclusion. It is not the only decision that could have been made, as the difference in the vote on the question reflects. But the fact that people may disagree, even strongly disagree, on the proper result, does not mean that the ultimate decision is unreasonable. It also does not mean that, just because more Benchers favoured one approach over the other, the result equates to the imposition of some form of "majoritarian tyranny" on the minority, as the applicants contend.
>
> [124] We conclude that the respondent did engage in a proportionate balancing of the *Charter* rights that were engaged by its decision and its decision cannot, therefore, be found to be unreasonable. We reach that conclusion based on a review of the record undertaken in accordance with the procedure set out in *Newfoundland Nurses*. In so doing, we have considered the speeches given at Convocation by the Benchers as a whole – not in isolation, one from the other. In determining whether a proportionate balancing was undertaken, it is only fair, in our view, to consider the interchange between the Benchers, not whether the individual speeches of each Bencher reflect that balance. In that regard, it is important to remember that the Benchers were speaking in reaction to what others had said, including what TWU itself had said. They were not speaking in a vacuum.

[46] On June 29, 2016 the Ontario Court of Appeal dismissed TWU's appeal for reasons indexed at 2016 ONCA 518. MacPherson J.A., for the Court, held the Divisional Court had been correct in applying a reasonableness standard of review to the Law Society's decision. The Court noted at para. 68 that the Benchers of the

Law Society constitute a tribunal "entitled, indeed required, to take account of, and try to act consistently with, *Charter* values as they make decisions within their mandate". At para. 69, the Court held: "[The Law Society's] decision not to accredit TWU fell squarely within its statutory mandate to act in the public interest."

[47] In relation to the balancing exercise, the Court held at para. 129 that although the Benchers' accreditation decision would adversely impact TWU, it was "[c]learly" reasonable "within the parameters set by *Dunsmuir*, *Ryan* and *Doré".* The Court gave four reasons for that conclusion at paras. 130-141:

(i) the Law Society, together with law schools, is a gatekeeper to entry into the legal profession with an obligation to ensure equality of admissions into the profession;

(ii) in balancing the rights at issue, the Law Society could attach weight to its obligations under applicable human rights legislation;

(iii) TWU was considered by the Court to be seeking access to a public benefit — the accreditation of its law school — and the Law Society, in determining whether to confer that public benefit, must consider whether doing so would meet its statutory mandate to act in the public interest; and

(iv) the Law Society's balancing in its accreditation decision was faithful to international human rights law, and especially international treaties and other documents that bind Canada.

9. The Judgment of the Court Below

[48] The application for judicial review in this case came on for hearing before the Chief Justice of the Supreme Court of British Columbia on August 24-26, 2015. For reasons indexed at 2015 BCSC 2326 the petition for judicial review was successful and the decision not to approve TWU's law school was set aside.

[49] The Chief Justice found that the procedures followed by the Law Society in reaching its decision were improper. In particular, he found that the Benchers had

unlawfully delegated their decision-making powers to the members, and had fettered their discretion by agreeing to be bound by the results of the referendum. He also found that it was incumbent on the Benchers to engage in a process of balancing the statutory objectives of the *Legal Profession Act* against *Charter* values, and that they failed to do so. For those reasons, he quashed the decision of the Law Society. He concluded it was unnecessary "to resolve the issue of the collision of the relevant *Charter* rights" (at para. 153).

[50] Although it does not appear to have been the basis for his decision, the chambers judge was also of the view that TWU had not been given a fair opportunity to present its case during the referendum period, which he characterized as a denial of procedural fairness.

III. ISSUES ON APPEAL

[51] On appeal the parties raise four issues:

1. Did the Law Society have statutory authority to refuse to approve TWU's law school on the basis of an admissions policy?

2. Did the Benchers unlawfully sub-delegate or fetter their decision-making authority?

3. Was TWU denied procedural fairness?

4. Does the Law Society's decision reasonably balance the statutory objectives of the *Legal Profession Act* against the religious freedom rights of TWU?

IV. ANALYSIS

1. Did the Law Society have statutory authority to refuse to approve TWU's law school on the basis of an admissions policy?

[52] The first issue the chambers judge considered was whether the Law Society, in deciding whether to approve a law faculty, was limited to considering "academic qualifications". TWU argued that the Law Society's jurisdiction was limited to

determining whether the legal instruction that TWU proposed to provide was capable of producing graduates ready to become competent lawyers.

[53] The judge rejected that contention, holding that:

> [108] … [t]he LSBC has a broad statutory authority that includes the object and duty to preserve and protect the rights and freedoms of all persons. ... [A] decision to refuse to approve a proposed faculty of law on the basis of an admissions policy is directly related to the statutory mandate of the LSBC and its duties and obligations under the [*Legal Profession Act*].

[54] The *Legal Profession Act* sets out the object and duty of the Law Society of British Columbia as follows:

> 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, and
>
> (e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

[55] The power of the Benchers to establish the requirements for admission to the profession is set out in s. 21(1)(b):

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

[56] TWU concentrates on the phrase “academic requirements” in s. 21(1)(b) of the Act. As it did before the chambers judge, it argues that matters other than the adequacy of the academic program at a law faculty cannot be considered by the Benchers in deciding whether or not to approve it.

[57] We are of the view that the chambers judge made no error in finding that the Law Society's decision to approve or deny approval to a law faculty could be based on factors beyond the academic education that its graduates would receive.

[58] The Law Society's objectives, as set out in s. 3 of the Act, are very broad. While "ensuring the competence of lawyers" is an objective, there are many others, including "preserving and protecting the rights and freedoms of all persons". Nothing in s. 21(1)(b) prevents the Benchers from considering the general objectives of the Law Society in determining the requirements for admission to the profession.

[59] The chambers judge concluded his analysis of this issue by finding that the Law Society correctly interpreted its jurisdiction. We agree. In our view, the Benchers interpreted the Act in a reasonable manner (and, indeed, in a manner that would pass the standard of correctness) when they came to the view that a decision not to approve a law faculty could be made on bases other than just the adequacy of the faculty's academic program.

2. Did the Benchers unlawfully sub-delegate or fetter their decision-making authority?

[60] The chambers judge found that, in binding themselves to the results of the referendum, the Benchers unlawfully sub-delegated their powers to the membership of the Law Society and fettered their own discretion.

[61] The principles underlying the rule against sub-delegation and the rule against fettering of discretion overlap to a considerable degree, but sub-delegation and fettering are distinct concepts, and it is not helpful to blur them together.

2.1 Sub-Delegation

[62] The rule against sub-delegation is easily stated: where an enactment delegates rule-making or decision-making authority to a particular person, that person is entitled to exercise the power directly, but is generally not entitled to delegate its exercise to another. The maxim that a delegate is not entitled to re-delegate is a basic principle of administrative law. While there are exceptions (see the classic article by John Willis, "*Delegatus non potest delegare*" (1943) 21 Can.

Bar Rev. 257), sub-delegation is generally permitted only where a statute authorizes it expressly or by necessary implication (Donald Brown and John Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Carswell, 2013) (loose-leaf) §§ 13-15 and 13-16).

[63] Section 21(1)(b) of the *Legal Profession Act* clearly delegates to the Benchers the power to establish requirements for admission to the profession. They have exercised that rule-making power, enacting former Rule 2-27(4.1) and current Rule 2-54(3). Those rules specifically provide that a law faculty that has been approved by the Federation is an approved law faculty for the purpose of admission to the Law Society of British Columbia unless the Benchers pass a resolution to the contrary. Nothing in the Act or Rules suggests that the Benchers are entitled to sub-delegate the power to pass such a resolution.

[64] In the case before us, however, the resolution declaring TWU not to be an approved law faculty was a resolution passed by the Benchers. While the Benchers considered themselves bound to pass such a resolution as a result of the referendum vote, the actual exercise of the statutory power was undertaken by them. In the result, this is not a case of sub-delegation. The statutory power was exercised directly by the body empowered to exercise it.

2.2 Fettering

[65] The issue, then, is not whether the Law Society's resolution was made by the body with authority to make it, but whether that body properly exercised its discretion. It is evident that, after the referendum results were known, the Benchers did not consider themselves free to exercise their discretion in an unrestricted manner. Rather, they considered the referendum binding on them.

[66] It is not necessary to engage in any detailed analysis of the concept of fettering of discretion in these circumstances. It is readily apparent that the Benchers considered the referendum to have eliminated their discretion completely. The question here is not whether their discretion was fettered — it clearly was — but rather whether that fettering was authorized by law. That question can be answered

by determining whether the Benchers had statutory authority to conduct a binding referendum.

(a) The Power to Hold a Binding Referendum

[67] The *Legal Profession Act* includes a provision that allows the members of the Law Society to make resolutions that are binding on the Benchers in limited circumstances. The process is a complex one, starting with a resolution at a general meeting. The provision is as follows:

> 13 (1) A resolution of a general meeting of the society is not binding on the benchers except as provided in this section.
>
> (2) A referendum of all members must be conducted on a resolution if
>
> (a) it has not been substantially implemented by the benchers within 12 months following the general meeting at which it was adopted, and
>
> (b) the executive director receives a petition signed by at least 5% of members in good standing of the society requesting a referendum on the resolution.
>
> (3) Subject to subsection (4), the resolution is binding on the benchers if at least
>
> (a) 1/3 of all members in good standing of the society vote in the referendum, and
>
> (b) 2/3 of those voting vote in favour of the resolution.
>
> (4) The benchers must not implement a resolution if to do so would constitute a breach of their statutory duties.

[68] Where the procedures set out in s. 13 have been followed, and the statutory requirements have been met, the members can adopt resolutions that fetter the discretion of the Benchers. There is, in principle, no reason that the s. 13 procedure could not be used, in appropriate circumstances, to require the Benchers to exercise their rule-making functions in a particular way.

[69] The October 2014 referendum was held without the full requirements of s. 13 having been met. A resolution was passed at the June 10, 2014 general meeting directing the Benchers to pass a resolution declaring TWU not to be an approved law faculty. Pursuant to s. 13(1) of the *Legal Profession Act*, that resolution was not binding on the Benchers.

[70] At their September 26, 2014 meeting, the Benchers considered their options and decided to hold a referendum, the results of which would be binding upon them if the results met the standards set out in s. 13(3) of the *Legal Profession Act*. The Benchers also purported to meet the requirements of s. 13(4) of the *Act* by making a determination that "implementation of the Resolution does not constitute a breach of their statutory duties, regardless of the results of the Referendum."

[71] It is not clear, on the face of the statute, that the Benchers had the power to circumvent the procedures set out in s. 13(2) of the *Act* and call a referendum without requiring a petition or a 12-month waiting period.

[72] The Law Society relies on former Rule 1-37 (now Rule 1-41) as authority for the Benchers to call a referendum:

> 1-37 (1) The Benchers may direct the Executive Director to conduct a referendum ballot of all members of the Society or of all members in one or more districts.
>
> (2) The Rules respecting the election of Benchers apply, with the necessary changes and so far as they are applicable, to a referendum under this Rule, except that the voting paper envelopes need not be separated by districts.

[73] The Benchers say it was open to them to call the referendum under Rule 1-37, and that they did not have to await action by the members under s. 13(2) of the *Legal Profession Act*. TWU, on the other hand, sees s. 13 of the *Legal Profession Act* as a complete code governing the making of binding resolutions by the members of the Law Society.

[74] We have not heard argument on the question of whether the Law Society had jurisdiction to enact Rule 1-37; nor have the parties made full submissions on the scope of the rule. It is not apparent that any provision, apart from s. 13 of the *Legal Profession Act*, gives the Law Society the ability to exercise its powers by referendum. Our tentative view, then, is that Rule 1-37, at least insofar as it deals with resolutions binding on the Benchers, is ancillary to s. 13 of the statute, and not a stand-alone procedure. It cannot, itself, obviate the requirements of s. 13(2).

[75] It might be argued, however, that in setting out circumstances in which a referendum must be held, s. 13(2) does not prevent the Benchers from holding referendums in other situations. To some degree, practical considerations favour an interpretation of s. 13 that allows the Benchers to hold referendums without insisting on the filing of petitions or the lapse of 12 months. Those statutory requirements are in place to ensure that referendums will not be held where only a small number of members feel strongly about an issue, or where the Benchers simply need time to study an issue before dealing with it. Where the Benchers are convinced that the requirements of s. 13(2) will inevitably be met in the future, and where they favour an abbreviated process, there does not appear to be any rationale for insisting that the referendum be delayed until the technical statutory conditions are fulfilled.

[76] We note, as well, that the Benchers are entitled to a margin of appreciation in interpreting their home statute. As long as their interpretation is not unreasonable, it will be respected by the courts.

[77] As we are of the view that the Benchers' decision to adopt the results of the referendum was improper for other reasons, we need not come to any final conclusion on whether the requirements set out in s. 13(2) are conditions precedent to the holding of a binding referendum. For the purposes of this case, we are prepared to assume, without deciding, that the Benchers had the authority to call a binding referendum to consider the resolution passed at the June 10, 2014 meeting despite the absence of a petition, and despite the fact that 12 months had not passed from the date of the meeting.

(b) Consistency with Statutory Duties

[78] We are not, however, convinced that the Benchers acted properly in passing a resolution to the effect that, regardless of the results of the referendum, following those results would be consistent with their statutory duties.

[79] The Benchers were cognizant of the fact that *Charter* values were implicated in the decision as to whether TWU should be an approved law faculty. They had, in the course of their own debates, become fully aware that the decision required them

to consider TWU's concerns for religious freedom, as well as opponents' concerns for equality on the basis of sexual orientation.

[80] Where *Charter* values are implicated in an administrative decision, and the decision might infringe a person's *Charter* rights, the administrative decision-maker is required to balance, or weigh, the potential *Charter* infringement against the objectives of the administrative regime. In *Doré v. Barreau du Québec*, 2012 SCC 12, the Supreme Court of Canada held that where an administrative tribunal undertakes such a balancing, it is entitled to deference.

[81] The rationale for such deference is that the tribunal will have a special appreciation for the statutory regime under which it operates, and a nuanced understanding of the facts of an individual case. In *Doré*, Abella J., for the Court, said:

> [47] An administrative decision-maker exercising a discretionary power under his or her home statute, has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values. As the Court explained in *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, adopting the observations of Prof. Danielle Pinard:
>
> > [translation] … administrative tribunals have the skills, expertise and knowledge in a particular area which can with advantage be used to ensure the primacy of the Constitution. Their privileged situation as regards the appreciation of the relevant facts enables them to develop a functional approach to rights and freedoms as well as to general constitutional precepts.
> >
> > (p. 605, citing "Le pouvoir des tribunaux administratifs québécois de refuser de donner effet à des textes qu'ils jugent inconstitutionnels" (1987-88), *McGill L.J.* 170, at pp. 173-74.)

[82] We would observe, however, that many tribunals have limited contact with the *Charter* and may have considerable difficulty interpreting it. There is also a real possibility that a tribunal's preoccupation with its own statutory regime will lead it to value the statutory objectives of that regime too highly against *Charter* values. As well, it is important to recognize that administrative tribunals do not enjoy the same independence that judges do. An elected tribunal or a statutory decision-maker with a renewable term of appointment may be vulnerable to public or governmental

pressure, and may find it difficult to give the *Charter* rights of unpopular persons or groups sufficient weight when balancing them against statutory objectives.

[83] While *Doré* requires a court to grant tribunals a "margin of appreciation" in determining whether they have properly balanced matters, the tribunal's decision will, in all cases, have to fall within the bounds of reasonableness. Where a tribunal has failed to appreciate the significance of a *Charter* value in the balancing, its decision will be found to be unreasonable — see, for example, *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12.

[84] A very significant aspect of *Doré* is its discussion of the procedure to be adopted by a tribunal in balancing statutory objectives against *Charter* values:

> [55] How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. In *Lake*, for instance, the importance of Canada's international obligations, its relationships with foreign governments, and the investigation, prosecution and suppression of international crime justified the *prima facie* infringement of mobility rights under s. 6(1) (para. 27). In *Pinet*, the twin goals of public safety and fair treatment grounded the assessment of whether an infringement of an individual's liberty interest was justified (para. 19).
>
> [56] Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the *Oakes* context. As this Court recognized in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160, "courts must accord some leeway to the legislator" in the *Charter* balancing exercise, and the proportionality test will be satisfied if the measure "falls within a range of reasonable alternatives". The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of *Dunsmuir*, "falls within a range of possible, acceptable outcomes" (para. 47).

[85] In making their October 31, 2014 declaration, the Benchers did not engage in any exploration of how the *Charter* values at issue in this case could best be protected in view of the objectives of the *Legal Profession Act*. They made no decision at all, instead deferring to the vote of the majority in the referendum.

[86] Counsel for the Law Society contends that the Benchers decided that either of the possible results of the referendum would fall within the range of reasonable outcomes of the required balancing exercise, and that their decision should be upheld. In our view, that contention confuses the role to be played by an administrative tribunal and the role of the courts.

[87] Administrative tribunals are called upon to make decisions under particular statutory regimes. They are considered to have expertise and a privileged position in making such decisions. As such, where a tribunal has made what it considers to be the right decision, the courts will defer to that decision if it is not unreasonable. The reasonableness standard on judicial review does not alter the tribunal's role, which is to make the right decision. Rather, it is a recognition that, within a particular statutory regime, the tribunal will generally be in a better position to assess whether a decision is "right" than a court will be.

[88] A tribunal's function, in other words, is always to make the decision that it considers correct. The "reasonableness" standard is not one to be applied by the tribunal, but by a court on judicial review.

[89] In the case before us, it was up to the Benchers to weigh the statutory objectives of the *Legal Profession Act* against *Charter* values, and to arrive at the decision that, in their view, best protected *Charter* values without sacrificing important statutory objectives. They could not fulfill their statutory duties without undertaking this balancing process.

[90] In deciding that either result on the referendum would meet the reasonableness standard, and therefore be acceptable, the Benchers were conflating the role of the courts with their own role.

[91] As the chambers judge found, the Benchers failed to fulfill their function when they chose not to come to any conclusion as to how statutory objectives should be weighed against *Charter* values. In reaching the decision by binding referendum, the Benchers fettered their discretion in a manner inconsistent with their statutory duties.

As a result, this Court is not in a position to defer to their decision to declare the TWU law school not to be approved.

3. Was TWU denied procedural fairness?

[92] The chambers judge found that TWU had not been accorded procedural fairness in this case. That determination appears to have stemmed, in part, from a misapprehension of the evidence. The judge understood the evidence to be that the Law Society delivered material to its members that was skewed against TWU's position. Counsel agree that that did not occur.

[93] The finding also appears to have been based on the judge's understanding that fettering is an issue going to procedural fairness. In our view, fettering issues are better described as engaging substantive administrative review rather than review for procedural fairness. Issues of procedural fairness are concerned with the fairness of the hearing, not with the factors that the decision-maker takes into account in arriving at a disposition.

[94] In the context of a referendum, where a very public debate was waged by the protagonists for each side, the neutral stance taken by the Benchers was consistent with procedural fairness. TWU was clearly aware of the issues in the referendum, and of the case that it had to meet. We would not endorse the chambers judge's finding that TWU was denied procedural fairness in the context of the referendum.

[95] In summary, we reach the following conclusions on the administrative law issues:

1. The Law Society has jurisdiction to consider factors other than the adequacy of a faculty's academic program in deciding whether to deny the faculty approval.

2. This is not a case of improper sub-delegation of decision-making authority. The resolution in issue here was adopted by the Benchers, who are the body statutorily authorized to make the decision.

3. The Benchers fettered their discretion by declaring themselves bound to follow the results of the referendum. However, if authorized by the statute, such fettering would not be objectionable.

