

No. S-149837  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

TRINITY WESTERN UNIVERSITY and  
BRAYDEN VOLKENANT

PETITIONERS (RESPONDENTS)

AND:

THE LAW SOCIETY OF BRITISH COLUMBIA

RESPONDENT (APPLICANT)

**APPLICATION RESPONSE**

Application response of the Petitioners: Trinity Western University ("TWU") and  
Brayden Volkenant (collectively, the "**Petitioners**" or the "**Application Respondents**")

THIS IS A RESPONSE TO the Notice of Application of The Law Society of British  
Columbia (the "**Law Society**") filed January 16, 2015.

**Part 1: ORDERS CONSENTED TO**

The Application Respondents consent to the granting of the orders set out in the  
following paragraphs of Part 1 of the Notice of Application.

1. *Nil.*

**Part 2: ORDERS OPPOSED**

The Application Respondents oppose the orders set out in paragraphs 1(a), 1(b), and 1(c)  
of Part 1 of the Notice of Application.

**Part 3: ORDERS ON WHICH NO POSITION IS TAKEN**

The Application Respondents take no position on the granting of the orders set out in the following paragraphs of Part 1 of the Notice of Application.

1. *Nil.*

**Part 4: FACTUAL BASIS**

1. On June 15, 2012, TWU submitted a proposal (the "**Proposal**") to the Minister of Advanced Education (the "**Minister**"), seeking his consent under the *Degree Authorization Act*, S.B.C. 2002, c. 24 (the "**DAA**") to open a law school offering a common law degree program (the "**JD Program**").
2. The Minister subjected the Proposal to a comprehensive quality review process pursuant to the *DAA*, which resulted in him giving conditional consent to TWU on December 17, 2013 to grant, confer and/or advertise the JD Program.
3. The Minister's consent allowed TWU to offer JD degrees. However, TWU required approval from the provincial law societies in order for its graduates to become practicing members. TWU received preliminary approval of the Federation of Law Societies of Canada on December 16, 2013, after it had completed its own comprehensive review of the Proposal.
4. On April 11, 2014, the Benchers of the Law Society voted on whether or not to adopt the following motion (the "**April Motion**"):
 

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 School of Law of Trinity Western University is not an approved faculty of law.
5. The Benchers voted against adoption of the April Motion by a margin of 20-7 and thereby accepted future TWU graduates.
6. On April 14, 2014, Trevor James Loke filed an application for Judicial Review of the Minister's decision to provide his consent to TWU under the *DAA* (the "**Loke Petition**"). The Law Society was not named as a respondent in the Loke Petition, despite its recent decision to accept TWU as an approved faculty of law.
7. After the defeat of the April Motion, a Special General Meeting of Law Society members (the "**SGM**") was requisitioned pursuant to Law Society Rule 1-9(2). The meeting was held on June 10, 2014. At the SGM, members were asked to consider the following resolution (the "**SGM Resolution**") on the basis that the School of Law

would not “promote and improve the standard of practice by lawyers as required by section 28 of the *Legal Profession Act*”:

The Benchers are directed to declare, pursuant to Law Society Rule 2-27(4.1), that Trinity Western University is not an approved faculty of law.

8. The SGM Resolution specifically and exclusively references the Bencher’s authority under section 28 of the *Legal Profession Act* (the “*LPA*”). No other sections of the *LPA* are referenced.
9. The SGM Resolution was passed at the SGM.
10. At its September 26, 2014 meeting (the “**September Meeting**”) the Benchers voted in favour of the following motion (the “**September Motion**”), which resolved to hold a referendum with respect to implementing the following resolution (emphasis added):

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**”)