4. The *Legal Profession Act* provides for binding referendums. While some of the conditions that must exist in order for members to force a referendum were not present in this case, we are prepared to assume, without deciding, that it was open to the Benchers to hold a binding referendum.

5. The Benchers were required to satisfy themselves that adopting the results of the referendum was consistent with their duty to balance the Law Society's statutory objectives against *Charter* values. They failed to fulfill this function, and their decision is not, therefore, entitled to deference.

6. There was no failure by the Law Society to accord procedural fairness to TWU.

[96] The chambers judge concluded that the Benchers' resolution declaring TWU not to be an approved law faculty should be quashed, and ordered the result of the April 11, 2014 vote restored. We have a technical concern with this remedy. The resolution before the Benchers on April 11, 2014 not to approve TWU's faculty of law failed to pass. Upon that failure it became a legislative "nothing". There is thus nothing to "restore" as the chambers judge ordered. Rather, what is left is the approval of TWU's faculty of law by the Federation, which is legally effective in the absence of a resolution to the contrary.

[97] In any event, in our view the judge's decision to quash the Benchers' resolution cannot be reached on the administrative law issues alone. Although the decision of the Benchers is not entitled to deference, it can be upheld if the Court is able to find that it represented the only reasonable balancing of statutory objectives with *Charter* values. Accordingly, it is necessary for the Court to consider the substantive *Charter* arguments presented by the parties and intervenors. In addition,

the parties asked the Court to address the *Charter* issues in order to avoid the need for further litigation. We turn now to those issues.

4. Does the Law Society's decision reasonably balance the statutory objectives of the Legal Profession Act against the religious freedom rights of TWU?

4.1 *Charter* Rights Engaged

[98] The relevant provisions of the *Charter* are as follows:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> 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.
>
> * * *
>
> 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.

[99] The first issue is whether freedom of religion is implicated. The Supreme Court of Canada has grappled with the nature of freedom of religion and conscience (which are usually considered in tandem, given the overlap between them), both alone and in the context of a free and democratic society. In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, one of the earliest judgments dealing with the topic, Dickson J. (as he then was) for the majority described the historical evolution of this right in the religious struggles of post-Reformation Europe. (See also chapter one of Margaret H. Ogilvie, *Religious Institutions and the Law in Canada* (3d ed., 2010)). Eventually, these struggles led to the perception, during the Commonwealth period, that "belief itself was not amenable to compulsion" (*Big M Drug Mart Ltd.* at 345). Dickson J. continued at 346-347:

> … an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen

> to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government. It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*.
>
> Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the *Charter*. Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice. It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion. For the present case it is sufficient in my opinion to say that whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose. I leave to another case the degree, if any, to which the government may, to achieve a vital interest or objective, engage in coercive action which s. 2(*a*) might otherwise prohibit.
>
> [Emphasis added.]

[100] Subsequent cases have developed the themes that freedom of religion also includes freedom *from* religion (see *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7 at para. 32) and that the government should remain neutral in religious matters, especially as the multicultural nature of modern Canadian society evolves (see *S.L*. at paras. 17-21, 32, and 54). We note parenthetically that there is one constitutional exception to this principle: s. 29 of the *Charter* protects against any derogation or abrogation of "privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools." The Constitution, in s. 93 of the *Constitution Act, 1867*, in turn prohibits any provincial legislature from "prejudicially affecting" any right or privilege belonging by law to a denominational school at the time of Union. Thus an exception is made by the *Charter* itself for the protection of the benefits (e.g., public funding) enjoyed by such

schools that were in existence in 1867 (or in the case of British Columbia, 1871) notwithstanding other *Charter* rights (e.g., equality) that could otherwise form the basis of legal challenge (see generally *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148; Ogilvie, *supra* at 120-131). Section 93 was extended to British Columbia (see Order in Council Admitting British Columbia into the Union, dated 16 May, 1871); but since this province had no publicly-funded denominational schools in 1871, s. 29 has no application in this case.

[101] The Supreme Court has formulated a methodology to be followed in cases involving allegations of infringement of freedom of religion or conscience. The first step is for the plaintiff or complainant to "establish the sincerity of his or her belief in a religious doctrine, practice or obligation". The second step is for the court to determine whether a significant infringement of the belief has occurred as a result of governmental action: see *S.L.* at para. 49; *Hutterian Brethren Colony v. Alberta*, 2009 SCC 37 at para. 32.

[102] There is little doubt that freedom of religion and conscience of at least TWU's faculty and students was implicated by the Law Society's decision not to approve its Faculty of Law — indeed the Law Society did not argue otherwise.

[103] The evidence overwhelmingly supports the view that the Covenant is an integral and important part of the religious beliefs and way of life advocated by TWU and its community of evangelical Christians. According to Dr. Jeffrey P. Greenman, a Professor of Theology at Regent College and an affiant on behalf of TWU, the Covenant reflects the core teachings of evangelical Christian theology; nothing in it is marginal to evangelical moral concerns:

> It attempts to do nothing more than organize the Bible's directions about how to live as a Christian with regard to many aspects of daily life as individuals and as members of a shared community.

[104] The evidence before the Law Society confirms that evangelicals comprise a distinct religious subculture. According to Dr. Samuel H. Reimer, Professor of Sociology at Crandall University in Moncton, New Brunswick, the evangelicals' faith, like any moral code, is not limited to their private lives. They carry their beliefs and

moral values into the public sphere, including work, education and politics. Codes of conduct are commonly established by evangelical Christians as distinctive moral codes that "strengthen commitment to the subculture, and thus strengthen the subculture".

[105] Dr. Gerald Longjohn Jr. swore an affidavit in these proceedings. He is the Vice-President for Student Development at Cornerstone University in Michigan. His area of expertise lies in the application of student conduct codes at North American Christian universities. He deposed that codes of conduct serve to establish a community that is conducive to moral and spiritual growth; such codes can foster spiritual growth, encourage students toward a life of wisdom and foster an atmosphere that is conducive to the integration of faith and learning. The Covenant is "very similar in tone and content to other codes of conduct at Christian colleges and universities". The Covenant, in his view, is a commitment of members of the community to encourage and support other members of the community in their pursuit of their values and ideals.

[106] Intervenors in support of TWU's position in this litigation included the Roman Catholic Archdiocese of Vancouver and allied groups, the Christian Legal Fellowship, the Evangelical Fellowship of Canada, the Seventh-Day Adventist Church in Canada, the Justice Centre for Constitutional Freedoms and the Canadian Council of Christian Charities, among others. These intervenors voiced a common theme. They asserted that a secular state supports pluralism and that a democratic society requires that differing groups have space to hold and act on their beliefs. In their view, freedom of religion requires the disciplined exercise of genuine state neutrality to prevent the use of coercive state power in the enforcement of majority beliefs or practices.

[107] It is clear, then, that rights of religion and conscience are engaged in this case. These freedoms belong at least to the faculty and students of TWU, and perhaps to TWU itself: see *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at para. 33 (*per* Abella J. for the majority) and at para. 100 (*per* McLachlin C.J.C. and Moldaver J. for the minority).

[108] The conflicting *Charter* right implicated by the Law Society's decision is the equality right of LGBTQ persons under the law, guaranteed by s. 15 of the *Charter*. As is well-known, sexual orientation has been found to constitute an analogous ground under s. 15, such that the equal benefit and protection of the law may not be denied on that basis. In *Vriend v. Alberta*, [1998] 1 S.C.R. 493, the majority of the Supreme Court described the effects of discrimination on the basis of sexual orientation in the context of the appellant's termination of his employment because of his homosexuality. The majority wrote:

> [101] The exclusion [in the *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2] sends a message to all Albertans that it is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation. The effect of that message on gays and lesbians is one whose significance cannot be underestimated. As a practical matter, it tells them that they have no protection from discrimination on the basis of their sexual orientation. Deprived of any legal redress they must accept and live in constant fear of discrimination. These are burdens which are not imposed on heterosexuals.
>
> [102] Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetrates the view that gays and lesbians are less worthy of protection as individuals in Canada's society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination.
>
> [103] Even if the discrimination is experienced at the hands of private individuals, it is the state that denies protection from that discrimination. Thus the adverse effects are particularly invidious. This was recognized in the following statement from *Egan* [*Egan v. Canada*, [1995] 2 S.C.R. 513] (at para. 161):
>
> > The law confers a significant benefit by providing state recognition of the legitimacy of a particular status. The denial of that recognition may have a serious detrimental effect upon the sense of self-worth and dignity of members of a group because it stigmatizes them … . Such legislation would clearly infringe s. 15(1) because its provisions would indicate that the excluded groups were inferior and less deserving of benefits.
>
> This reasoning applies *a fortiori* in a case such as this where the denial of recognition involves something as fundamental as the right to be free from discrimination.

[109] The Law Society led evidence from various experts touching on the impact of the Covenant on LGBTQ persons. Dr. Barry Adam is a Professor of Sociology, Anthropology and Criminology at the University of Windsor. His work looks at issues of subordination and empowerment and the social status of lesbian, bisexual and gay people. He deposes:

a) When gay, lesbian and bisexual people are identified with private sexual activity, and subject to penalty for the expression of intimacy, a special range of social limitations are thereby imposed on them (at para. 16). Exclusion from public affirmation of relationship is a form of withholding access to the full exercise of citizenship rights in the public sphere (at para. 17).

b) Lesbian, bisexual and gay people still live in social and economic contexts characterized by lack of family support, vulnerability to harassment, violence, negative social attitudes, and diminished opportunities (at para. 20).

c) Based on the extensive record of social science investigation, any implementation or enforcement of a policy of exclusion reproduces the conditions that lead to well demonstrated deleterious consequences for lesbian, gay and bisexual people (at para. 25).

[110] Dr. Ellen Faulkner is a Professor of Sociology and Criminology at the College of New Caledonia. She has conducted research in the field of discrimination and the harm caused by it. She considered the potential adverse effects on gay and lesbian students if they were to sign the Covenant. She fears that this would push gay and lesbian people “back into the closet” (at para. 11); because of limited law school spaces they might be “living a lie in order to obtain a degree” (at para. 12). Signing the Covenant would require self-censorship by gay and lesbian people — hiding relationships even though they are legally sanctioned in Canada (at para. 29); it would require gays and lesbians to isolate themselves (at para. 30); and it would be harmful because it potentially “re-pathologizes” homosexual identity and denies recognition of the harm of homophobia (at para. 38).

[111] Other experts reached similar conclusions. In their opinion, TWU's admissions policy and the Covenant perpetuate and exacerbate existing stigmatization and marginalization of LGBTQ persons.

[112] Unlike the College of Teachers in *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 [*TWU v. BCCT*], to which we will return, the Law Society did not contend that the potential "downstream" effect of the learning environment might foster intolerant attitudes on the part of TWU graduates once called to the Bar.

[113] The intervenors in support of the Law Society's position included the Canadian Secular Alliance, the British Columbia Humanist Association, the LGBTQ Coalition, West Coast Women's Legal Education and Action Fund and The Advocates' Society, among others. These intervenors raised many of the same concerns raised by the Law Society's experts. The Coalition submitted that religious freedom cannot be used as a basis to exclude LGBTQ persons from access to a law program when that program requires the approval of a public body; s. 15 guarantees LGBTQ persons the right to equal access to the 60 new law school spaces to be created by TWU and equal access to the profession of law generally. As well, it is said that the dignity and self-worth of LGBTQ persons would be affronted and that the Law Society would be perceived as endorsing the Covenant if it were to approve the proposed law school.

[114] It bears emphasizing at the outset that under the *Charter*, "[n]o right is absolute." Each must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises (*S.L.* at para. 25). Where freedom of religion is concerned, this fact distinguishes the *Charter* from the First Amendment to the U.S. Constitution, which expresses freedom of religion as an absolute right. As Professor Ogilvie observes, s. 15 of the *Charter* "reduces religion to one of many categories vying for 'equality'"; and s. 1 gives courts the right to qualify freedom of religion by "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (at 135). Thus, Ogilvie

writes, "[e]ffectively, the *Charter* reduces and relativizes religious freedom and gives courts the power to select and balance other countervailing claims" (at 135).

[115] Unlike many *Charter* cases, this case does not involve a direct contest between *Charter* rights. It does not involve, for example, an LGBTQ person who has been denied admission by TWU on the basis of his or her refusal to sign the Covenant. The law is clear that as a private institution, it would be open to TWU to accept only students who subscribe to its adopted religious views — a right also ensconced in this province's *Human Rights Code* at s. 41. Nor does this case involve a decision by the Law Society directly to deny evangelical Christians the right to practise law. Such a denial would obviously infringe at least s. 2 of the *Charter* and would have to be justified under s. 1.

[116] Instead, this case, like *TWU v. BCCT*, is one in which a statutory body has made a decision under its home statute that effectively bars from the practice of law evangelical Christians who choose to attend the TWU law school — in practical terms, prohibiting such a law school from opening (see para. 168 below). The focus of this appeal is therefore the decision of the Law Society as an administrative tribunal that is bound to uphold and protect the public interest in the administration of justice, as more particularly delineated by s. 3 of the *Legal Profession Act*.

4.2 The Decision-Maker's Exercise of Authority When *Charter* Rights and Values Are Engaged

[117] As we have earlier noted, how an administrative decision-maker is to exercise its delegated authority to decide an issue involving *Charter* rights and freedoms was addressed by the Supreme Court of Canada in two decisions that we will now discuss at some length — *Doré v. Barreau du Québec*, 2012 SCC 12; and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12.

(a) Doré

[118] In *Doré*, the disciplinary council of the Quebec bar was considering a conduct complaint involving a lawyer who wrote a private letter to a judge in which he disparaged the judge. The lawyer's freedom of expression was in clear tension with

the disciplinary council's mandate. The council reprimanded the lawyer, who sought judicial review.

[119] Justice Abella wrote the judgment for the Court. She addressed the "issue of how to protect *Charter* guarantees and the values they reflect in the context of adjudicated administrative decisions" (at para. 3). In particular, she considered whether the presence of a *Charter* issue requires the replacement of the reasonableness administrative law framework with the test set out in *Oakes* (*R. v. Oakes*, [1986] 1 S.C.R. 103), "the test traditionally used to determine whether the state has justified a law's violation of the *Charter* as a 'reasonable limit' under s. 1" (at para. 3). At para. 6, she stated:

> In assessing whether a law violates the *Charter*, we are balancing the government's pressing and substantial objectives against the extent to which they interfere with the *Charter* right at issue. If the law interferes with the right no more than is reasonably necessary to achieve the objectives, it will be found to be proportionate, and, therefore, a reasonable limit under s. 1. In assessing whether an adjudicated decision violates the *Charter*, however, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right. In both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited. [Emphasis added.]

[120] The key word is "proportionality"; the reviewing court must ensure that the discretionary administrative decision "interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives" (at para. 7). If the decision disproportionately impairs the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one.

[121] We repeat here Justice Abella's description of the procedure to be followed by the administrative decision-maker (at paras. 55-58):

> How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. In *Lake*, for instance, the importance of Canada's international obligations, its relationships with foreign governments, and the investigation, prosecution and suppression of international crime

> justified the *prima facie* infringement of mobility rights under s. 6(1) (para. 27). In *Pinet*, the twin goals of public safety and fair treatment grounded the assessment of whether an infringement of an individual's liberty interest was justified (para. 19).
>
> Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the *Oakes* context. As this Court recognized in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160, "courts must accord some leeway to the legislator" in the *Charter* balancing exercise, and the proportionality test will be satisfied if the measure "falls within a range of reasonable alternatives". The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of *Dunsmuir*, "falls within a range of possible, acceptable outcomes" (para. 47).
>
> On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play. As LeBel J. noted in *Multani*, when a court is faced with reviewing an administrative decision that implicates *Charter* rights, "[t]he issue becomes one of proportionality" (para. 155), and calls for integrating the spirit of s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives.
>
> If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.
>
> [Emphasis added.]

(b) Loyola High School

[122] This brings us to the decision in *Loyola High School*. It is highly relevant to the case before this Court because it involved a contest between the religious freedom of a private Catholic high school and the statutory objectives of Quebec's Program on Ethics and Religious Culture (ERC).

[123] Briefly, ERC was designed to teach about the beliefs and ethics of different world religions from a neutral and objective perspective. Since Loyola High School initially wanted to teach the program from a wholly Catholic perspective, it applied

under s. 22 of the regulation to provide an alternative but "equivalent" program. This required the approval of the responsible minister. The Minister decided not to grant the exemption. Loyola sought judicial review. Applying a correctness standard, the motions judge concluded that the school's right to religious freedom was unjustifiably violated. The Quebec Court of Appeal, applying a reasonableness standard to the review of the Minister's balancing of the *Charter* rights at stake, overturned the lower court's decision.

[124] On appeal to the Supreme Court of Canada, the appeal was allowed and the matter was remitted back to the Minister for reconsideration. By the time the case reached the Supreme Court, Loyola had altered its position (at para. 31):

> Loyola had previously asserted that the *entire* orientation of the ERC Program represented an impairment of religious freedom on the basis that discussing any religion through a neutral lens would be incompatible with Catholic beliefs. Its revised position before us was that it did not object to teaching *other* world religions objectively in the first component which focuses on "understanding religious culture". But it still wanted to be able to teach the *ethics* of other religious traditions from the perspective of the Catholic religion rather than in an objective and neutral way. Moreover, it continued to assert the right to teach Catholic doctrine and ethics from a Catholic perspective. Loyola took no position on the perspective from which it would seek to teach the dialogue component, which would be integrated with the other two components of its proposed alternative program. The position of the Minister before this Court, however, remained the same as it had been in the prior proceedings, namely, that in no aspect of the ERC Program would Loyola be permitted to teach from a Catholic perspective. [Emphasis in original.]

[125] Justice Abella wrote for herself and Justices LeBel, Cromwell and Karakatsanis. Chief Justice McLachlin and Justice Moldaver wrote separately, with Justice Rothstein concurring. The majority did not find it necessary to decide whether Loyola itself, as a corporation, enjoyed s. 2(a) rights,

> … since the Minister is bound in any event to exercise her discretion in a way that respects the values underlying the grant of her decision-making authority, including the *Charter*-protected religious freedom of the members of the Loyola community who seek to offer and wish to receive a Catholic education: *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, at para. 71. [At para. 34.]

[126] The minority went further in defining the beneficiaries of the right to religious freedom under s. 2(a) of the *Charter* to include Loyola itself (at para. 91):

> In our view, Loyola may rely on the guarantee of freedom of religion found in s. 2(*a*) of the *Canadian Charter*. The communal character of religion means that protecting the religious freedom of individuals requires protecting the religious freedom of religious organizations, including religious educational bodies such as Loyola. Canadian and international jurisprudence supports this conclusion.

[127] Justice Abella proceeded to assess the Minister's decision from the perspective of proportionality. She discussed how that decision necessarily engaged religious freedom and, at para. 58, repeated the words of Dickson J. (as he then was) in *Big M Drug Mart Ltd.* at 336-37 (the emphasis is that of Abella J.):

> The essence of the concept of 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. But the concept means more than that.
>
> Freedom can primarily be characterized by the absence of coercion or constraint. … Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. *Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.*
>
> What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards religious minorities from the threat of "the tyranny of the majority".

[128] In Justice Abella's view, the "collective aspects of religious freedom — in this case, the collective manifestation and transmission of Catholic beliefs through a private denominational school — were a critical part of Loyola's claim" (para. 61) and distinguished that claim from the public school context of *S.L.* She concluded that the Minister's decision had a "serious impact" on religious freedom in the case of Loyola. Going further the judge said (at para. 67):

> Ultimately, measures which undermine the character of lawful religious institutions and disrupt the vitality of religious communities represent a profound interference with religious freedom.

[129] On the "core issue" of whether the Minister's insistence on a purely secular program of study to qualify for an exemption was a limit no more than reasonably necessary to achieve the ERC Program's goals, the majority concluded that it was not. The Minister's decision was based "on the flawed determination that only a cultural and non-denominational approach could serve as equivalent" (para. 149). It led to "a substantial infringement on the religious freedom of Loyola" (para. 151). The minority went on to consider the appropriate scope of an equivalent program and defined it. On remedy the minority cited *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 and concluded (at para. 165):

> We find it neither necessary nor just to send this matter back to the Minister for reconsideration, further delaying the relief Loyola has sought for nearly seven years. Based on the application judge's findings of fact, and considering the record and the submissions of the parties, we conclude that the only constitutional response to Loyola's application for an exemption would be to grant it. Accordingly, we would order the Minister to grant an exemption to Loyola, as contemplated under s. 22 of the regulation at issue, to offer an equivalent course to the ERC Program in line with Loyola's proposal and the guidelines we have outlined. [Emphasis added.]

[130] It is instructive to note that even in the case of a standard of review calibrated at "reasonableness", the range of "reasonable" outcomes can be exceedingly narrow indeed, effectively amounting to one correct answer.

[131] While the parallel between *Loyola* and the present case is not exact, in that the state's accommodation of religious freedom in *Loyola* did not have a direct detrimental impact on the equality rights of others, the requirement of minimal infringement and proportionality pertains. In addition, the context of the decision made in *Loyola* is similar: "how to balance robust protection for the values underlying religious freedom with the values of a secular state" (at paras. 43-46):

Part of secularism, however, is respect for religious differences. A secular state does not — and cannot — interfere with the beliefs or practices of a religious group unless they conflict with or harm overriding public interests. Nor can a secular state support or prefer the practices of one group over those of another: Richard Moon, "Freedom of Religion Under the *Charter of Rights*: The Limits of State Neutrality" (2012), 45 *U.B.C. L. Rev.* 497, at pp. 498-99. The pursuit of secular values means respecting the right to hold and manifest different religious beliefs. A secular state respects religious differences, it does not seek to extinguish them.

Through this form of neutrality, the state affirms and recognizes the religious freedom of individuals and their communities. As Prof. Moon noted:

> Underlying the [state] neutrality requirement, and the insulation of religious beliefs and practices from political decision making, is a conception of religious belief or commitment as deeply rooted, as an element of the individual's identity, rather than simply a choice or judgment she or he has made. Religious belief lies at the core of the individual's worldview. It orients the individual in the world, shapes his or her perception of the social and natural orders, and provides a moral framework for his or her actions. Moreover, religious belief ties the individual to a community of believers and is often the central or defining association in her or his life. The individual believer participates in a shared system of practices and values that may, in some cases, be described as "a way of life". If religion is an aspect of the individual's identity, then when the state treats his or her religious practices or beliefs as less important or less true than the practices of others, or when it marginalizes her or his religious community in some way, it is not simply rejecting the individual's views and values, it is denying her or his equal worth. [Footnote omitted; p. 507.]

Because it allows communities with different values and practices to peacefully co-exist, a secular state also supports pluralism. The European Court of Human Rights recognized the relationship between religious freedom, secularism and pluralism in *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A No. 260-A, a case about a Jehovah's Witness who had been repeatedly arrested for violating Greece's ban on proselytism. Concluding that the claimant's Article 9 rights to religious freedom had been violated, the court wrote:

> As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. [p. 17]

See also *Metropolitan Church of Bessarabia v. Moldova*, No. 45701/99, ECHR 2001-XII.

This does not mean that religious differences trump core national values. On the contrary, as this Court observed in *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607:

> Not all differences are compatible with Canada's fundamental values and, accordingly, not all barriers to their expression are arbitrary. Determining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright-line application. It is, at the same time, a delicate necessity for protecting the evolutionary integrity of both multiculturalism and public confidence in its importance. [para. 2]

Or, as the Bouchard-Taylor report observed:

> A democratic, liberal State cannot be indifferent to certain core values, especially basic human rights, the equality of all citizens before the law, and popular sovereignty. These are the constituent values of our political system and they provide its foundation.
>
> (Gérard Bouchard and Charles Taylor, Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles, *Building the Future: A Time for Reconciliation* (2008), at p. 134.)

[Emphasis added.]

[132] We have quoted at length here because in our view state neutrality and pluralism lie at the heart of this case.

[133] The balancing exercise that *Doré* and *Loyola* call for in the case before us can be expressed this way: did the decision of the Law Society not to approve TWU's faculty of law interfere with freedom of religion of at least the faculty and students of that institution no more than is necessary given the statutory objectives of the Law Society?

[134] As we have reviewed at some length, *Doré* and *Loyola* clearly charted the course for the Law Society; the question is: did the Law Society navigate it?

4.3 The Law Society Did Not Balance *Charter* Rights

[135] We touched on this question in our discussion of the administrative law issues. We expand upon that discussion here.

[136] We have earlier outlined the procedural history of the treatment of TWU's application by the Benchers. It was preceded by consideration and conclusions of the Federation, the body to whom the Law Society has delegated primary approving authority under rule 2-54(3).

[137] We have also described the Law Society's consideration and rejection of a resolution to "not approve" TWU's faculty of law at its meeting of April 11, 2014. We have described at paragraphs 12-20 the due diligence carried out by the Law Society prior to that meeting. Finally, we have noted the notice to the profession published by the Law Society before the Special General Meeting of June 2014. We repeat that notice as it neatly describes the process adopted by the Law Society before its initial consideration of the "not to approve" resolution in April 2014:

> The decision was made after a thoughtful and sometimes emotional expression of views and careful consideration of two Federation reports on the Trinity Western University application, nearly 800 pages of submissions from the public and the profession and a submission from TWU, and after thoroughly considering the judgment of the Supreme Court of Canada in *Trinity Western University v. British Columbia College of Teachers* 2001 SCC 31 … and its applicability to the TWU application. In addition, the Benchers considered a memorandum from former Chief Justice Finch on the relevant considerations and additional legal opinions as follows:
>
> 1. Finch/Banks - Overview Brief re: Relevant Considerations for the Law Society in Relation to the Proposed Faculty of Law at TWU
> 2. Laskin Opinion on Applicability of SCC Decision in *TWU v. BCCT*
> 3. Gomery Opinion on Academic Qualifications
> 4. Gomery Opinion on Application of the Charter
> 5. Gomery Opinion on Scope of Law Society's Discretion under Rule 2-27(4.1)
> 6. Thomas/Foy Opinion on Application of the *Labour Mobility Act* and the *Agreement on Internal Trade*

[138] A number of the opinions the Law Society considered are important because they demonstrate that the Law Society at and before its April 2014 meeting was very much alive to the *Charter* issues presented by the case and the proper legal approach to the Law Society's consideration of a decision exercising its administrative discretion not to approve TWU's law school.

[139] The discussion at the Benchers meeting of April 11, 2014 makes it clear that some Benchers considered the issue in the context of the balancing exercise mandated by *Doré* (decided the previous month) and *Loyola* (yet to be decided). Others viewed *TWU v. BCCT* as dispositive.

[140] Some members of the Law Society did not accept the Benchers' April 2014 disposition. As we have related, they sought a Special General Meeting of the Society to consider a resolution directing the Benchers to declare TWU's faculty of law "not approved".

[141] The recitals to that proposed resolution are informative. At one point in oral submissions before us, counsel for the Law Society suggested that in effect the scheme under the *Legal Profession Act* and the Law Society rules constituted the membership at large as the "tribunal" undertaking the balancing exercise mandated by *Doré* et al. That position was soon modified in argument with counsel maintaining that it was always the Benchers undertaking that task. Still, to the extent that it is suggested that the membership balanced the competing rights in issue, that is not reflected in the recitals to the resolution, which are the best evidence of the "reasons" of the membership. We repeat them:

> WHEREAS:
>
> -Section 28 of the *Legal Profession Act* permits the Benchers to take steps to promote and improve the standard of practice by lawyers, including by the establishment, maintenance and support of a system of legal education;
>
> -Trinity Western University requires students and faculty to enter into a covenant that prohibits "sexual intimacy that violates the sacredness of marriage between a man and a woman";
>
> -The Barristers' and Solicitors' Oath requires Barristers and Solicitors to uphold the rights and freedoms of all persons according to the laws of Canada and of British Columbia;
>
> -There is no compelling evidence that the approval of a law school premised on principles of discrimination and intolerance will serve to promote and improve the standard of practice of lawyers as required by section 28 of the *Legal Profession Act,* and
>
> -The approval of Trinity Western University, while it maintains and promotes the discriminatory policy reflected in the covenant, would not serve to promote and improve the standard of practice by lawyers;

[142] These recitals suggest that what motivated the resolution adopted at the Special General Meeting was a concern that a law school "premised on principles of discrimination and intolerance" would not promote and improve the standard of practice by lawyers. No mention is made of the concerns with equality of access to TWU's faculty of law now advanced by the Law Society and its allied intervenors as

more particularly discussed above. More importantly, no reference is made to freedom of religion.

[143] We do not wish to make too much of this point. Ascertaining the motives in the minds of individual decision-makers is not generally a simple or useful task and, in any event, the members did not have the authority to make the decision. But it does serve to belie the suggestion, if it is still maintained, that the membership was providing their considered views on how best to accommodate the competing values implicated by the decision "not to approve". And to the extent it has been demonstrated that concerns with the "standard of practice by lawyers" motivated the membership, it raises parallels with the downstream concerns with TWU teachers in future classrooms that were found to be unsupported by any evidentiary basis in *TWU v. BCCT*.

[144] This brings us again to the important meeting of the Benchers on September 26, 2014 and the resolution adopted at that meeting. That resolution called for a referendum to vote on implementation of the Special General Meeting resolution, with the referendum to be binding on the Benchers.

[145] For the reasons we have developed in our discussion of the administrative law issues, we conclude that the Benchers improperly fettered their discretion by binding themselves to adopt the decision of the majority of members on whether "not to approve". It appears they did so altruistically in the sense of letting "democracy" dictate the result, and letting the members have their say. But in so doing, the Benchers abdicated their duty as an administrative decision-maker to properly balance the objectives of the *Legal Profession Act* with the *Charter* rights at stake.

[146] If there was any doubt that this was the case, one need only look to the Law Society's written submissions before Chief Justice Hinkson. We note these paragraphs:

> 332. The motion adopted by the Benchers stated that the referendum would be binding on the Benchers in the event that (a) 1/3 of all members in good standing of the Law Society vote in the Referendum; and (b) 2/3 of those voting vote in favour of the Resolution. It also included the statement that the "Benchers hereby determine that *implementation of the Resolution does not constitute a breach of their statutory duties, regardless of the results of the Referendum*".
>
> 333. The clear implication of the motion is that the Benchers in favour of the September resolution calling for a referendum had collectively determined that *both* approving TWU and refusing to accredit would be consistent with the Law Society's statutory duties, in that both decisions would be a reasonable exercise of the Law Society's powers under the *Legal Profession Act*.
>
> 334. Having reached that conclusion, the Benchers decided that the best and most legitimate way to resolve the matter would be for the Law Society to adopt the views of the membership as a whole on this important decision impacting the public interest in the administration of justice and the honour and integrity of the profession.
>
> [Underline emphasis added.]

[147] As stated earlier, although the decision of the Law Society not to approve TWU's law school is therefore not entitled to deference, we must decide whether it nonetheless represents a reasonable balancing of statutory objectives and *Charter* rights. We begin by considering whether *TWU v. BCCT* is dispositive of the issue.

(a) Is Trinity Western University v. British Columbia College of Teachers Dispositive?

[148] Many Benchers at the April 14, 2014 meeting considered *TWU v. BCCT* to be dispositive of the issues before them. Whether that is so has vexed the parties, the Federation and other courts considering TWU's applications. That case concerns the same university and effectively the same covenant. In issue was the decision of the British Columbia College of Teachers not to approve TWU's teacher training program.

[149] We agree with the Ontario Court of Appeal in *Trinity Western University v. The Law Society of Upper Canada* that *TWU v. BCCT* is not dispositive. That case concerned the "downstream" effect of the Covenant on students in public school classrooms, in particular whether TWU's Community Covenant and learning environment might foster intolerant attitudes on the part of its graduate teachers.

The issue of access by LGBTQ individuals to the faculty of education was not raised directly. However, we also agree with the Ontario Court of Appeal that the principles in *TWU v. BCCT* are highly relevant to the present case in that it involves balancing freedom of religion against the Law Society's public interest in considering the impact of its decision on other *Charter* values, including sexual orientation equality (paras. 57 and 58).

[150] One such principle is the limited reach of the *Charter* (s. 32). It applies to government, and to the Law Society as a statutory delegate of government, but it does not apply to private persons and institutions. As the majority in *TWU v. BCCT* concluded, TWU as a private institution is exempted in part from human rights legislation and the *Charter* does not apply to it:

> [25] Although the Community Standards are expressed in terms of a code of conduct rather than an article of faith, we conclude that a homosexual student would not be tempted to apply for admission, and could only sign the so-called student contract at a considerable personal cost. TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions. That said, the admissions policy of TWU alone is not in itself sufficient to establish discrimination as it is understood in our s. 15 jurisprudence. It is important to note that this is a private institution that is exempted, in part, from the British Columbia human rights legislation and to which the *Charter* does not apply. 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, which co-exist with the right to equality. [Emphasis added.]

[151] These are important considerations. TWU's admissions policy does not amount to a breach of the *Charter* — it is not "unlawful discrimination". That is not to say that it does not have an impact on LGBTQ individuals that must be considered, but the lawfulness of TWU's policy is significant to the balancing exercise.

[152] Another principle is that equality guarantees under the *Charter* and provincial human rights legislation, including protection against discrimination based on sexual orientation, are a proper consideration when a statutory decision-maker acts in the public interest (at para. 27):

> While the BCCT was not directly applying either the *Charter* or the province's human rights legislation when making its decision, it was entitled to look to these instruments to determine whether it would be in the public interest to allow public school teachers to be trained at TWU.

[153] The majority in *TWU v. BCCT* also underscored the obligation (at para. 28) to consider issues of religious freedom, quoting Justice Dickson's elegant statement from *Big M Drug Mart Ltd.* which we reproduced earlier. It ends thus:

> What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards religious minorities from the threat of "the tyranny of the majority".

The majority in *TWU v. BCCT* continued (at para. 28):

> It is interesting to note that this passage presages the very situation which has arisen in this appeal, namely, one where the religious freedom of one individual is claimed to interfere with the fundamental rights and freedoms of another. The issue at the heart of this appeal is how to reconcile the religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.'s public school system, concerns that may be shared with their parents and society generally. [Emphasis added.]

[154] Although the discrimination alleged in *TWU v. BCCT* was not unequal access to teacher training spots for LGBTQ individuals, the majority expressly addressed that question and recognized that the reconciliation of competing rights must take into account the context of private religious institutions (at para. 34):

> Consideration of human rights values in these circumstances encompasses consideration of the place of private institutions in our society and the reconciling of competing rights and values. Freedom of religion, conscience and association coexist with the right to be free of discrimination based on sexual orientation. Even though the requirement that students and faculty adopt the Community Standards creates unfavourable differential treatment since it would probably prevent homosexual students and faculty from applying, one must consider the true nature of the undertaking and the context in which this occurs. Many Canadian universities, including St. Francis Xavier University, Queen's University, McGill University and Concordia University College of Alberta, have traditions of religious affiliations. Furthermore, s. 93 of the *Constitution Act, 1867* enshrined religious public education rights into our Constitution, as part of the historic compromise which made Confederation possible. [Emphasis added.]

[155] The majority then addressed the difficult question of where to draw the line, concluding (at para. 36):

> Instead, the proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them. 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. The BCCT, rightfully, does not require public universities with teacher education programs to screen out applicants who hold sexist, racist or homophobic beliefs. For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society. [Emphasis added.]

[156] *TWU v. BCCT* thus determined that in balancing competing *Charter* rights and values, the impact of an administrative decision must be assessed on the basis of "concrete evidence", not conjecture. Since there was no specific evidence of harm arising out of the beliefs buttressed by the Community Standards, the restriction on freedom of religion worked by the decision of the B.C. College of Teachers could not be justified. In supporting the order of *mandamus* directing accreditation of TWU's program, the majority noted that the "only reason for denial of certification was the consideration of discriminatory practices" (para. 43):

> In considering the religious precepts of TWU instead of the actual impact of these beliefs on the school environment, the BCCT acted on the basis of irrelevant considerations. It therefore acted unfairly.

[157] It was argued before us that *TWU v. BCCT* should not be followed today. It was said that lower courts may reconsider a decision where, in the words of the Supreme Court of Canada in *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 42:

> … new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.

[158] The last decade has seen an evolutionary advance of the law in the protection of the rights and freedoms of LGBTQ persons as full participants in our society and its institutions, but the essential legal analysis posited in *TWU v. BCCT* has not changed appreciably with respect to the obligation to balance statutory objectives and the *Charter* rights affected by an administrative decision. To the contrary, that balancing exercise has been confirmed and developed in *Doré* and *Loyola*.

[159] The decision of the Supreme Court of Canada in *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 is relevant here. That decision was considered by John B. Laskin, who provided an opinion to the Federation during its consideration of TWU's application. We reproduce and adopt this portion of that opinion (which in general supported the applicability of *TWU v. BCCT* to today's context):

> In *Whatcott*, the Court addressed the constitutional validity of the prohibition of hate speech in Saskatchewan human rights legislation. It was alleged that certain flyers distributed by Whatcott infringed the prohibition by promoting hatred on the basis of sexual orientation; Whatcott maintained that the flyers constituted the exercise of his freedom of expression and freedom of religion. The Court saw the case as requiring it
>
> > to balance the fundamental values underlying freedom of expression (and, later, freedom of religion) in the context in which they are invoked, with competing *Charter* rights and other values essential to a free and democratic society, in this case, a commitment to equality and respect for group identity and the inherent dignity owed to all human beings.
>
> In striking this balance, which resulted in its severing certain portions of the prohibition but upholding the remainder, and finding the conclusion that there was a contravention of the legislation unreasonable for two of the four flyers in issue and reasonable for the other two, the Court stated that "the protection provided under s. 2(a) [the freedom of religion guarantee] should extend broadly," and that "[w]hen reconciling *Charter* rights and values, freedom of religion and the right to equality accorded all residents of Saskatchewan must co-exist." It also referred to the "mistaken propensity to focus on the nature of the ideas expressed, rather than on the likely effects of the expression."
>
> Just as in *BCCT*, the Supreme Court in *Whatcott* found the proper balance point between equality and freedom of religion values to be the point at which conduct linked to the exercise of freedom of religion resulted in actual harm. Absent evidence of actual harm, it held in both cases, freedom of religion values must be given effect. [Emphasis added; footnotes omitted.]

[160] In its argument before the chambers judge, the Law Society submitted that the legal landscape had changed so much in this area of the law that the Supreme Court of Canada in *Whatcott* unanimously adopted the following portion of L'Heureux-Dubé J.'s dissent in *TWU v. BCCT* (para. 69):

> I am dismayed that at various points in the history of this case the argument has been made that one can separate condemnation of the "sexual sin" of "homosexual behaviour" from intolerance of those with homosexual or bisexual orientations. This position alleges that one can love the sinner, but condemn the sin. ... The status/conduct or identity/practice distinction for homosexuals and bisexuals should be soundly rejected, as *per* Madam

> Justice Rowles: "Human rights law states that certain practices cannot be separated from identity, such that condemnation of the practice is a condemnation of the person" (para. 228). She added that "the kind of tolerance that is required [by equality] is not so impoverished as to include a general acceptance of all people but condemnation of the traits of certain people" (para. 230). This is not to suggest that engaging in homosexual behaviour automatically defines a person as homosexual or bisexual, but rather is meant to challenge the idea that it is possible to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood.