11. The Benchers speaking in favour of the September Motion identified a number of rationales for implementing the September Motion. These rationales differ significantly from the arguments now made by the Law Society in support of the September Motion.
12. The Benchers passed the September Motion by a vote of 20-11.
13. The referendum was held among Law Society members pursuant to Rule 1-37 of the Law Society Rules. On October 30, 2014, the Law Society released the results of the referendum: 5,951 BC lawyers (74%) voted in favour of the Referendum Question and 2,088 (26%) voted against it.
14. At a meeting held on October 31, 2014, the Benchers voted 25-1, with four abstentions, to implement the Referendum Question (the “**Decision**”). There was no substantive debate or discussion on the Decision at the meeting.
15. On December 11, 2014, the Minister revoked his consent for the School of Law, citing the lack of regulatory approval following the Decision as the sole reason for the revocation.
16. On December 18, 2014, TWU commenced a judicial review of the Decision (the “**TWU Petition**”) on the grounds that it was *ultra vires*, unreasonable, incorrect, and unconstitutional. The Minister was not added as a party to the TWU Petition.

## Part 5: LEGAL BASIS

1. The Minister has applied to dismiss the Loke Petition on the grounds of mootness. If the Loke Petition is dismissed, the Law Society's applications are unnecessary.
2. The Law Society seeks three orders in its Notice of Application. The Petitioners submit that:
  - I. The Loke Petition and the TWU Petition should not be consolidated and/or heard in the same proceeding pursuant to Rule 22-5(8). However, for reasons of judicial economy, they can be heard consecutively and by the same judge.
  - II. The constitutional issues in the Loke Petition should not be determined prior to or at the same time as the constitutional issues in the TWU Petition and prior to the administrative law issues in the TWU Petition.
  - III. The evidence relating to the *Charter* issues in each Petition should not be evidence in the other Petition.
- I. **The Loke Petition and the TWU Petition should not be consolidated and/or heard together in the same proceeding.**
  1. Rule 22-5(8) of the *Supreme Court Civil Rules* provides as follows (emphasis added):
 

Consolidation

(8)Proceedings may be **consolidated** at any time by order of the court or may be **ordered to be tried at the same time or on the same day.**
  2. An order for consolidation is distinct from an order that a proceeding be tried at the same time or on the same day.
 

*Discovery Enterprises Inc. v. Ebco Industries Ltd.*,  
2001 BCSC 235 at para. 23
  3. The Law Society only expressly seeks an order that the TWU Petition and the Loke Petition "be heard at the same time".
 

*Notice of Application*, Part 1, Para. 1(a)
  4. However, the Law Society's argument refers to consolidation, as well as seeks an order that the Loke Petition and the TWU Petition be heard together in one proceeding.
  5. The Petitioners oppose any order resulting in the *de facto* consolidation of the Loke Petition and the TWU Petition into a single proceeding, or an order allowing the

constitutional issues to be joined together in the same proceeding and determined in isolation from the administrative law issues and context in which they arise.

6. The Petitioners do not oppose an order that the Loke Petition and the TWU Petition be heard consecutively before the same judge.
7. However, these proceedings deal with different questions of law and arise out of distinct contexts. They should be heard as separate proceedings.
8. The Loke Petition and the TWU Petition are judicial reviews of separate administrative decisions of distinct statutory decision-makers.
9. A court's role on judicial review is to determine whether a decision made by a specific administrative body is within its statutory authority or jurisdiction.

*Asad v. Kinexus Bioinformatics Corp.*, 2010 BCSC 33 [*Asad*], paras. 12-14

10. The essential purpose of judicial review is the review of *decisions* to determine their legality.

*Gitxsan Treaty Society v. H.E.U.*, [2000] 1 F.C. 135 at para. 15

11. The Loke Petition and the TWU Petition relate to distinct decisions made by different decision-makers exercising autonomous grants of authority under separate statutes following unrelated processes. It cannot be said that the factual and legal issues giving rise to these separate decisions are sufficiently common as to require that they be disposed of in a single proceeding.
12. One issue in each petition is whether the decision arrived at by each separate decision-maker met the applicable standard of review. A factor in this analysis is whether each decision achieved a proportionate balancing of *Charter* values within the relevant statutory objectives and the specific facts of the case.