[161] However, when adopting this portion of Justice L'Heureux-Dubé's judgment, the court in *Whatcott* noted that she was not in dissent on this point. We conclude that the law in this regard has not changed since these views were expressed in 2001.

[162] In summary, while *TWU v. BCCT* is not dispositive of the issues before us, the principles enunciated in that decision provide significant guidance in the present case.

(b) The Balancing Exercise

[163] We turn now to the balancing exercise, and begin with a review of some basic principles.

[164] First, while the rights identified by the Law Society and its allied intervenors are significant and deserve protection and encouragement to flourish in a progressive society, respectfully, the starting premise cannot be that they trump the fundamental religious freedom rights advanced by TWU. The *Charter* does not create a hierarchy of rights with some to be treated as more important than others: *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 15 at para. 26.

[165] Second, the *Charter* rights we have described must be considered and balanced against the statutory objectives of the Law Society, here the "public interest in the administration of justice" and "preserving and protecting the rights and freedoms of all persons": s. 3(a) of the *Legal Profession Act*. Acting in "the public interest" does not mean making a decision with which most members of the profession or public would agree.

[166] Third, the balancing exercise goes beyond simply considering the competing rights engaged and choosing to give greater effect to one or the other, with either course of action being equally reasonable. Rather, the nature and degree of the detrimental impact of the statutory decision on the rights engaged must be considered. The robust proportionality test called for in *Doré* requires no less.

(i) Impact of the decision on religious freedom

[167] As Justice Abella made clear in *Loyola*, the *Charter* right to freedom of religion recognizes and protects the "embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions", including private educational institutions (at para. 60).

[168] In our view, the detrimental impact of the Law Society decision on TWU's right to religious freedom is severe. The legal education of TWU graduates would not be recognized by the Law Society and they could not apply to practise law in this province. TWU's religious freedom rights as an institution are also significantly impacted by the decision. While the Ontario Court of Appeal assumed TWU could continue to operate a law school even if the LSUC refused to recognize the qualifications of its graduates, the effect of non-approval by the Law Society is not so limited. The immediate result of the October resolution "not to approve" was the government's revocation of TWU's ministerial consent under the *Degree Authorization Act*, R.S.B.C. 2002, c. 24. While this revocation may not be irreversible, it represents at this time a complete bar to TWU operating a law school.

[169] We are unable to accept the argument that TWU's freedom of religion is not infringed because it remains free to operate a private law school, even if it is unable to grant degrees that are recognized or accredited by the Law Society. Such a contention fails to recognize that the main function of a faculty of law is to train lawyers.

(ii) Impact of the decision on sexual orientation equality rights

[170] We turn next to consider the impact of the decision on the equality rights of LGBTQ individuals. The Law Society and related intervenors identified two such

impacts, which we have noted earlier. First, they contend there would be fewer law school seats available to LGBTQ students; and second, there would be harm to the dignity and personhood of LGBTQ individuals from the Law Society endorsing a law school with a code of conduct that is offensive to the vast majority of LGBTQ persons because it denies the validity of same-sex marriage. We will consider each impact in turn.

Inequality of access to law school

[171] We accept that if TWU's law school is approved, there is a potential detrimental effect on LGBTQ equality rights. While on the evidence there are LGBTQ students who have voluntarily signed the Covenant and embraced the TWU community's values, it is indisputable that the vast majority of LGBTQ law students could not sign the Covenant.

[172] We have described the adverse effects on LGBTQ persons that would ensue if they were to sign the Community Covenant to gain access to TWU: they would have to either "live a lie to obtain a degree" and sacrifice important and deeply personal aspects of their lives, or face the prospect of disciplinary action including expulsion.

[173] However, as the majority noted in *TWU v. BCCT*, this impact must be considered in context and concretely. Is there evidence that the existence of a law school at TWU would impede access to law school and hence the profession for LGBTQ students?

[174] That precise question was thoroughly considered by the Special Committee of the Federation, the decision-maker with first responsibility for deciding whether the approval of a law school for TWU was in the public interest:

> As a starting point, we are not aware of any evidence that TWU limits or bans the admission to the university of LGBT individuals. A number of those who made submissions to the Federation noted that there are LGBT students at TWU. It is reasonable to conclude that the requirement to adhere to the Community Covenant would make TWU an un welcoming [*sic*] place for LGBT individuals and would likely discourage most from applying to a law school at the university, but it may also be that a faith-based law school would be an attractive option for some prospective law students, whatever

> their sexual orientation. It is also clear that approval of the TWU law school would not result in any fewer choices for LGBT students than they have currently. Indeed, an overall increase in law school places in Canada seems certain to expand the choices for all students. [Emphasis added.]

These findings are entitled to deference; they were based on numerous submissions to the Federation, including legal advice sought by the Federation.

[175] In assessing whether the decision of the Law Society met its public interest objective of ensuring access to the practice of law for LGBTQ individuals, it is incontrovertible that refusing to recognize the TWU faculty will not enhance accessibility. The Law Society does not control where law school seats will be created; it is not a matter, then, of this refusal resulting in the opening up of 60 places in a public "equal access" law school.

[176] Further, it must be recognized that it is the Covenant's refusal to recognize same-sex marriage that is in issue here. The Law Society was prepared to approve the law school if TWU agreed to remove the offending portions of the Covenant requiring students to abstain from "sexual intimacy that violates the sacredness of marriage between a man and a woman". However, even without that term, TWU's faculty of law would be part of an evangelical Christian community that does not accept same-sex marriage and other expressions of LGBTQ sexuality. If we are to assess the detrimental impact of the decision concretely and in context, in reality very few LGBTQ students would wish to apply to study in such an environment, even without the Covenant.

[177] This is not a cynical observation. It was effectively made by the Supreme Court of Canada in *TWU v. BCCT* (at para. 25):

> … we conclude that a homosexual student would not be tempted to apply for admission, and could only sign the so-called student contract at a considerable personal cost. TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions.

[178] TWU is a relatively small community of like-minded persons bound together by their religious principles. It is not for everyone. For those who do not share TWU's beliefs, there are many other options. It has been suggested in argument that TWU

is, in effect, a segregated community, and that the accreditation of its law program would amount to the endorsement of a "separate but equal" doctrine. We are not persuaded that that is a fair characterization. The long discredited "separate but equal" doctrine was offensive because it forced segregation on an oppressed minority. In the context of this case, the members of the TWU community constitute a minority. A clear majority of Canadians support the marriage rights of the LGBTQ community, and those rights enjoy constitutional protection. The majority must not, however, be allowed to subvert the rights of the minority TWU community to pursue its own values. Members of that community are entitled to establish a space in which to exercise their religious freedom.

[179] Thus, while we accept that approval of TWU's law school has in principle a detrimental impact on LGBTQ equality rights because the number of law school places would not be equally open to all students, the impact on applications made, and hence access to, law schools by LGBTQ students would be insignificant in real terms. TWU's law school would add 60 seats to a total class of about 2,500 places in common law schools in Canada. The admission standards for TWU are not anticipated to be lower than those of other law schools; some number of TWU's students would likely be diverted from other faculties of law. As a result, as the Federation concluded, the increase in the number of seats overall is likely to result in an enhancement of opportunities for all students.

[180] Further, as we have noted earlier, the decision not to approve will not increase accessibility to law school for LGBTQ students. The number of seats would remain the same.

Law Society endorsement of the Covenant

[181] As for the public interest objective of the Law Society as a state actor not being seen to endorse the discriminatory aspects of the Covenant by giving TWU the benefit of accreditation, we suggest that this premise is misconceived.

[182] We note parenthetically that TWU is not seeking a financial public benefit from this state actor. This is not the tax break sought in *Bob Jones University v.*

United States, 461 U.S. 574 (1983), a monetary benefit to which Bob Jones University was not otherwise entitled. Accreditation is not a "benefit" granted in the exercise of the largesse of the state; it is a regulatory requirement to conduct a lawful "business" which TWU would otherwise be free to conduct in the absence of regulation. While there is a practical benefit to TWU flowing from the regulatory approval, it is not a funding benefit and the reliance on the comments of a single concurring justice in the *Bob Jones* case is misplaced. Nor do we see *Bob Jones University* as supporting a general principle that discretionary decision-makers should deny public benefits to private applicants.

[183] We return then to the submission that the approval of TWU's law school would amount to endorsing discrimination against LGBTQ individuals. It is significant that the Law Society was prepared to accredit TWU's law school if the Covenant was amended to remove the offending reference to marriage. It is not argued that regulatory approval would then amount to endorsing the continued substantive belief of this evangelical Christian university's views on marriage. In our view, this example underscores the weakness of the premise that regulatory approval amounts to endorsement of the applicant's beliefs.

[184] In a diverse and pluralistic society, this argument must be treated with considerable caution. If regulatory approval is to be denied based on the state's fear of being seen to endorse the beliefs of the institution or individual seeking a license, permit or accreditation, no religious faculty of any kind could be approved. Licensing of religious care facilities and hospitals would also fall into question.

[185] State neutrality is essential in a secular, pluralistic society. Canadian society is made up of diverse communities with disparate beliefs that cannot and need not be reconciled. While the state must adopt laws on some matters of social policy with which religious and other communities and individuals may disagree (such as enacting legislation recognizing same-sex marriage), it does so in the context of making room for diverse communities to hold and act on their beliefs. This approach is evident in the *Civil Marriage Act*, S.C. 2005, c. 33 itself, which expressly

recognizes that "it is not against the public interest to hold and publicly express diverse views on marriage".

[186] That there will be conflicting views and beliefs is inevitable, but as Professor William Galston observes in "Religion and the Limits of Liberal Democracy" (in Douglas Farrow, ed., *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (McGill-Queen's University Press, 2004) at 47 and 49):

> … [P]luralists refuse to resolve these problems by allowing public authorities to determine the substance and scope of allowable belief (Hobbes) or by reducing faith to civil religion and elevating devotion to the common civic good as the highest human value (Rousseau). Fundamental tensions rooted in the deep structure of human existence cannot be abolished in a stroke but must rather be acknowledged, negotiated, and adjudicated with due regard to the contours of specific cases and controversies.
>
> …
>
> This does not mean that all religiously motivated practices are equally deserving of accommodation or protection. Some clearly are not. Religious associations cannot be permitted to … endanger the basic interests of children by withholding medical treatment in life-threatening situations. But there is a distinction between basic human goods, which the state must defend, and diverse conceptions of flourishing above that base-line, which the state should accommodate to the maximum extent possible. There is room for reasonable disagreement as to where that line should be drawn. But an account of liberal democracy built on a foundation of political pluralism should make us very cautious about expanding the scope of state power in ways that mandate uniformity.

[187] As the Court noted in *Loyola* at para. 43, "a secular state does not — and cannot — interfere with the beliefs or practices of a religious group unless they conflict with or harm overriding public interests".

[188] We address here the submission, made by the Law Society intervenors and accepted by the Ontario Court of Appeal, that the Community Covenant "is deeply discriminatory, and it hurts". The balancing of conflicting *Charter* rights requires a statutory decision-maker to assess the degree of infringement of a decision on a *Charter* right. While there is no doubt that the Covenant's refusal to accept LGBTQ expressions of sexuality is deeply offensive and hurtful to the LGBTQ community, and we do not in any way wish to minimize that effect, there is no *Charter* or other

legal right to be free from views that offend and contradict an individual's strongly held beliefs, absent the kind of "hate speech" described in *Whatcott* that could incite harm against others (see paras. 82, 89-90 and 111). Disagreement and discomfort with the views of others is unavoidable in a free and democratic society.

[189] Indeed, it was evident in the case before us that the language of "offense and hurt" is not helpful in balancing competing rights. The beliefs expressed by some Benchers and members of the Law Society that the evangelical Christian community's view of marriage is "abhorrent", "archaic" and "hypocritical" would no doubt be deeply offensive and hurtful to members of that community.

4.4 Conclusion on *Charter* Balancing

[190] The TWU community has a right to hold and act on its beliefs, absent evidence of actual harm. To do so is an expression of its right to freedom of religion. The Law Society's decision not to approve TWU's faculty of law denies these evangelical Christians the ability to exercise fundamental religious and associative rights which would otherwise be assured to them under s. 2 of the *Charter.*

[191] In light of the severe impact of non-approval on the religious freedom rights at stake and the minimal impact of approval on the access of LGBTQ persons to law school and the legal profession, and bearing in mind the *Doré* obligation to ensure that *Charter* rights are limited "no more than is necessary" (para. 7), we conclude that a decision to declare TWU not to be an approved law faculty would be unreasonable.

[192] In our view, while the standard of review for decisions involving the *Doré*/*Loyola* analysis is reasonableness and there may in many cases be a range of acceptable outcomes, here (as was the case for the minority in *Loyola*) there can be only one answer to the question: the adoption of a resolution not to approve TWU's faculty of law would limit the engaged rights to freedom of religion in a significantly disproportionate way — significantly more than is reasonably necessary to meet the Law Society's public interest objectives.

[193] A society that does not admit of and accommodate differences cannot be a free and democratic society — one in which its citizens are free to think, to disagree, to debate and to challenge the accepted view without fear of reprisal. This case demonstrates that a well-intentioned majority acting in the name of tolerance and liberalism, can, if unchecked, impose its views on the minority in a manner that is in itself intolerant and illiberal.

V. CONCLUSION

[194] The appeal is dismissed.

"The Honourable Chief Justice Bauman"

"The Honourable Madam Justice Newbury"

"The Honourable Mr. Justice Groberman"

"The Honourable Mr. Justice Willcock"

"The Honourable Madam Justice Fenlon"

FINAL ORDER OF THE COURT OF APPEAL IN

Trinity Western University v. The Law Society of British Columbia, 2016 BCCA 423

TO BE SENT TO THE SUPREME COURT OF CANADA AS SOON AS IT IS CONFIRMED AND FILED

File Number: _____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

APPLICANT
(Appellant)

- and –

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

RESPONDENTS
(Respondents)

MEMORANDUM OF ARGUMENT OF THE LAW SOCIETY OF BRITISH COLUMBIA

Peter A. Gall, Q.C
Donald R. Munroe, Q.C.
Benjamin J. Oliphant

Gall Legge Grant & Munroe LLP
Suite 1000-1199 West Hastings Street
Vancouver, B.C. V6E 3T5

Tel: 604-891-1152
Fax: 604-669-5101
E-mail: pgall@glgmlaw.com

Counsel for the Applicant,
the Law Society of British Columbia

Mark Power

Power Law / Juristes Power
130 Albert Street, Suite 1103
Ottawa, Ontario K1P 5G4

Tel: 613-702-5569
Fax: 1-888-404-2227
Email: MPower@powerlaw.ca

Ottawa Agent for the Applicant,
the Law Society of British Columbia

OVERVIEW

1. The issue of whether Trinity Western University's ("**TWU**") proposed law school should or must be approved for the purposes of admitting graduates into articling or entrance programs of Canadian law societies has generated considerable controversy in the legal profession, and in the British Columbia legal profession in particular.

2. That is not because there is a concern about the quality of the legal education these graduates will receive at TWU, which has been accepted by both the Law Society of British Columbia (the "**BC Law Society**") and the Law Society of Upper Canada (the "**LSUC**").

3. Rather, it is because of aspects of a community covenant that TWU requires its students to sign as a condition of admission (the "**Covenant**") that are viewed as discriminatory against lesbian, gay, bisexual, transgender and queer ("**LGBTQ**") persons.

4. The discriminatory impact of TWU's covenant on applicants to law school directly engages the statutory obligations of the BC Law Society: to uphold and protect the public interest in the administration of justice, including by protecting the rights and freedoms of all persons.[1]

5. In pursuing this public interest mandate, the question is whether the harms of approving TWU's proposed law school – to the rights of LGBTQ people and to the integrity of the justice system – are outweighed by the freedom of religion rights of TWU's evangelical Christian community.

6. The Courts of Appeal of Ontario and British Columbia have reached starkly different conclusions on this question.

7. The Ontario Court of Appeal found that it was reasonable for the LSUC to not accredit TWU as a result of its discriminatory covenant, while the British Columbia Court of Appeal found that the only reasonable (and therefore only legally acceptable) option was for the BC Law Society to approve TWU.

8. The decisions of the British Columbia and Ontario Courts of Appeal, dealing with the exact same subject matter (i.e. approval of TWU by law societies) and in a similar statutory context, are in conflict.

9. The broader issues raised in these appeals, with respect to how freedom of religion and equality rights can be reconciled in the regulatory context, as well as the content of the

[1] *Legal Profession Act*, SBC 1998, c 9 ("***LPA***"), s. 3 [Application for Leave to Appeal ("**ALA**") **Tab 10**, Part VII].

duty of religious neutrality owed by public bodies like law societies acting to protect equality rights, are of national importance.

10. It is particularly important for the legal profession – not only in Ontario and British Columbia, but across the country – as well as for TWU and its prospective graduates in terms of their ability to practice law across the country, that this Court rule on how the competing rights and interests should be resolved in this context.

11. A consolidated hearing of the appeals of both the Ontario and the British Columbia decisions would provide the Court with the opportunity to resolve the two core legal issues upon which the British Columbia and Ontario Courts of Appeal disagreed:

    a. first, how should the conflicting rights and interests be balanced under the statutory mandates of the law societies in the context of law school admissions policies impacting entry into the legal profession, and

    b. second, to what extent should the courts defer to the judgement or conclusions of the respective law societies.

12. Granting leave to appeal the decision of the British Columbia Court of Appeal is of particular significance in resolving the issues of national importance raised in these cases, because British Columbia is the home jurisdiction of TWU and is where many if not the majority of TWU graduates will want to practice law.

13. Also, TWU's proposed law school requires the authorization of the British Columbia Government, and the Minister of Advanced Education (the "**Minister**") revoked his consent to TWU's proposed JD degree program based on the BC Law Society's decision not to approve TWU's proposed law school.

14. In summary, as the British Columbia and Ontario Courts of Appeal reached opposing conclusions on the same important legal issues, the BC Law Society submits that the appeals from these Courts of Appeal on the issues of national importance raised in these cases should be heard together by the Supreme Court of Canada.

PART I STATEMENT OF FACTS

A. The Controversy

15. While each law society in Canada has ultimate statutory authority over its own admissions process and criteria, Canadian law societies have adopted a uniform national requirement for admission into law school, giving primary responsibility for reviewing

and approving new law degree programs to the Federation of Law Societies of Canada ("**FLSC**").[2]

16. In June 2012, TWU submitted for approval a proposal for a new law school to the FLSC, as well as to the British Columbia Minister of Advanced Education, who has the statutory power to consent to new degree programs in British Columbia.[3]

17. TWU's proposed law school would require law students to adhere to its Covenant, which prohibits sexual intimacy outside of marriage, defined as between one man and one woman. This aspect of the Covenant effectively prohibits LGBTQ persons from engaging in sexual intimacy during their time in law school.[4]

18. As a result of the exclusionary nature of the Covenant, TWU's proposal sparked a great deal of controversy in the legal profession, the legal academy, and the public at large.

19. Some argued that TWU's proposed law school and Covenant were protected by freedom of religion and must be approved, while others argued that Covenant's discriminatory impact on LGBTQ persons required that TWU not be approved. Others debated the applicability of the *Charter* in this context, the relevance of the *Doré* analysis,[5] and the relationship between legal education and the regulation of the legal profession.[6]

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[2] *Trinity Western University v. The Law Society of British Columbia*, 2015 BCSC 2326 ("**BCSC Decision**"), at para 29 [**ALA Tab 6**].

[3] See *Degree Authorization Act*, S.B.C. 2002, c. 24 ("***DAA***"), ss. 3-4 [**ALA Tab 10**, Part VII]. See also *Trinity Western University v. The Law Society of British Columbia*, 2016 BCCA 423 ("**BCCA Decision**"), at paras 6-11 [**ALA Tab 8**]; BCSC Decision, at paras 28-30 [**ALA Tab 6**]. Note that the relevant British Columbia Minister is now called the "Minister of Education".

[4] BCCA Decision, at paras 13-15, 27 [**ALA Tab 8**].

[5] See *Doré v. Barreau du Québec*, 2012 SCC 12 ("***Doré***") [Applicant's Book of Authorities ("**ABOA**"), **Tab 1**].

[6] These views and others are reflected in the uncommon degree of academic commentary over the issue of whether law societies should approve TWU's proposed law school. See e.g. Dwight Newman, "On the Trinity Western University Controversy: An Argument for a Christian Law School in Canada" (2013) 22:3 Const Forum 1 [**ABOA Tab 14**]; Dianne Pothier, "An Argument Against Accreditation of Trinity Western University's Proposed Law School" (2014) 23:1 Const Forum 1 [**ABOA Tab 15**]; Elaine Craig, "The Case for the Federation of Law Societies Rejecting Trinity Western University's Proposed Law Degree Program" (2013) 25 CJWL 148 [**ABOA Tab 10**]; A. Cameron, A. Chaisson & J. McGill, "The Law Society of Upper Canada Must Not Accredit Trinity Western University's Law School" (2015) University of Ottawa Working Paper Series (WP 2015 – 11) [**ABOA Tab 8**]; Jena McGill, "'Now it's My Rights Versus Yours': Equality in Tension with Religious Freedoms" (2016) 53 Alta L Rev 583 [**ABOA Tab 12**]; Robert E. Charney, "Should the Law Society of Upper Canada Give Its Blessing to Trinity Western University Law School?" (2015) 34 NJCL 173 [**ABOA Tab 9**]; Carissima Mathen & Michael Plaxton, "Legal Education, TWU and the Looking Glass" (2016) 75 SCLR (2d) 223 [**ABOA Tab 11**]; Richard Moon, "The Accreditation of Trinity Western University's Law Program" (2015) *Law Matters*

20. In response to the controversy surrounding TWU's application, the FLSC established a Special Advisory Committee to advise it on whether approving TWU's proposed law school would be contrary to the public interest. The Special Committee issued a report finding no public interest bar to approving TWU, which was followed by "preliminary approval" from the FLSC.[7]

21. Following the FLSC's preliminary approval, the question became whether the individual law societies would agree with the FLSC or would exercise their statutory power to not approve TWU.

22. Some law societies – including those of Alberta, Saskatchewan, Yukon, New Brunswick, Prince Edward Island, and Manitoba – have either approved TWU or acquiesced in the FLSC's decision to approve TWU.

23. Others, including the law societies of Nova Scotia, British Columbia, Northwest Territories, and Ontario, decided not to approve TWU, while the Law Society of Newfoundland and Labrador decided to await the issue's resolution in court.[8]

24. In making these decisions, the votes of the law society benchers tended to be close, reflecting the difficult nature of the legal issues raised in this case. For instance, in Ontario, the LSUC voted 28-21 to not accredit TWU; in Nova Scotia, TWU was not approved based on a 10-9 vote (with one abstention); while in New Brunswick and the Northwest Territories, TWU was deemed approved and not approved, respectively, as a result of tie votes.[9]

25. TWU's proposed law school was perhaps especially controversial in British Columbia.

(CBA Alberta) [**ABOA Tab 13**]; MA Witten, "Tracking Secularism: Freedom of Religion, Education, and the Trinity Western University Law School Dispute" (2016) 79 Sask L Rev 215 [**ABOA Tab 16**].

[7] BCSC Decision, at para 33 [**ALA Tab 6**]; BCCA Decision, at paras 6-8 [**ALA Tab 8**].

[8] BCCA Decision, at paras 32-40 [**ALA Tab 8**].

[9] See *Ibid; Trinity Western University v. The Law Society of Upper Canada*, 2016 ONCA 518 ("**ONCA Decision**"), at para 8 [**ABOA Tab 6**]; *The Nova Scotia Barristers' Society v Trinity Western University*, 2016 NSCA 59, at para 15 [**ABOA Tab 3**]. The Executive of the Law Society of the Northwest Territories voted 3 to 3 on a motion to approve TWU's proposed law school, which led the President to follow the Law Society's policy manual and cast the deciding vote in favour of the status quo (i.e. non-approval). See Law Society of the Northwest Territories, "President's Statement regarding vote on TWU Law School" (August 2014), online: <http://www.lawsociety.nt.ca/society/twu/> [**ALA Tab 11A**]. The Council in New Brunswick initially voted to approve TWU's proposed law school, which was followed by a Special General Meeting in which the membership passed a resolution directing the Benchers to not approve TWU's proposed law school. After considering the matter again, the resolution to rescind Council's approval was not successful as a result of a 12 to 12 vote. See Law Society of New Brunswick, "Law Society Council Upholds Decision to Accredit TWU Law School" (January 9, 2015), online: < http://lawsociety-barreau.nb.ca/en/public/media/trinity-western-university> [**ALA Tab 11B**].

26. Under the BC Law Society Rules, TWU became presumptively approved by the BC Law Society following FLSC's preliminary approval in December 2013, subject to any future resolution to not approve TWU's proposed law school.[10]

27. As a result of the BC Law Society's presumptive approval in December 2013, the Minister initially consented to TWU issuing law degrees under the *Degree Authorization Act,*[11] which decision was challenged in a petition on administrative law and constitutional grounds.[12]

28. Following the FLSC's preliminary approval, the BC Law Society announced that it intended to consider the matter and welcomed submissions from the public. A large volume of submissions came in from members of the BC Law Society, academics, law students, and members of the public, both in support of and against approving TWU.[13]

29. In April 2014, the Benchers of the BC Law Society voted to reject a motion to not approve TWU's proposed law school.[14]

30. The Benchers' April decision was followed by an extraordinary, member-driven Special General Meeting ("**SGM**"), at which the membership voted strongly in favour of a resolution to direct the Benchers to not approve TWU, by a vote of 3,210 to 968.[15]

31. The resolution passed by the membership at the SGM was not binding on the Benchers at that time. However, section 13 of the *Legal Profession Act* requires the Benchers to hold a referendum of the membership if the Benchers have not implemented such a resolution within 12 months, and if the Benchers receive a petition to that effect signed by 5% of the membership.[16]

32. If such a referendum is held in which one third of the membership vote, and two thirds of those voted in favour of the resolution, the Benchers must implement that resolution,

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[10] See the BC Law Society Rules (2014), Rule 2-27(4) (now Rule 2-54) [**ALA Tab 10**, Part VII]; BCSC Decision, at para 34 [**ALA Tab 6**]; BCCA Decision, at paras 10-11 [**ALA Tab 8**].

[11] BCSC Decision, at para 34 [**ALA Tab 6**]; BCCA Decision, at para 9 [**ALA Tab 8**].

[12] The petition was dismissed as moot after the Minister revoked his consent to TWU's proposed law program under the *Degree Authorization Act* following the BC Law Society's Resolution to not approve TWU. See *Loke v. British Columbia (Minister of Advanced Education)*, 2015 BCSC 413 [**ABOA Tab 2**].

[13] BCCA Decision, at paras 20, 22 [**ALA Tab 8**].

[14] BCSC Decision, at paras 35-37 [**ALA Tab 6**]; BCCA Decision, at paras 10-20 [**ALA Tab 8**].

[15] BCSC Decision, at para 42 [**ALA Tab 6**]; BCCA Decision, at paras 22-24 [**ALA Tab 8**].

[16] *LPA*, s. 13(2) [**ALA Tab 10**, Part VII]; BCCA Decision, at paras 67-68 [**ALA Tab 8**].

unless the Benchers consider the resolution to be inconsistent with their statutory obligations.[17]

33. In September 2015, the Benchers approved a resolution to expedite the referendum process. The resolution stated that the Benchers would abide by the outcome of the referendum if the criteria under section 13 of the *Legal Profession Act* were met, i.e. that one-third of BC Law Society members voted and two-thirds of members voted in favour of the resolution. The September resolution also stated that neither outcome would be inconsistent with the Benchers' statutory obligations.[18]

34. Thus, unlike in Ontario, the Benchers of the BC Law Society held a referendum of the members of the BC Law Society on whether TWU's proposed law school should be approved, after having concluded that either result would be consistent with the Benchers' statutory and constitutional obligations.

35. Ultimately, 74% of the membership voting in the referendum were in favour of the BC Law Society not approving TWU. The Benchers then passed a motion on October 31, 2014, declaring that TWU was not an approved faculty of law under the BC Law Society's admission rules (the "**Resolution**").[19]

36. The Minister soon thereafter revoked his consent for TWU's proposed JD program,[20] and TWU brought a petition in court challenging the Resolution, leading to the present appeal.

B. The Conflicting Decisions

i. The British Columbia Decisions

37. TWU was successful in its petition at first instance, with the Chambers Judge finding that the Resolution should be quashed on procedural fairness and administrative law grounds. As a result of these findings, the Chambers Judge did not address the substantive balancing of *Charter* rights and the BC Law Society's statutory mandate.[21]

38. A five-judge panel of the British Columbia Court of Appeal unanimously upheld the Chambers Judge's decision, although on different grounds.

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[17] *LPA*, s. 13(3), 13(4) [**ALA Tab 10**, Part VII]; BCCA Decision, at paras 67-68 [**ALA Tab 8**].

[18] BCSC Decision at paras 44-45 [**ALA Tab 6**]; BCCA Decision, at para 27 [**ALA Tab 8**]. And see Reasons for Decision – LSBC Transcript dated September 27, 2014 [**ALA Tab 4**].

[19] BCSC Decision at paras 47-48 [**ALA Tab 6**]; BCCA Decision, at paras 29-30 [**ALA Tab 8**]. And see Reasons for Decision – LSBC Minutes dated October 31, 2014 [**ALA Tab 5**].

[20] BCSC Decision at para 49 [**ALA Tab 6**]; BCCA Decision, at para 31 [**ALA Tab 8**].

[21] BCSC Decision, at paras 152-153 [**ALA Tab 6**].

39. The Court of Appeal held that the Chambers Judge erred in finding an unlawful sub-delegation and a violation of procedural fairness.[22]

40. Although the Court of Appeal thought that the Benchers fettered their discretion by adopting the vote of a large majority of the profession in British Columbia not to approve TWU's proposed law school, it also held that the validity of the BC Law Society's Resolution turned on whether the Resolution represented an appropriate balancing of the competing *Charter* rights with the BC Law Society's statutory mandate.[23]

41. The Court of Appeal also held that, while not dispositive of the appeal, the fact that the Benchers based their decision to pass the Resolution on a referendum of the membership meant that no deference was owed to the decision of the BC Law Society with respect to whether an appropriate balancing of *Charter* rights and values had been reached.[24]

42. On the *Charter* balancing, the Court of Appeal accepted that the approval of TWU by the BC Law Society would result in a potential detrimental effect on LGBTQ equality rights. However, it found that the impact on LGBTQ applicants was relatively minimal, because approving TWU would not reduce the number of law school seats currently available to LGBTQ applicants, and that approval by the BC Law Society for admission purposes would not be tantamount to approval of TWU's beliefs.[25]

43. In reaching this conclusion, the Court of Appeal effectively equated the interests of LGBTQ persons with the ability of LGBTQ persons to obtain additional placements in law school, as opposed to their interest in equal access to law schools.

44. As such, the Court downplayed the impact of a public body approving a law school with a discriminatory admissions policy on the equality rights of the LGBTQ community, and the risk that the BC Law Society's approval of TWU would send a message, as in *Vriend*, that the LGBTQ community was "not worthy of protection" by the BC Law Society.[26]

45. According to the Court of Appeal:

> While there is no doubt that the Covenant's refusal to accept LGBTQ expressions of sexuality is deeply offensive and hurtful to the LGBTQ community, and we do not in any way wish to minimize that effect, there is no *Charter* or other legal right to be free from views that offend and contradict an individual's strongly held

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[22] BCCA Decision, at paras 62-64, 92-95 [**ALA Tab 8**].

[23] BCCA Decision, at para 97 [**ALA Tab 8**].

[24] BCCA Decision, at paras 78-91, 95, 97 [**ALA Tab 8**].

[25] BCCA Decision, at paras 170-189 [**ALA Tab 8**].

[26] *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at paras 102 [**ABOA Tab 7**].

> beliefs, absent the kind of "hate speech" described in *Whatcott* that could incite harm against others.[27]

46. By contrast, the Court of Appeal found that the impact on religious freedom of not approving TWU would be "severe", because TWU graduates could not obtain admission to the BC Law Society. The Court also found that TWU's religious freedom rights "as an institution" were significantly impacted by the decision, because the Minister revoked consent for TWU's proposed program on the basis of the BC Law Society's decision.[28]

47. As a result, the Court of Appeal held that there can be only one answer to the proper balancing in this context: that not approving TWU's proposed law school "would limit the engaged rights to freedom of religion in a significantly disproportionate way — significantly more than is reasonably necessary to meet the BC Law Society's public interest objectives".[29]

48. The Court of Appeal concluded with the following comment:

> [193] A society that does not admit of and accommodate differences cannot be a free and democratic society — one in which its citizens are free to think, to disagree, to debate and to challenge the accepted view without fear of reprisal. This case demonstrates that a well-intentioned majority acting in the name of tolerance and liberalism, can, if unchecked, impose its views on the minority in a manner that is in itself intolerant and illiberal.

49. On this basis, the BC Law Society's appeal was dismissed.

ii. The Ontario Decisions

50. The courts in Ontario went in the opposite direction.

51. In a unanimous decision a first instance, a three-judge panel of the Ontario Divisional Court upheld the LSUC's decision to not approve TWU (the "**LSUC Resolution**"), emphasizing that "equal access to a legal education is important to the public interest role that the legal profession plays in our society".[30]

52. The Divisional Court found the LSUC was entitled to not approve TWU on the basis that the Covenant discriminated against LGBTQ persons, as well as women (as a result of the

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[27] BCCA Decision, at para 188 [**ALA Tab 8**].

[28] BCCA Decision, at paras 167-169 [**ALA Tab 8**].

[29] BCCA Decision, at para 192 [**ALA Tab 8**].

[30] *Trinity Western University v The Law Society of Upper Canada*, 2015 ONSC 4250 ("**ONSC Decision**"), at para 98 [**ABOA Tab 5**].

provision of the Covenant limiting reproductive choice), common law couples, and those with other religious beliefs.[31]

53. The Divisional Court considered the impact on TWU to be relatively minimal, because the Divisional Court did not have evidence that evangelical Christianity required studying law in isolation from others who do not share the same religious beliefs, and because the LSUC's decision did not preclude TWU from opening a law school with a Covenant; it only effected whether its graduates would be automatically accepted into the Law Society of Upper Canada.[32]

54. Nevertheless, the Divisional Court was satisfied that the LSUC Resolution did amount to an infringement of freedom of religion in the *Charter*, as it placed "an impediment in the path of TWU to pursue its faith-based objective through one component part of its institution, i.e., its law school".[33]

55. On the ultimate question of the appropriate *Charter* balancing, the Divisional Court found as follows:

> [116] In exercising its mandate to advance the cause of justice, to maintain the rule of law, and to act in the public interest, the respondent was entitled to balance the applicants' rights to freedom of religion with the equality rights of its future members, who include members from two historically disadvantaged minorities (LGBTQ persons and women). It was entitled to consider the impact on those equality rights of accrediting TWU's law school, and thereby appear to give recognition and approval to institutional discrimination against those same minorities. Condoning discrimination can be ever much as harmful as the act of discrimination itself. [...]
>
> [118] It was open to the respondent to take a decision that it viewed as not only promoting its statutory mandate but, as importantly, being seen as promoting that mandate. It was also open to the respondent to view accrediting TWU's law school, while professing equal opportunity and equal treatment for its members, its prospective members, and for the legal profession as a whole, as fundamentally inconsistent, if not hypocritical. [...]
>
> [123] Simply put, in balancing the interests of the applicants to freedom of religion, and of the respondent's members and future members to equal opportunity, in the course of the exercise of its statutory authority, the respondent arrived at a reasonable conclusion. It is not the only decision that could have been made, as the difference in the vote on the question reflects. But the fact that people may disagree, even strongly disagree, on the proper result, does not mean

[31] ONSC Decision, at para 104 [**ABOA Tab 5**].

[32] ONSC Decision, at pars 78-80, 85 [**ABOA Tab 5**].

[33] ONSC Decision, at paras 81-84, 91 [**ABOA Tab 5**].

that the ultimate decision is unreasonable. It also does not mean that, just because more Benchers favoured one approach over the other, the result equates to the imposition of some form of "majoritarian tyranny" on the minority, as the applicants contend.

56. TWU's appeal from that decision was dismissed by a unanimous, three-judge panel of the Ontario Court of Appeal.

57. The Ontario Court of Appeal agreed with the Divisional Court on all key points. The Court of Appeal held that the "link between the values enshrined in not only the Covenant but also TWU's foundational documents, such as its Mission Statement, and the appellants' evangelical Christian religious belief and practice is self-evident", but also questioned the extent to which the LSUC's decision directly impacted religious rights.[34]

58. However, the Court nevertheless found it "appropriate to adopt a broad definition of freedom of religion at this stage of the analysis", finding that the 2(a) rights of TWU and its potential students were infringed by the LSUC's decision.[35]

59. On the other side of the balance, the Court found that the decision clearly engaged the LSUC's statutory mandate, that "human rights values must inform how the LSUC pursues its stated objective of ensuring equal access to the profession", and that "the part of TWU's Community Covenant in issue in this appeal is deeply discriminatory to the LGBTQ community".[36]

60. In applying the *Doré* balancing analysis, the Court held that the LSUC's decision was reasonable, on the basis that:

    a. Law schools are a gatekeeper to the legal profession and therefore their admission policies impact the diversity and equality of the legal profession [at paras 130-132];

    b. The LSUC was required to take into account its *Charter* and Human Rights Code obligations, including whether TWU's discriminatory policy precluded accreditation [at para 135];

    c. That TWU was not seeking an immunity from state action preventing the exercise of a religious belief or practice, but rather seeking a public benefit (accreditation) that was denied on the basis of the impact of that religious beliefs upon others [at paras 134-138];

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[34] ONCA Decision, at paras 90, 95-97, 99 [**ABOA Tab 6**].

[35] ONCA Decision, at paras 100-101 [**ABOA Tab 6**].

[36] ONCA Decision, at paras 110, 119 [**ABOA Tab 6**].

d. That international human rights law supports the conclusion that freedom of religion is limited where its exercise impacts the fundamental rights and freedoms of others [at paras 139-140]; and

e. That religious neutrality does not mean that the state must refrain from taking positions on policy disputes with a religious dimension, and the LSUC was entitled to find that "the public interest in ensuring equal access to the profession justified a degree of interference with the appellants' religious freedoms" [at paras 141-142].

61. On those grounds, the Court of Appeal found that the LSUC's decision fell within a range of reasonable options, and it was upheld accordingly.