*Doré v. Barreau du Québec*, 2012 SCC 12 at paras. 54-55 [*Doré*]

13. The *DAA* and the *LPA* contain very different statutory objectives and the facts of each decision are distinct.
14. Balancing the *Charter* issues in each of the Loke Petition and the TWU Petition will require separate analyses.
15. Hearing these matters as one proceeding will not have any appreciable impact on the number of days necessary to consider each issue in its proper context.
16. There are jurisdictional and procedural fairness issues raised in the TWU Petition but not the Loke Petition. There are also very different administrative law issues in the TWU Petition from the Loke Petition.

17. The Loke Petition (if it goes ahead) and the TWU Petition will be decided on affidavit evidence. Concerns regarding the cost of experts, witness fees, and other pre-trial expenses are minimal, given the nature of these proceedings.

**II. The constitutional issues should not be conflated and heard before the administrative law issues.**

18. The Petitioners are responsible for initiating the TWU Petition. As the initiating parties and dominant litigants, the Petitioners, not the Law Society, set the course of this litigation.

*Cooper v. Lynch*, 2009 BCSC 1317 at para. 10

19. The Law Society is not entitled to act as *de facto* master of the Petitioners' proceeding by dictating the order in which matters arising out of this proceeding should be determined.
20. In *Doré*, the Supreme Court of Canada adopted an integrated analysis for considering the application of *Charter* values within an administrative law context.
21. The Law Society seeks to consolidate these proceedings into a *de facto* private reference by divorcing the *Charter* issues in the TWU Petition and having them heard together with the Loke Petition in one proceeding. This is improper under *Doré*.

**III. The evidence relating to the Charter issues in each Petition should not be evidence in the other Petition.**

22. An order that evidence in the Loke Petition also be evidence in the TWU Petition would not be appropriate given the scope of admissible evidence in a judicial review.
23. Applications for judicial review are generally conducted exclusively on the basis of material that was put before the administrative decision-maker.

*Asad, supra*, at paras. 16-17  
*Carry the Kettle First Nation v. O'Watch*, 2007 FC 847 at para. 52

24. None of the evidence filed by the Petitioner in the Loke Proceeding was put before the Law Society when it made the Decision. This material does not form part of the record in the TWU Petition. The Law Society seeks to circumvent the rules ordinarily applicable to judicial reviews through a preliminary evidentiary order.
25. The Benchers bound themselves to a referendum vote of the members. The arguments now made by the Law Society were not the basis for the Decision.

26. The Law Society cannot improve upon the Decision by supplementing the record with *ex post facto* affidavit evidence appropriated from the Loke Petition. A judicial review is not a trial *de novo*.

*Sellathurai v. Canada (Minister of Public Safety and Emergency Preparedness)*,  
2008 FCA 255

27. The admissibility of the evidence that the Law Society now seeks to file in the TWU Petition is very much contested in the Loke Petition. An order that evidence in each petition be evidence in the other prejudices the Petitioners.
28. In the alternative, if the court makes an order that evidence in one proceeding be evidence in the other, this order should be made subject to the Petitioners' right to argue all of the same objections to the evidence filed in both proceedings.


**Part 6: MATERIAL TO BE RELIED ON**

1. Affidavit #1 of J. Epp Buckingham made December 15, 2014;
2. Affidavit #1 of E. Phillips made December 15, 2014;
3. Affidavit #2 of T. McGee made January 26, 2015;
4. Petition filed December 18, 2014;
5. Response to Petition of the Law Society, filed January 16, 2015;
6. Petition filed by Mr. Loke in Vancouver Registry No.S142908;
7. Response to Petition of TWU in Vancouver Registry No. S142908;
8. Response to Petition of the Minister of Advanced Education in Vancouver Registry No. S142908; and
9. Such further material as counsel may advise.

Two days are scheduled to hear this application and other related applications.

- The Petitioners have filed in this proceeding a document that contains the application respondent's address for service.

Dated: February 2, 2015

  
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Signature of Kevin L. Boonstra  
Lawyer for the Petitioners  
(Application Respondents)