PART II STATEMENT OF ISSUES

62. The issues of national importance raised in these appeals are:

a. Whether, and how, the courts should apply the *Doré* 'reasonableness' framework in the context of decisions involving conflicting *Charter* rights, and resulting from a majority vote of statutory bodies, particularly in the absence of written reasons?

b. Whether the law societies' decisions to not approve TWU's proposed law school were reasonable or correct conclusions in light of the conflicting *Charter* rights and interests engaged in the context of the law societies' mandates to act in the public interest in the administration of justice?

63. These issues are of profound importance to the immediate parties as well as to the legal profession generally, including other law societies in the country, and the public at large.

PART III STATEMENT OF ARGUMENT

A. The Issues of National Importance

i. Key Points of Dispute between the Courts of Appeal

64. The decisions of the British Columbia and Ontario Courts of Appeal agree on two key points:

a. that the Supreme Court of Canada's 2001 decision in the context of TWU's teachers college,[37] while relevant, is not dispositive of the issues raised in this case,[38] and

[37] *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 ("***BCCT***") **[ABOA Tab 4]**.

b. that the respective law societies have the jurisdiction to refuse to approve or accredit a law school on the basis of its admission policies.[39]

65. Beyond those points of agreement, however, the two Courts of Appeal differed as to how to appropriately reconcile the law societies' statutory mandates with the conflicting *Charter* rights and interests at play, and the legal framework to be applied.

66. For instance, after rejecting TWU's principal submission that the LSUC Benchers failed to balance TWU's religious rights against the LSUC's statutory objectives, the Ontario Court of Appeal found:[40]

> the ultimate question still remains: was the LSUC's decision or the outcome (*Dunsmuir*, at para. 47) reasonable within the parameters set by *Dunsmuir*, *Ryan* and *Doré*? In my view, the answer to this question is 'Yes', indeed 'Clearly yes'. [emphasis added]

67. The position of the British Columbia Court of Appeal, however, was profoundly different. It found that there could only be one reasonable outcome in this context, and concluded as follows:[41]

> This case demonstrates that a well-intentioned majority acting in the name of tolerance and liberalism, can, if unchecked, impose its views on the minority in a manner that is in itself intolerant and illiberal. [emphasis added]

68. Thus, while both Courts of Appeal purported to apply the analysis outlined in *Doré*, they came to fundamentally different conclusions.

69. Moreover, the Courts of Appeal also disagreed on the proper focus of the *Doré* analysis in a context like this, where the decision implicates not only the statutory objects and purposes of a public body, but also raises conflicting *Charter* rights and interests.

70. While the Ontario courts paid particular attention to the statutory mandate of the LSUC and their obligation to protect the public interest, including the equality rights of potential applicants, the British Columbia Court of Appeal focused primarily on the clash of

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[38] BCCA Decision, at paras 148-162 [**ALA Tab 8**]; ONCA Decision, at paras 54-59 [**ABOA Tab 6**]; ONSC Decision, at paras 59-72 [**ABOA Tab 5**]. While the Chambers Judge in British Columbia did not resolve the *Charter* balancing issue, he did express his view that he considered the Supreme Court's decision in *BCCT* to be "dispositive of many of the issues in this case": BCSC Decision, at para 78 [**ALA Tab 6**].

[39] BCSC Decision, at paras 102-108 [**ALA Tab 6**]; BCCA Decision, at paras 52-59 [**ALA Tab 8**]; ONSC Decision, at paras 52-58 [**ABOA Tab 5**]; ONCA Decision, at paras 102-111 [**ABOA Tab 6**].

[40] ONCA Decision, at paras 129 [**ABOA Tab 6**].

[41] BCCA Decision, at para 193 [**ALA Tab 8**].

interests between the equality rights of LGBTQ persons on the one hand, and TWU and its community's religious freedom on the other.

71. These conflicting results and analyses reflect a fundamental tension in the applicability of the *Doré* framework, which is complicated in this context by the following considerations:

    a. there is a fundamental clash of *Charter* rights and values, in addition to the pursuit of statutory obligations;

    b. the decisions were made through votes of majoritarian bodies without formal written reasons to scrutinize for "reasonableness"; and

    c. applying a reasonableness standard could possibly lead to different conclusions on the same *Charter* question.

72. The legal issues dividing the two Courts of Appeal are of national importance transcending the immediate decisions, and warrant clarification and guidance from this Court.

ii. The Importance to the Public and the Profession

73. This case raises a tension between two fundamental *Charter* rights – the right to equality and freedom of religion – in the context of the regulation of the legal profession by self-governing bodies.

74. As a self-governing profession, law societies have a unique public interest mandate. How to balance that statutory mandate in the context of the competing *Charter* rights and interests at play in this case has generated considerable controversy within the governing bodies of law societies, as well as in the legal community generally.

75. Providing a definitive resolution of this issue is important, as Canadian law schools are the starting point for participation in the legal profession for the majority of Canada's lawyers. Admission to law school therefore plays a central role in the future of the legal profession.

76. Canadian law societies, Canada's legal profession, and Canadians in general have a substantial interest in who is admitted to Canadian law schools and the education and values students acquire during law school.

77. It is therefore important not only for the immediate parties, but also for the legal profession generally as well as the public at large, that the Supreme Court of Canada conclusively resolve this matter.

B. Conclusion

78. In two well-reasoned and thoughtful judgments, unanimous panels of the British Columbia and Ontario Courts of Appeal have reached diametrically opposed results on the issues of national importance raised in these proposed appeals.

79. Hearing the appeals from both Courts of Appeal would enable this Court to address how the conflicting rights and interests are to be reconciled in the context of the admissions policies of law schools, which are the initial gatekeeper to the legal profession and an important component of the justice system.

80. The BC Law Society therefore respectfully submits that this court should grant leave to appeal both decisions, to be heard together or consecutively, in order to ensure that the important issues raised in these two cases are fully considered by the Court.

PART IV SUBMISSION ON COSTS

81. Costs should be in the cause.

PART V ORDER REQUESTED

82. The Applicant requests that leave to appeal be granted with costs in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: November 28, 2016

"Peter A. Gall"

Peter A. Gall, Q.C.,
Counsel for the Applicant,
The Law Society of British Columbia

PART VI TABLE OF AUTHORITIES

PART VII STATUTORY PROVISIONS

1. *Degree Authorization Act*, S.B.C. 2002, c. 24, ss. 3-4
2. *Legal Profession Act*, SBC 1998, c 9, s. 13 [excerpt]
3. BC Law Society Rules (2014), Rule 2-27(4) (now Rule 2-54) [excerpt]

This Act is Current to November 9, 2016

This Act has "Not in Force" sections. *See* the Table of Legislative Changes.

DEGREE AUTHORIZATION ACT

[SBC 2002] CHAPTER 24

Assented to May 9, 2002

Contents

Definitions

1 In this Act:

"consent" means a written consent given under section 4 (1);

"degree" means recognition or implied recognition of academic achievement that

(a) is specified in writing to be an associate, baccalaureate, masters, doctoral or similar degree, and

(b) is not a degree in theology;

"minister" includes a person designated in writing by the minister for the purposes of this Act.

Application of this Act

2 (1) This Act does not apply in relation to

(a) [Repealed 2004-33-14.]

(b) an institution as defined in the *College and Institute Act*,

(c) [Repealed 2012-7-22.]

(d) Royal Roads University,

(e) Simon Fraser University,

(f) [Repealed 2002-35-3.]

(f.1) the Thompson Rivers University,

(g) The University of British Columbia,

(h) the University of Northern British Columbia,

(i) the University of Victoria, or

(j) a special purpose, teaching university as defined in the *University Act*.

(2) Subject to subsection (1), this Act applies to every person despite any other enactment.

Granting of degrees and use of "university" restricted

3 (1) A person must not directly or indirectly do the following things unless the person is authorized to do so by the minister under section 4:

(a) grant or confer a degree;

(b) provide a program leading to a degree to be conferred by a person inside or outside British Columbia;

(c) advertise a program offered in British Columbia leading to a degree to be conferred by a person inside or outside British Columbia;

(d) sell, offer for sale, or advertise for sale or provide by agreement for a fee, reward or other remuneration, a diploma, certificate, document or other material that indicates or implies the granting or conferring of a degree.

(1.1) A person who is authorized by the minister to do the things referred to in subsection (1) may grant or confer an honorary degree to or on a person.

(2) A person must not directly or indirectly make use of the word "university" or any derivation or abbreviation of the word "university" to indicate that an educational program is available, from or through the person, unless the person is authorized to do so by the minister under section 4 or by an Act.

(3) Despite subsections (1) and (2), a person may directly or indirectly advertise or provide a program leading to a degree if

(a) the person provides the program under an agreement with another person who is given consent by the minister under section 4 to provide the program or is authorized by this section or another Act to grant or confer degrees, and

(b) the other person who has consent or authorization to provide the program grants or confers the degree to which the program leads.

(4) Despite subsections (1) and (2), a person who is registered with the Private Post-Secondary Education Commission on the date this Act receives First Reading in the Legislative Assembly and who is carrying out an activity described in subsection (1) or (2) on that date may continue to carry out the activity until the earlier of

(a) the date the person ceases to be registered with the Private Post-Secondary Education Commission,

(b) the date 5 years after this Act receives First Reading in the Legislative Assembly, and

(c) the date specified by the minister.

(5) Despite subsections (1) and (2), if, on the date this Act receives First Reading in the Legislative Assembly, an institution established in Canada is designated under paragraph (f) of the definition of "post-secondary education" in section 1 of the *Private Post-Secondary Education Act*, and is carrying on an activity described in subsection (1) or (2), the institution or a person acting for it may continue to carry out the activity until the earlier of

(a) the date they cease to be so designated,

(b) the date 5 years after this Act receives First Reading in the Legislative Assembly, and

(c) the date specified by the minister.

(6) A degree granted or conferred as allowed by subsection (4) or (5) must not indicate that degree is granted or conferred in British Columbia.

(7) Despite subsections (1) and (2), Trinity Western University and the Seminary of Christ the King may continue to carry out an activity described in subsections (1) and (2).

(8) Subsections (4), (5), (6) and (7) do not authorize a person referred to in subsection (4), an institution referred to in subsection (5), Trinity Western University or the Seminary of Christ the King to confer or grant a degree, or provide a program leading to a degree, that the person, institution, university or seminary did not confer, grant or provide on the date this Act receives First Reading in the Legislative Assembly.

Consent of minister

4 (1) The minister may give an applicant consent to do things described in section 3 (1) or (2) if the minister is satisfied that the applicant has undergone a quality assessment process and been found to meet the criteria established under subsection (2) of this section.

(2) The minister must establish and publish the criteria that will apply for the purposes of giving or refusing consent, or attaching terms and conditions to consent, under this section.

(3) The minister may attach to a consent the terms and conditions that the minister considers appropriate to give effect to the criteria established and published under subsection (2), including a termination date after which the consent will cease to be effective unless renewed by the minister.

(4) The minister must not give consent unless that minister is satisfied that the person seeking the consent

(a) has given security to protect the interests of students, if security is prescribed respecting the person seeking consent, and

(b) has made adequate arrangements to protect the interests of students by ensuring

(i) that students have access to their transcripts, and

(ii) if requirements for transcript access are prescribed, that the arrangements comply with the requirements.

Suspension or revocation of consent

5 (1) If a person who has received consent fails to comply with this Act or the regulations, or with the terms and conditions of the consent, the minister may

(a) suspend or revoke the consent, or

(b) change or remove terms and conditions attached to the consent.

(2) A person who has received consent must promptly notify the minister if it is reasonable to believe that not all of the terms and conditions of the consent may be met.

Inspectors

6 (1) The minister may appoint inspectors for the purposes of determining whether

(a) it is appropriate to suspend or revoke a consent or change the terms and conditions attached to a consent, or

(b) a person has failed to comply with this Act or the regulations or with the terms and conditions attached to a consent.

(2) The minister may restrict the inspector's powers of entry and inspection to specified business premises.

(3) If relevant to the purposes of an inspection, an inspector conducting the inspection may

(a) enter business premises,

(b) examine a record or other thing,

(c) demand that a document or other thing be produced for inspection,

(d) remove a record or other thing for review and copying, after providing a receipt,

(e) use data storage, information processing or retrieval devices or systems that are normally used in carrying on business in the premises to produce a record in readable form, or

(f) question a person.

(4) A person must not hinder, obstruct or interfere with an inspector conducting an inspection or provide the inspector with information that the person knows to be false or misleading.

Offence and penalty

7 (1) A person who contravenes section 3 (1), (2) or (6), 5 (2) or 6 (4) commits an offence.

(2) A person who supplies false or misleading information in a return or other document submitted under this Act commits an offence.

(3) If a person directed, authorized, assented to, acquiesced in or participated in an act or omission by a corporation and that act or omission is an offence under subsection (1) or (2), the person is guilty of an offence, whether or not the corporation has been prosecuted or convicted of an offence.

(4) A person does not commit an offence under subsection (2), or under subsection (3) as it relates to subsection (2), if, at the time the information was supplied, the person did not know that it was false or misleading and, with the exercise of reasonable diligence, could not have known that it was false or misleading.

(5) A person who commits an offence under this section is liable to a fine of not more than $100 000.

(6) Section 5 of the *Offence Act* does not apply in respect of this Act or the regulations.

Enforcement of Act by court injunction

8 (1) On application of the minister, the Supreme Court may grant an injunction as follows:

(a) the court may grant an injunction restraining a person from contravening this Act if the court is satisfied that there are reasonable grounds to believe that the person has contravened or is likely to contravene this Act;

(b) the court may grant an injunction requiring a person to comply with this Act if the court is satisfied that there are reasonable grounds to believe that the person has not complied or is likely not to comply with this Act.

(2) An order under subsection (1) may be made without notice to others if it is necessary to do so in order to protect the public interest.

(3) A contravention of this Act may be restrained under subsection (1) whether or not a penalty or other remedy has been provided by this Act.

Power to make regulations

9 (1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act*, including regulations that:

(a) prescribe, for the purposes of section 4 (4), requirements relating to the giving of security and access to student transcripts;

(b) prescribe the procedures for making claims against the security referred to in section 4 (4);

(c) govern the suspension and revocation of consent;

(d) specify the information that must be disclosed respecting applications and consents under this Act, the persons who must disclose it, the manner and time of its disclosure and the persons or classes of persons to whom the information must be disclosed;

(e) set the fees payable

(i) on application for consent or for renewal of a consent,

(ii) annually during the period a consent is in force, or

(iii) for the conduct of reviews for quality assessment.

(2) The Lieutenant Governor in Council may make different regulations under subsection (1) for different classes of persons, matters, transactions, events or things.

Spent

10–16 [Consequential and related amendments. Spent. 2002-24-10 to 16.]

Commencement

17 This Act comes into force by regulation of the Lieutenant Governor in Council.

This Act is Current to November 9, 2016

This Act has "Not in Force" sections. *See* the Table of Legislative Changes.

LEGAL PROFESSION ACT

[SBC 1998] CHAPTER 9

Assented to May 13, 1998

Contents

Definitions

1 (1) In this Act:

"applicant" means a person who has applied for

(a) enrolment as an articled student,

(b) call and admission, or

(c) reinstatement;

"articled student" means a person enrolled in the society's admission program;

"bencher" means a person elected or appointed under Part 1 to serve as a member of the governing body of the society;

"chair" means a person appointed to preside at meetings of a committee or panel;

"conduct unbecoming a lawyer" includes a matter, conduct or thing that is considered, in the judgment of the benchers, a panel or a review board,

(a) to be contrary to the best interest of the public or of the legal profession, or

(b) to harm the standing of the legal profession;

"disbar" means to declare that a lawyer or former lawyer is unsuitable to practise law and to terminate the lawyer's membership in the society;

"executive committee" means the committee established under section 10;

"executive director" means the executive director or acting executive director of the society;

"foundation" means the Law Foundation of British Columbia continued under section 58 (1);

"law corporation" means a corporation that holds a valid permit under Part 9;

"law firm" means a legal entity or combination of legal entities carrying on the practice of law;

"lawyer" means a member of the society, and

(a) in Part 2, Division 1, includes a member of the governing body of the legal profession in another province or territory of Canada who is authorized to practise law in that province or territory,

(b) in Parts 4 to 6 and 10 includes a former member of the society, and

(c) in Part 10 includes an articled student;

"member" means a member of the society;

"officer" means the executive director, deputy executive director or other person appointed as an officer of the society by the benchers;

"panel" means a panel appointed in accordance with section 41;

"practice of law" includes

(a) appearing as counsel or advocate,

(b) drawing, revising or settling

(i) a petition, memorandum, notice of articles or articles under the *Business Corporations Act*, or an application, statement, affidavit, minute, resolution, bylaw or other document relating to the incorporation, registration, organization, reorganization, dissolution or winding up of a corporate body,

(ii) a document for use in a proceeding, judicial or extrajudicial,

(iii) a will, deed of settlement, trust deed, power of attorney or a document relating to a probate or a grant of administration or the estate of a deceased person,

(iv) a document relating in any way to a proceeding under a statute of Canada or British Columbia, or

(v) an instrument relating to real or personal estate that is intended, permitted or required to be registered, recorded or filed in a registry or other public office,

(c) doing an act or negotiating in any way for the settlement of, or settling, a claim or demand for damages,

(d) agreeing to place at the disposal of another person the services of a lawyer,

(e) giving legal advice,

(f) making an offer to do anything referred to in paragraphs (a) to (e), and

(g) making a representation by a person that he or she is qualified or entitled to do anything referred to in paragraphs (a) to (e),

but does not include

(h) any of those acts if performed by a person who is not a lawyer and not for or in the expectation of a fee, gain or reward, direct or indirect, from the person for whom the acts are performed,

(i) the drawing, revising or settling of an instrument by a public officer in the course of the officer's duty,

(j) the lawful practice of a notary public,

(k) the usual business carried on by an insurance adjuster who is licensed under Division 2 of Part 6 of the *Financial Institutions Act*, or

(l) agreeing to do something referred to in paragraph (d), if the agreement is made under a prepaid legal services plan or other liability insurance program;

"practising lawyer" means a member in good standing who holds or is entitled to hold a practising certificate;

"president" means the chief elected official of the society;

"resolution" means a motion passed by a majority of those voting at a meeting;

"respondent" means a person whose conduct or competence is the subject of a hearing or an appeal under this Act;

"review board" means a review board appointed in accordance with section 47;

"rules" means rules enacted by the benchers under this Act;

"society" means the Law Society of British Columbia continued under section 2;

"suspension" means temporary disqualification from the practice of law;

"written" or **"in writing"** includes written messages communicated electronically.

(2) In Parts 1 to 5, **"costs"** means costs assessed under a rule made under section 27 (2) (e) or 46.

Application

1.1 This Act does not apply to a person who is both a lawyer and a part time judicial justice, as that term is defined in section 1 of the *Provincial Court Act*, in the person's capacity as a part time judicial justice under that Act.

Part 1 — Organization

Division 1 — Law Society

Incorporation

2 (1) The Law Society of British Columbia is continued.

(2) For the purposes of this Act, the society has all the powers and capacity of a natural person.

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, and

(e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

Benchers

4 (1) The following are benchers:

(a) the Attorney General;

(b) the persons appointed under section 5;

(c) the lawyers elected under section 7;

(d) the president, first vice-president and second vice-president.

(2) The benchers govern and administer the affairs of the society and may take any action they consider necessary for the promotion, protection, interest or welfare of the society.

(3) The benchers may take any action consistent with this Act by resolution.

(4) Subsections (2) and (3) are not limited by any specific power or responsibility given to the benchers by this Act.

(5) The benchers may

(a) use the fees, assessments and other funds of the society, including funds previously collected or designated for a special purpose before this Act came into force, for the purposes of the society,

(b) raise funds by the issue of debentures, with or without a trust deed, for the purposes of the society,

(c) provide for a pension scheme for its officers and employees out of the funds of the society, and

(d) approve forms to be used for the purposes of this Act.

Appointed benchers

5 (1) The Lieutenant Governor in Council may appoint up to 6 persons to be benchers.

(2) Members and former members of the society are not eligible to be appointed under this section.

(3) A bencher appointed under this section has all the rights and duties of an elected bencher, unless otherwise stated in this Act.

(4) If a bencher appointed under this section fails to complete a term of office, the Lieutenant Governor in Council may appoint a replacement to hold office for the balance of the term of the bencher who left office.

(5) A bencher appointed under this section is not eligible to hold the position of president, first vice-president or second vice-president.

Meetings

6 (1) The benchers may make rules respecting meetings of the benchers.

(2) For a quorum at a meeting of the benchers, at least 7 benchers must be present and a majority of those present must be members of the society.

(3) A motion assented to in writing by at least 75% of the benchers has the same effect as a resolution passed at a regularly convened meeting of the benchers.

Elections

7 (1) The benchers may make rules respecting the election of benchers and of the second vice-president.

(2) The rules made under subsection (1) must be consistent with the following:

(a) voting is by secret ballot;

(b) the right of each member to vote for a bencher or the second vice-president carries the same weight as any other member who is entitled to vote for that bencher or the second vice-president;

(c) only members in good standing are entitled to vote.

(3) Section 11 (4) applies to the rules made under subsection (1) of this section unless they deal directly with a matter referred to in section 12.

(4) Section 12 applies to the rules made under subsection (1) of this section that deal directly with a matter referred to in that section.

Officers and employees

8 The benchers may make rules to do either or both of the following:

(a) delegate to the executive director, or the executive director's delegate, any power or authority of the benchers under this Act except rule-making authority;

(b) authorize a committee established under this Act to delegate authority granted to it under this Act to the executive director or the executive director's delegate.

Division 2 — Committees

Law Society committees

9 (1) The benchers may establish committees in addition to those established by this Act.

(2) The benchers may authorize a committee to do any act or to exercise any jurisdiction that, by this Act, the benchers are authorized to do or to exercise, except the exercise of rule-making authority.

(3) The benchers may make rules providing for

(a) the appointment and termination of appointments of persons to committees, and

(b) the practice and procedure for meetings of committees, including proceedings before committees.

(4) For a quorum at a meeting of a committee, at least 1/2 of the members of the committee must be present.

Executive committee

10 (1) The benchers must establish an executive committee.

(2) The benchers may delegate any of the powers and duties of the benchers to the executive committee, subject to any conditions they consider necessary.

(3) A quorum of the executive committee is 4.

(4) A motion assented to in writing by at least 75% of the executive committee's members has the same effect as a resolution passed at a regularly convened meeting of the executive committee.

Division 3 — Rules and Resolutions

Law Society rules

11 (1) The benchers may make rules for the governing of the society, lawyers, law firms, articled students and applicants, and for the carrying out of this Act.

(2) Subsection (1) is not limited by any specific power or requirement to make rules given to the benchers by this Act.

(3) The rules are binding on the society, lawyers, law firms, the benchers, articled students, applicants and persons referred to in section 16 (2) (a) or 17 (1) (a).

(4) Enactment, amendment or rescission of a rule is not effective unless at least 2/3 of the benchers present at the meeting at which the rule, amendment or rescission is considered vote in favour of it.

(5) Unless section 12 applies, no approval other than that required under subsection (4) of this section is necessary to enact, rescind or amend a rule.

Rules requiring membership approval

12 (1) The benchers must make rules respecting the following:

(a) the offices of president, first vice-president or second vice-president;

(b) the term of office of benchers;

(c) the removal of the president, first vice-president, second vice-president or a bencher;

(d) the electoral districts for the election of benchers;

(e) the eligibility to be elected and to serve as a bencher;

(f) the filling of vacancies among elected benchers;

(g) the general meetings of the society, including the annual general meeting;

(h) the appointment, duties and powers of the auditor of the society;

(i) life benchers;

(j) [Repealed 2012-16-6(a).]

(k) the qualifications to act as auditor of the society when an audit is required under this Act.

(2) The first rules made under subsection (1) after this Act comes into force must be consistent with the provisions of the *Legal Profession Act*, R.S.B.C. 1996, c. 255, relating to the same subject matter.

(3) The benchers may amend or rescind rules made under subsection (1) or enact new rules respecting the matters referred to in subsection (1), in accordance with an affirmative vote of 2/3 of those members voting at a general meeting or in a referendum respecting the proposed rule, or the amendment or rescission of a rule.

Implementing resolutions of general meeting

13 (1) A resolution of a general meeting of the society is not binding on the benchers except as provided in this section.

(2) A referendum of all members must be conducted on a resolution if

(a) it has not been substantially implemented by the benchers within 12 months following the general meeting at which it was adopted, and

(b) the executive director receives a petition signed by at least 5% of members in good standing of the society requesting a referendum on the resolution.

(3) Subject to subsection (4), the resolution is binding on the benchers if at least

(a) 1/3 of all members in good standing of the society vote in the referendum, and

(b) 2/3 of those voting vote in favour of the resolution.

(4) The benchers must not implement a resolution if to do so would constitute a breach of their statutory duties.

Part 2 — Membership and Authority to Practise Law

Division 1 — Practice of Law

Members

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

(a) establish categories of members;

(b) determine the rights and privileges associated with categories of members;

(c) set the annual fee for categories of members other than practising lawyers;

(d) determine whether or not a person is a member in good standing of the society.

(2) A member in good standing of the society is an officer of all courts of British Columbia.

(3) A practising lawyer is entitled to use the style and title of "Notary Public in and for the Province of British Columbia," and has and may exercise all the powers, rights, duties and privileges of the office of notary public.

Authority to practise law

15 (1) No person, other than a practising lawyer, is permitted to engage in the practice of law, except

(a) a person who is an individual party to a proceeding acting without counsel solely on his or her own behalf,

(b) as permitted by the *Court Agent Act*,

(c) an articled student, to the extent permitted by the benchers,

(d) an individual or articled student referred to in section 12 of the *Legal Services Society Act*, to the extent permitted under that Act,

(e) a lawyer of another jurisdiction permitted to practise law in British Columbia under section 16 (2) (a), to the extent permitted under that section,

(f) a practitioner of foreign law holding a permit under section 17 (1) (a), to the extent permitted under that section, and

(g) a lawyer who is not a practising lawyer, to the extent permitted under the rules.

(2) A person who is employed by a practising lawyer, a law firm, a law corporation or the government and who acts under the supervision of a practising lawyer does not contravene subsection (1).

(3) A person must not do any act described in paragraphs (a) to (g) of the definition of "practice of law" in section 1 (1), even though the act is not performed for or in the expectation of a fee, gain or reward, direct or indirect, from the person for whom the acts are performed, if

(a) the person is a member or former member of the society who is suspended or has been disbarred, or who, as a result of disciplinary proceedings, has resigned from membership in the society or otherwise ceased to be a member as a result of disciplinary proceedings, or

(b) the person is suspended or prohibited for disciplinary reasons from practising law in another jurisdiction.

(4) A person must not falsely represent himself, herself or any other person as being

(a) a lawyer,

(b) an articled student, a student-at-law or a law clerk, or

(c) a person referred to in subsection (1) (e) or (f).

(5) Except as permitted in subsection (1), a person must not commence, prosecute or defend a proceeding in any court.

(6) The benchers may make rules prohibiting lawyers from facilitating or participating in the practice of law by persons who are not authorized to practise law.

Interprovincial practice

16 (1) In this section, **"governing body"** means the governing body of the legal profession in another province or a territory of Canada.

(2) The benchers may permit qualified lawyers of other Canadian jurisdictions to practise law in British Columbia and may promote cooperation with the governing bodies of the legal profession in other Canadian jurisdictions by doing one or more of the following:

(a) permitting a lawyer or class of lawyers of another province or a territory of Canada to practise law in British Columbia;

(b) attaching conditions or limitations to a permission granted under paragraph (a);

(c) submitting disputes concerning the interjurisdictional practice of law to an independent adjudicator under an arbitration program established by agreement with one or more governing bodies;

(d) participating with one or more governing bodies in establishing and operating a fund to compensate members of the public for misappropriation or wrongful conversion by lawyers practising outside their home jurisdictions;

(e) making rules

(i) establishing conditions under which permission may be granted under paragraph (a), including payment of a fee,

(ii) respecting the enforcement of a fine imposed by a governing body, and

(iii) allowing release of information about a lawyer to a governing body, including information about practice restrictions, complaints, competency and discipline.

(3) Parts 3 to 8 and 10 apply to a lawyer or class of lawyers given permission under this section.

Practitioners of foreign law

17 (1) The benchers may do any or all of the following:

(a) permit a person holding professional legal qualifications obtained in a country other than Canada to practise law in British Columbia;

(b) attach conditions or limitations to a permission granted under paragraph (a);

(c) make rules establishing conditions or limitations under which permission may be granted under paragraph (a), including payment of a fee.

(2) Parts 3 to 8 and 10 apply to a person given permission under this section.

Association with non-resident lawyers or law firms

18 The benchers may make rules concerning the association of members of the society or law firms in British Columbia with lawyers or law firms in other jurisdictions.

Division 2 — Admission and Reinstatement

Applications for enrolment, call and admission, or reinstatement

19 (1) No person may be enrolled as an articled student, called and admitted or reinstated as a member unless the benchers are satisfied that the person is of good character and repute and is fit to become a barrister and a solicitor of the Supreme Court.

(2) On receiving an application for enrolment, call and admission or reinstatement, the benchers may

(a) grant the application,

(b) grant the application subject to any conditions or limitations to which the applicant consents in writing, or

(c) order a hearing.

(3) If an applicant for reinstatement is a person referred to in section 15 (3) (a) or (b), the benchers must order a hearing.

(4) A hearing may be ordered, commenced or completed despite the applicant's withdrawal of the application.

(5) The benchers may vary conditions or limitations made under subsection (2) (b) if the applicant consents in writing to the variation.

Articled students

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

(a) establish requirements, including academic requirements, and procedures for enrolment of articled students;

(b) set fees for enrolment;

(c) establish requirements for lawyers to serve as principals to articled students;

(d) limit the number of articled students who may be articled to a principal;

(e) stipulate the duties of principals and articled students;

(f) permit the investigation and consideration of the fitness of a lawyer to act as a principal to an articled student.

(2) The benchers may establish and maintain an educational program for 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;

(c) set a fee for call and admission;

(d) establish requirements and procedures for the reinstatement of former members of the society;

(e) set a fee for reinstatement;

(f) establish conditions under which a member in good standing of the society who is not permitted to practise law, may apply to become a practising lawyer.

(2) The fee set under subsection (1) (c) must not exceed 1/6 of the practice fee set under section 23 (1) (a).

(3) The benchers may impose conditions or limitations on the practice of a lawyer who, for a cumulative period of 3 years of the 5 years preceding the imposition of the conditions, has not engaged in the practice of law.

Prohibition on resignation from membership

21.1 (1) A lawyer may not resign from membership in the society without the consent of the benchers if the lawyer is the subject of

(a) a citation or other discipline process under Part 4,

(b) an investigation under this Act, or

(c) a practice review under the rules.

(2) In granting consent under subsection (1), the benchers may impose conditions.

Credentials hearings

22 (1) This section applies to a hearing ordered under section 19 (2) (c).

(2) A hearing must be conducted before a panel.

(3) Following a hearing, the panel must do one of the following:

(a) grant the application;

(b) grant the application subject to conditions or limitations that the panel considers appropriate;

(c) reject the application.

(4) If an application is rejected,

(a) the panel must, on the written request of the applicant, give written reasons for its decision, and

(b) the applicant must not be enrolled as an articled student, called and admitted or reinstated as a member.

(5) On application, the benchers may vary or remove conditions or limitations imposed by a panel under this section.

(6) The benchers may make rules requiring payment of security for costs of a hearing.

Division 3 — Fees and Assessments

Annual fees and practising certificate

23 (1) A practising lawyer must pay to the society an annual fee consisting of

(a) a practice fee in an amount set by the benchers, and

(b) [Repealed 2012-16-13.]

(c) an insurance fee set under section 30 (3) (a), unless exempted from payment of the insurance fee under section 30 (4) (b).

(2) The benchers may waive payment of all or part of the annual fee or a special assessment for a lawyer whom they wish to honour.

(3) A lawyer who is suspended under section 38 (5) (d) or the rules made under section 25 (2), 32 (2) (b), 36 (h) or 39 (1) (a) must pay the annual fee or special assessment when it is due in order to remain a member of the society.

(4) The executive director must issue to each practising lawyer a practising certificate on payment of the annual fee, if the lawyer is otherwise in good standing and has complied with this Act and the rules.

(5) A certificate purporting to contain the signature of the executive director stating that a person is, or was at the time specified in the certificate, a member in good standing of the society is proof of that fact, in the absence of evidence to the contrary.

(6) A lawyer who is suspended or who, for any other reason, ceases to be a member in good standing of the society must immediately surrender to the executive director his or her practising certificate and any proof of professional liability insurance issued by the society.

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

(a) set the date by which the annual fee is payable, subject to rules made under section 30 (4) (a);

(b) permit late payment of the annual fee or a special assessment;

(c) set a fee for late payment of fees and assessments;

(d) determine the circumstances in which a full or partial refund of a fee or assessment may be made;

(e) deem a lawyer to have been a practising lawyer during a period in which the lawyer was in default of payment of fees or an assessment on conditions that the benchers consider appropriate.

Fees and assessments

24 (1) The benchers may

(a) set fees, and

(b) set special assessments to be paid by lawyers and applicants for the purposes of the society and set the date by which they must be paid.

(c) [Repealed 2012-16-14.]

(2) [Repealed 2012-16-14.]

(3) If the benchers set a special assessment for a stated purpose and do not require all of the money collected for that stated purpose, they must return the excess to the members.

(4) On or before the date established by the benchers, each lawyer and applicant must pay to the society any special assessments set under subsection (1) (b), unless the benchers otherwise direct.

Failure to pay fee or penalty

25 (1) If a lawyer fails to pay the annual fee or a special assessment as required under this Act by the time that it is required to be paid, the lawyer ceases to be a member, unless the benchers otherwise direct, subject to rules made under section 23 (7).

(2) The benchers may make rules providing for the suspension of a lawyer who fails to pay a fine, costs or a penalty by the time payment is required.

Part 3 — Protection of the Public

Complaints from the public

26 (1) A person who believes that a lawyer, former lawyer or articled student has practised law incompetently or been guilty of professional misconduct, conduct unbecoming a lawyer or a breach of this Act or the rules may make a complaint to the society.

(2) The benchers may make rules authorizing an investigation into the conduct of a law firm or the conduct or competence of a lawyer, former lawyer or articled student, whether or not a complaint has been received under subsection (1).

(3) For the purposes of subsection (4), the benchers may designate an employee of the society or appoint a practising lawyer or a person whose qualifications are satisfactory to the benchers.

(4) For the purposes of an investigation authorized by rules made under subsection (2), an employee designated or a person appointed under subsection (3) may make an order requiring a person to do either or both of the following:

(a) attend, in person or by electronic means, before the designated employee or appointed person to answer questions on oath or affirmation, or in any other manner;

(b) produce for the designated employee or appointed person a record or thing in the person's possession or control.

(5) The society may apply to the Supreme Court for an order

(a) directing a person to comply with an order made under subsection (4), or

(b) directing an officer or governing member of a person to cause the person to comply with an order made under subsection (4).

(6) The failure or refusal of a person subject to an order under subsection (4) to

(a) attend before the designated employee or appointed person,

(b) take an oath or make an affirmation,

(c) answer questions, or

(d) produce records or things in the person's possession or control

makes the person, on application to the Supreme Court by the society, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court.

Suspension during investigation

26.01 (1) The benchers may make rules permitting 3 or more benchers to make the following orders during an investigation, if those benchers are satisfied it is necessary to protect the public:

(a) suspend a lawyer who is the subject of the investigation;

(b) impose conditions or limitations on the practice of a lawyer who is the subject of the investigation;

(c) suspend the enrolment of an articled student who is the subject of the investigation;

(d) impose conditions or limitations on the enrolment of an articled student who is the subject of the investigation.

(2) Rules made under subsection (1) must

(a) provide for a proceeding to take place before an order is made,

(b) set out the term of a suspension, condition or limitation, and

(c) provide for review of an order made under subsection (1) and for confirmation, variation or rescission of the order.

(3) Rules made under this section and section 26.02 may provide for practice and procedure for a matter referred to in subsection (2) (a) and (c) or section 26.02 (3) and may specify that some or all practices and procedures in those proceedings may be determined by the benchers who are present at the proceeding.

Medical examination

26.02 (1) The benchers may make rules permitting 3 or more benchers to make an order requiring a lawyer or an articled student to

(a) submit to an examination by a medical practitioner specified by the benchers, and

(b) instruct the medical practitioner to report to the benchers on the ability of the lawyer to practise law or, in the case of an articled student, the ability of the student to complete his or her articles.

(2) Before making an order under subsection (1), the benchers making the order must be of the opinion that the order is likely necessary to protect the public.

(3) Rules made under subsection (1) must

(a) provide for a proceeding to take place before an order is made, and

(b) provide for review of an order under subsection (1) and for confirmation, variation or rescission of the order.

Written notification to chief judge

26.1 If an investigation is conducted in accordance with the rules established under section 26 (2) of this Act respecting a lawyer or former lawyer who is also a "part time judicial justice", as that term is defined in section 1 of the *Provincial Court Act*, the society must, as soon as practicable, provide a written notification to the chief judge designated under section 10 of the *Provincial Court Act* that includes the following information:

(a) the name of the lawyer or former lawyer;

(b) confirmation that an investigation is being conducted with respect to that lawyer or former lawyer.

Practice standards

27 (1) The benchers may

(a) set standards of practice for lawyers,

(b) establish and maintain a program to assist lawyers in handling or avoiding personal, emotional, medical or substance abuse problems, and

(c) establish and maintain a program to assist lawyers on issues arising from the practice of law.

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

(a) establish a practice standards committee and delegate any or all authority and responsibility under this section, other than rule-making authority, to that committee;

(b) permit an investigation into a lawyer's competence to practise law if

(i) there are reasonable grounds to believe that the lawyer is practising law in an incompetent manner, or

(ii) the lawyer consents;

(c) require a lawyer whose competence to practise law is under investigation to answer questions and provide access to information, files or records in the lawyer's possession or control;

(d) provide for a report to the benchers of the findings of an investigation into the competence of a lawyer to practise law;

(d.1) permit the practice standards committee established under paragraph (a) to make orders imposing conditions and limitations on lawyers' practices, and to require lawyers whose competence to practise law has been investigated to comply with those orders;

(e) permit the benchers to order that a lawyer, a former lawyer, an articled student or a law firm pay to the society the costs of an investigation or remedial program under this Part and set and extend the time for payment;

(f) permit the discipline committee established under section 36 (a) to consider

(i) the findings of an investigation into a lawyer's competence to practise law,

(ii) any remedial program undertaken or recommended,

(iii) any order that imposes conditions or limitations on the practice of a lawyer, and

(iv) any failure to comply with an order that imposes conditions or limitations on the practice of a lawyer.

(3) The amount of costs ordered to be paid by a person under the rules made under subsection (2) (e) may be recovered as a debt owing to the society and, when collected, the amount is the property of the society.

(3.1) For the purpose of recovering a debt under subsection (3), the executive director may

(a) issue a certificate stating that the amount of costs is due, the amount remaining unpaid, including interest, and the name of the person required to pay it, and

(b) file the certificate with the Supreme Court.

(3.2) A certificate filed under subsection (3.1) with the Supreme Court is of the same effect, and proceedings may be taken on it, as if it were a judgment of the Supreme Court for the recovery of a debt in the amount stated against the person named in it.

(4) Rules made under subsection (2) (d.1)

(a) may include rules respecting

(i) the making of orders by the practice standards committee, and

(ii) the conditions and limitations that may be imposed on the practice of a lawyer, and

(b) must not permit the imposition of conditions or limitations on the practice of a lawyer before the lawyer has been notified of the reasons for the proposed order and given a reasonable opportunity to make representations respecting those reasons.

Education

28 The benchers may take any steps they consider advisable to promote and improve the standard of practice by lawyers, including but not limited to the following:

(a) establishing and maintaining or otherwise supporting a system of legal education, including but not limited to the following programs:

(i) professional legal training;

(ii) continuing legal education;

(iii) remedial legal education;

(iv) loss prevention;

(b) granting scholarships, bursaries and loans to persons engaged in a program of legal education;

(c) providing funds of the society and other assistance to establish or maintain law libraries in British Columbia;

(d) providing for publication of court and other legal decisions and legal resource materials.

Specialization and restricted practice

29 The benchers may make rules to do any of the following:

(a) provide for the manner and extent to which lawyers or law firms may hold themselves out as engaging in restricted or preferred areas of practice;

(b) provide for the qualification and certification of lawyers as specialists in areas of practice designated under paragraph (c);

(c) designate specialized areas of practice and provide that lawyers must not hold themselves out as restricting their practices to, preferring or specializing in a designated area of practice unless the lawyer has met the qualifications required for certification under a rule made under paragraph (b);

(d) establish qualifications for and conditions under which practising lawyers may practise as mediators.

Insurance

30 (1) In this section, **"trust protection insurance"** means insurance for lawyers to compensate persons who suffer pecuniary loss as a result of dishonest appropriation of money or other property entrusted to and received by a lawyer in his or her capacity as a barrister and solicitor.

(1.1) The benchers must make rules requiring lawyers to maintain professional liability and trust protection insurance.

(2) The benchers may establish, administer, maintain and operate a professional liability insurance program and may use for that purpose fees set under this section.

(2.1) The benchers

(a) must establish, administer, maintain and operate a trust protection insurance program and may use for that purpose fees set under this section,

(b) may establish conditions and qualifications for a claim against a lawyer under the trust protection insurance program, including time limitations for making a claim, and

(c) may place limitations on the amounts that may be paid out of the insurance fund established under subsection (6) in respect of a claim against a lawyer under the trust protection insurance program.

(3) The benchers may, by resolution, set

(a) the insurance fee, and

(b) the amount to be paid for each class of transaction under subsection (4) (c).

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

(a) permit lawyers to pay the insurance fee by instalments on or before the date by which each instalment of that fee is due;

(b) establish classes of membership for insurance purposes and exempt a class of lawyers from the requirement to maintain professional liability or trust protection insurance or from payment of all or part of the insurance fee;

(c) designate classes of transactions for which a lawyer must pay a fee to fund the professional liability or trust protection insurance program.

(5) The benchers may use fees set under this section to act as the agent for the members in obtaining professional liability or trust protection insurance.

(6) The benchers must establish an insurance fund, comprising fees set under this section and other income of the professional liability and trust protection insurance programs, and the fund

(a) must be accounted for separately from other funds,

(b) is not subject to any process of seizure or attachment by a creditor of the society, and

(c) is not subject to a trust in favour of a person who has sustained a loss.

(7) Subject to rules made under section 23 (7), a lawyer must not practise law unless the lawyer has paid the insurance fee when it is due, or is exempted from payment of the fee.

(8) A lawyer must immediately surrender to the executive director his or her practising certificate and any proof of professional liability or trust protection insurance issued by the society, if

(a) the society has, on behalf of the lawyer,

(i) paid a deductible amount under the professional liability insurance program in respect of a claim or potential claim under that program, or

(ii) made an indemnity payment under the trust protection insurance program in respect of a claim under that program, and

LAW SOCIETY RULES

Adopted by the Benchers of the Law Society of British Columbia
under the authority of the *Legal Profession Act*, S.B.C. 1998, c. 9

Effective date: December 31, 1998

Powers of the Credentials Committee

2-26 (1) The Credentials Committee may

(a) and (b) [rescinded]

(c) exercise the authority of the Benchers to call and admit barristers and solicitors,

(d) implement, administer and evaluate a training course and examinations, assignments and assessments for all articled students,

(e) establish standards for passing the training course and examinations, assignments and assessment,

(f) establish procedures to be applied by the Executive Director and faculty of the training course for

(i) the deferral, review or appeal of failed examinations, assignments and assessments, and

(ii) remedial work in the training course or examinations, assignments and assessments, and

(g) review, investigate and report to the Benchers on all aspects of legal education leading to call and admission.

(2) When the Credentials Committee is empowered to order a hearing under this Division, it may do so even though the application has been withdrawn.

(3) The Credentials Committee may, with the consent of the person concerned, vary or remove practice conditions or limitations imposed by the Committee under this Division.

[(1) amended 11/1999; 03/2003; (3) amended 09/2012, effective 01/2013; (3) amended 09/2014]

Application for enrolment, admission or reinstatement

Disclosure of information

2-26.1 (1) When an application has been made under this Division, the Executive Director may

(a) disclose the fact that the application has been made and the status of the application, and

(b) on the request of a governing body, provide to the governing body copies of all or part of the contents of the application and related material.

(2) For the purpose of subrule (1)(a), the status of an application is its stage of progress in processing the application, including, but not limited to the following:

(a) received and under review;

(b) granted, with or without conditions or limitations;

(c) referred to the Credentials Committee;

(d) hearing ordered, whether or not a hearing has been scheduled;

(e) withdrawn;

(f) refused.

(3) Before the Executive Director sends material to a governing body under subrule (1)(b), the Executive Director must be satisfied that privacy of the applicant will be protected where possible, unless the material has been put in evidence in a public hearing.

(4) With the consent of the Credentials Committee, the Executive Director may deliver to a law enforcement agency any information or documents obtained under this Division that the Committee reasonably believes may disclose evidence of an offence.

(5) The Executive Director may disclose the existence and nature of a condition or limitation imposed or agreed to under this Division if the condition or limitation

(a) is ordered as a result of a hearing under this Division,

(b) restricts or prohibits a lawyer's practice in one or more areas of law, or

(c) is imposed by Rule 2-48.1, 2-49.1 or 2-54.

(6) If the Executive Director discloses the existence of a condition or limitation under subrule (5) by means of the Society's website, the Executive Director must remove the information from the website within a reasonable time after the condition or limitation ceases to be in force.

[added 02/2004; (1) amended, (5) and (6) added 06/2005; (5) amended 12/2009; (2) amended 07/2012]

Admission program

Enrolment in the admission program

2-27 (1) An applicant for enrolment in the admission program may apply for enrolment at any time.

(2) [rescinded]

(3) An applicant may make an application under subrule (1) by delivering to the Executive Director the following:

(a) a completed application for enrolment in a form approved by the Credentials Committee, including a written consent for the release of relevant information to the Society;

(b) proof of academic qualification under subrule (4);

(c) an articling agreement stating a proposed enrolment start date not less than 30 days from the date that the application is received by the Executive Director;

(d) other documents or information that the Credentials Committee may reasonably require;

(e) the application fee specified in Schedule 1.

(4) Each of the following constitutes academic qualification under this Rule:

(a) 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;

(b) a Certificate of Qualification issued under the authority of the Federation of Law Societies of Canada;

(c) approval by the Credentials Committee of the qualifications of a full-time lecturer at the faculty of law of a university in British Columbia.

(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.

(5) An official transcript of the applicant's grades at each faculty of law at which the applicant studied is proof of academic qualification under subrule (4)(a).

(6) The Credentials Committee may approve academic qualifications under subrule (4)(c) if the applicant

(a) has been a full-time lecturer at a common law faculty of law in a Canadian university for at least 5 of the last 8 years, and

(b) has been found by the Credentials Committee to have an adequate knowledge of the common law.

[(1) and (3) amended, (2) rescinded 11/1999; (4) amended 09/2001; (3) amended 03/2003, 12/2011; (4) amended, (4.1) added 09/2013]

Re-enrolment

2-28 (1) This Rule applies to a person

(a) whose application for enrolment has been rejected because he or she has not satisfied a panel that he or she is of good character and repute and fit to become a barrister and solicitor of the Supreme Court,

(b) whose enrolment has been set aside by a panel under section 38(6)(d) of the Act, or

(c) who has failed to complete the training course satisfactorily.

(2) A person referred to in subrule (1)(a) and (b) may not apply for enrolment until the earlier of

(a) the date set by a panel acting under subrule (1)(a) or (b), or

(b) 2 years after the date of the event referred to in subrule (1)(a) or (b).

(3) A person referred to in subrule (1)(c) may not apply for enrolment for 1 year after the later of

(a) the date on which the Executive Director issued the transcript of failed standing, or

(b) the failed standing is confirmed under Rule 2-45(6)(a).

[amended, (3) added 03/04]

Consideration of application for enrolment

2-29 (1) The Executive Director must consider an application for enrolment by a person meeting the academic qualifications established under Rule 2-27, and may conduct or authorize any person to conduct an investigation concerning the application.

(2) On an application for enrolment as an articled student, the Executive Director may

(a) enrol the applicant without conditions or limitations effective the enrolment start date proposed in the application, or

(b) refer the application to the Credentials Committee.

(3) When an application is referred to the Credentials Committee under subrule (2), the Committee may

(a) enrol the applicant effective on or after the proposed enrolment start date without conditions or limitations,

(b) enrol the applicant effective on or after the proposed enrolment start date with conditions or limitations on the activities of the applicant as an articled student, if the applicant consents in writing to those conditions or limitations, or

(c) order a hearing.

[(2) and (3) amended 11/99; (1) amended 03/05]

Principals

2-30 (1) A lawyer may act as principal to no more than 2 articled students at one time.

(1.1) To qualify to act as a principal, a lawyer must have

(a) engaged in the active practice of law in Canada

(i) for 7 of the 10 years, and

(ii) full-time for 3 of the 5 years

immediately preceding the articling start date, and

Trinity Western University

President's Statement regarding vote on TWU Law School

On October 16, 2014 the Executive of the Law Society of the NWT met to discuss and debate issues arising from the proposed law school at Trinity Western University. The Executive had the benefit of 19 written submissions to our own Law Society as well as many learned writings available on line from other Law Societies who have addressed these issues. It was clear that each member of the Executive had taken careful opportunity to review the submissions and consider his or her position and that each position was presented in a reasoned and respectful manner.

It was moved by Michael Woodward and seconded by Alain Chiasson that the Law Society designate TWU as an approved law school pursuant to S. 18 (1)(c) of the Legal Profession Act. This resulted in a tied vote of 3 in favour and 3 against. Pursuant to Policy 1(3) of the Policy Manual of the Law Society, the President cast a second vote, being guided by the principles outlined in that policy to vote in favour of the status quo. The motion was therefore defeated.

It was moved by Karen Wilford and seconded by Margo Nightingale that consideration of the issue be deferred pending guidance from the Courts and the outcome of the process of the Federation of Law Societies of Canada. The motion was defeated.

It was moved by Shannon Cumming that TWU be approved, conditional upon the Community Covenant being amended so as to cease being discriminatory. The motion was not seconded and did not proceed.

The question of where this leaves us as an Executive and indeed as a Law Society is something that will require further discernment over the coming weeks. I strongly encourage all members to remain in dialogue with one another in the same careful manner that we have seen to date. I am extremely grateful to our members for their time and commitment to the process.

Karen Wilford,
President

Originally posted August 2014:

A **Discussion Paper** regarding Trinity Western University's application for approval of their proposed law school is **posted here.**

Written response submissions (PDF or Word documents) will be received by the Law Society of the Northwest Territories until Friday, Sept. 26th, 2014. They will be reviewed by the executive and posted on our website. Please email your PDF or Word document to **Communications.**

RESPONSES RECEIVED:

Member Response

Member Response

Member Response

Member Response

Member Response

Member Response

Member Response

Member Response

Member Response

Member Response

(Inactive) Member Response

Trinity Western University

OutlawsCanada

Canadian Council of Christian Charities

CBA-NT SOGIC

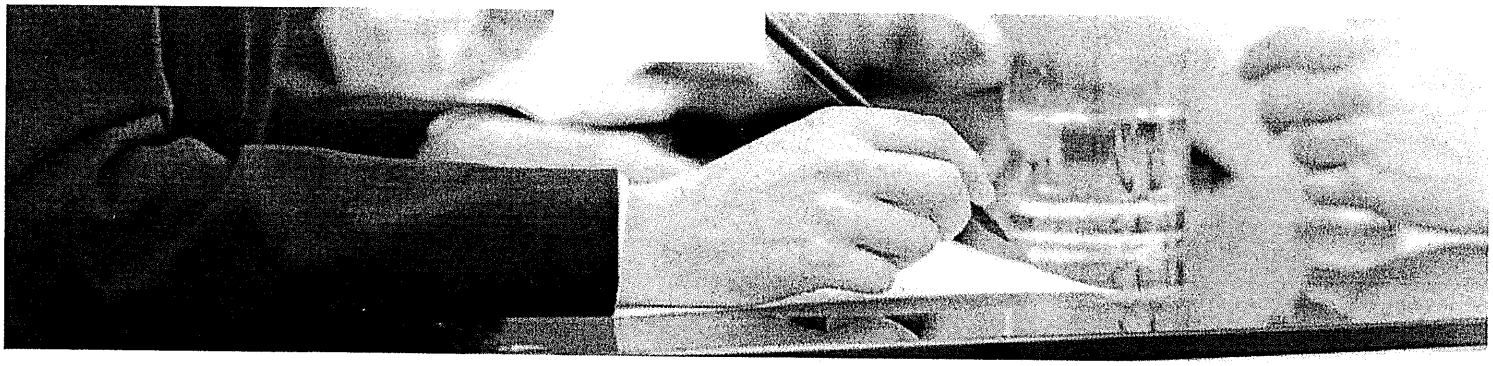
CBA-NT Branch

Non-Member (J.D. Candidate)

Christian Legal Fellowship

Non-Member (J.D. Candidate)

Non-Members



Trinity Western
UNIVERSITY

Frequently Asked Questions
Complaints
Discipline Cases
Publication Policies - Discipline
Compensation Fund
Review of Lawyers' Bills (Taxation)
Contingent Fee Agreements
Public Representative
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New Brunswick Law Foundation
Links
Media Advisories
Trinity Western University
Supreme Court of Canada

For Immediate Release - January 9, 2015

Law Society Council Upholds Decision to Accredit TWU Law School

Fredericton – The motion to rescind the decision of Council of June 27, 2014, was not defeated, but it was not successful. There is a difference.

Following passionate arguments from both sides, the vote was held. The result was a tied vote 12 votes to 12. President of the Law Society of New Brunswick, Hélène L. Beaulieu, Q.C., FCIP, said "This result is indicative of the difficult issue that the Courts will have to decide."

Beaulieu said, "There have been major recent developments that cast the future of the law school in serious doubt. First, the BC Law Society has reversed an earlier decision to accredit the university. Second, the BC government has withdrawn its support for the law school pending the results of multiple court challenges that will delay the start of a law school indefinitely. The BC government says continuing support would have resulted in a school turning out graduates who would not be permitted to practice in BC.

Beaulieu said, "Council's priority is protection of the public interest and in this case ensuring our profession represents all of the communities that lawyers serve. As well, the Law Society has additional safeguards to ensure both religious freedom and the right to sexual orientation without discrimination."

Beaulieu said, "The result of the decision demonstrates the difficulty Council was faced with."

On June 27, 2014, Council of the Law Society voted to accredit Trinity Western University's proposed law school program by a vote of 14 to 5. Following the approval, Council received a request for a Special General Meeting which was held on Saturday, September 13, 2014. During the Special General Meeting, members of the Law Society passed a resolution by a vote of 137 to 30 directing Council not to approve Trinity Western University's Law school as a faculty of law. The resolution passed at the Special General Meeting does not bind Council because the *Act* and the *General Rules* assign exclusive authority to Council to accredit law school programs.

1. The following notice of motion was filed with the Law Society of New Brunswick, and will be considered at the January 9, 2015, Council meeting at 10 a.m. at the Law Society office located at 68 Avonlea Court, Fredericton, NB:

"BE IT RESOLVED THAT

Council rescinds the following resolution adopted by Council on June 27, 2014:

> *Council accepts the report of the Federation Approval Committee, that, subject to the concerns and comments noted in the report, the TWU program will meet the national requirement and thereby approves the proposed law school at Trinity Western University pursuant to paragraph 22(3)(b) of the General Rules under the Law Society Act, 1996.*

with the result that the law school program proposed by Trinity Western University is not a program approved by Council for the purposes of paragraph 22(3)(b) of the General Rules under the Law Society Act, 1996."

2. All material received up to October 29, 2014, will be part of the record of consideration for the January 9, 2015, Council meeting. The materials are categorized as follows:

A. COUNCIL MEETING MATERIALS - JUNE 27, 2014

a) Letter from bâtonnière Marie-Claude Bélanger-Richard, Q.C., president of the Federation of Law Societies of Canada, dated December 16, 2013

b) Canadian Common Law Program Approval Committee report on Trinity Western University's proposed School of Law Program (December 2013) - Federation of Law Societies of Canada

c) Special Advisory Committee report on Trinity Western's Proposed School of Law (December 2013) - Federation of Law Societies of Canada

d) Letter from Bob Kuhn, J.D., president of Trinity Western University, dated January 8, 2014

e) Memorandum from Marc L. Richard, Q.C., executive director, to Council of the Law Society of New Brunswick, dated January 28, 2014

f) Memorandum from Marc L. Richard, Q.C., executive director, to Council of the Law Society of New Brunswick, dated March 12, 2014

g) Written submissions received by the Law Society of New Brunswick (as of April 30, 2014)

h) Trinity Western University's written submission to the Law Society of New Brunswick dated May 30, 2014

i) June 27, 2014, Council meeting minutes

j) Audio recording of the June 27, 2014, Council meeting

B. MATERIALS RECEIVED AFTER JUNE 27, 2014, COUNCIL MEETING BUT BEFORE SPECIAL GENERAL MEETING OF SEPTEMBER 13, 2014

a) Letter from David M. Lutz, Q.C., dated August 14, 2014

b) Petition for a Special General Meeting received August 14, 2014

c) Special General Meeting Notice

d) Petition from law students received September 11, 2014

e) Correspondence received after June 27, 2014, Council meeting - 938 emails and letters

f) Special General Meeting minutes (September 13, 2014)

g) September 13, 2014, Special General Meeting audio recording

i. PowerPoint Presentation from Lorena A. Henry during Special General Meeting

ii. Rick Mercer video clip on Teen Suicide (shown by Brenda J. Lutz, Q.C., during the Special General Meeting)

C. MATERIALS RECEIVED AFTER SPECIAL GENERAL MEETING BEGAN ON SEPTEMBER 13, 2014

a) Correspondence received after the Special General Meeting began up to October 29, 2014 - 1,355 emails and letters

3. Trinity Western University was invited to provide a written submission to Council which must be filed with the Law Society of New Brunswick by December 31, 2014.

4. No other materials except those enumerated in 2 and 3 will be considered by Council.

5. No oral presentation can be made at the January 9, 2015, Council meeting.

6. Council members must be present in person at the meeting in order to be entitled to vote.