No. 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

INTERVENERS

WRITTEN ARGUMENT OF TRINITY WESTERN UNIVERSITY AND BRAYDEN VOLKENANT

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A. INTRODUCTION

A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct.

R. v. *Big M Drug Mart*[1]

The diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected.

Trinity Western University v. *British Columbia College of Teachers*[2]

1. Trinity Western University (**"TWU"**) is a private religious educational community, with an evangelical Christian mission. For over 50 years, TWU has served as a flagship institution of higher learning for Canada's evangelical Christian community. TWU was founded to be, and always has remained, an educational arm of the evangelical Christian church. In accordance with its legislation, TWU's programs are provided with a Christian viewpoint and underlying Christian philosophy of higher education. The mission of TWU and the Christian church have remained inextricably bound together.

2. In the context of an evangelical Christian community, TWU's Community Covenant is neither surprising nor offensive. It is part of TWU's Christian philosophy of education, which integrates academic learning, spiritual formation and moral character development in a manner consistent with TWU's view of biblical truth. It also directly associates TWU with the evangelical Christian community that TWU serves.

3. The right of the TWU community to maintain the Community Covenant is protected by TWU's private legislation, the *Human Rights Code*, and the *Charter*. In *TWU* v. *BCCT*, the Supreme Court of Canada already determined that the Community Covenant is neither a bar to approval of TWU's programs nor a bar to recognizing the graduates of TWU's professional programs.

4. Under the authority granted to it by the *Legal Profession Act*[3] (**"*LPA*"**) the Law Society of British Columbia (the "**Law Society**") "regulates the legal profession in BC, protecting the

[1] [1985] 1 S.C.R. 295 [*Big M Drug Mart*] at para. 94.
[2] 2001 SCC 31 [*TWU v. BCCT*] at para. 33.
[3] *Legal Profession Act*, S.B.C. 1998, c. 9 [*LPA*].

public interest in the administration of justice by setting and enforcing standards of professional conduct for lawyers."[4] Its affairs are governed by the Benchers, who are responsible for setting academic requirements to obtain admission to the Law Society.[5]

5. The Benchers, after considering the facts and the law, found no public interest or other bar to admitting graduates of TWU to the practice of law. Then, after a popular vote of the membership of the Law Society, they reversed themselves. The opposition to TWU has focused solely on the character of its religious community as expressed in the Community Covenant.

6. To demand that TWU abandon the Community Covenant, as the Law Society has done, is to undermine TWU's Christian philosophy of education, its foundation as an evangelical Christian religious community, and its connection with the wider Canadian evangelical population. The final decision of the Law Society penalizes the TWU community for its religious views on marriage and human sexuality.

7. The Benchers' actions were contrary to their obligations under the *LPA* and the principles of administrative law. Their ultimate decision also seriously infringes the *Charter* rights of TWU and the members of its religious community, including the Petitioner, Brayden Volkenant ("**Brayden**"). The Benchers have ignored that "the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection of freedom of religion".[6]

8. Issues of fundamental rights and freedoms cannot be determined by popular vote or sentiment. This was how women, communists, and non-citizens were at one time prohibited from Law Society membership. As predicted by Bencher Lynal Doerksen on the day that the Benchers opted for a referendum, the vote showed that the TWU community needs the Court's protection from the Law Society membership.[7] As a result, TWU and Brayden have now brought this Petition and seek orders restoring the substantive decision originally made by the Benchers to admit TWU graduates to the practice of law in British Columbia.

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[4] Law Society of British Columbia, "About Us" <http://www.lawsociety.bc.ca/page.cfm?cid=40&t=About-Us>.
[5] *LPA*, ss.20-21.
[6] *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 at para. 64.
[7] Affidavit #2 of T. McGee, Exhibit O at 569.

B. BACKGROUND

1. THE PARTIES

(a) TRINITY WESTERN UNIVERSITY

(i) History and Background

9. TWU is a Christian liberal arts and sciences university located in Langley, British Columbia. It is the largest privately funded Christian university in Canada, with approximately 4,000 students attending per year and over 22,000 alumni.[8] TWU offers over 40 undergraduate programs and 17 graduate programs, including professional programs in nursing, education, business, and counselling psychology.[9]

10. TWU originated out of the desire of members of the Evangelical Free Church of America (the "**EFCA**") to establish a Christian liberal arts college in the Fraser Valley. TWU was founded to be, and has always remained, an arm of the evangelical Christian church.[10]

11. TWU was originally incorporated in 1962 by the EFCA under the *Societies Act* as "Trinity Junior College". It was continued by the *Trinity Junior College Act*, which empowered it to offer two years of university education.[11] TWU has been a degree-granting institution recognized by the government of British Columbia since 1979. In 1985, the British Columbia Legislature passed *An Act To Amend The Trinity Western College Act*, (the "***TWU Act***"), which changed the name of Trinity Junior College to Trinity Western University and provided it authority to grant graduate degrees.[12] Section 3(2) of the *Trinity Junior College Act* provided TWU with a mandate to offer educational programs "***with an underlying philosophy and viewpoint that is Christian***". This section remains in the *TWU Act*.

12. TWU retains direct institutional affiliation with two related Christian denominations: the EFCA and the Evangelical Free Church of Canada ("**EFCC**"). (The EFCC was created in

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[8] Affidavit #1 of R. Wood, paras. 14, 16.
[9] Affidavit #1 of R. Wood, paras. 21-25.
[10] Affidavit #1 of R. Wood, paras. 8, 52, 58, Exhibit U at 154; Affidavit #1 of W. Taylor, paras. 35-38, Exhibit E at 20-26.
[11] *Trinity Junior College Act*, S.B.C. 1969, c. 44.
[12] *An Act To Amend The Trinity Western College Act*, S.B.C. 1985, c. 63; Affidavit #1 of R. Wood, paras. 8-13.

1967, became autonomous in 1984, and remains affiliated with the EFCA.[13]) TWU continues to exist as an expression of the religious mission, heritage, and values of the EFCC and the EFCA.[14]

13. TWU's bylaws require that the Executive Director of the EFCC and the President of the EFCA are *ex officio* members of TWU's Board of Governors.[15] Except for one minor variance, TWU's Statement of Faith is identical to that maintained by the EFCC.[16] If dissolved, TWU's assets revert to the EFCC.[17]

14. TWU has consistently demonstrated an excellent academic track record in regard to its degree programs, which has been specifically recognized by the Canada Research Program, and by publications such as *Maclean's* and the *Globe and Mail*, among others. It has been a member of the Association of Universities and Colleges of Canada (now called "Universities Canada") since 1984.[18]

(ii) TWU as an Evangelical Christian University

15. As an expressly evangelical Christian institution of higher learning, TWU primarily exists to serve the evangelical Christian community in Canada.[19]

16. Evangelicalism is a distinct branch of Christianity within the Protestant tradition. Evangelicals represent a minority religious subculture in Canada, with approximately 11-12% of the Canadian population being associated with communities reflecting evangelical Christian beliefs and practices.[20]

17. The evangelical subculture is characterized by shared religious priorities, including: (a) prioritizing the Bible as a final source of authority; (b) the importance of conducting

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[13] Affidavit #1 of W. Taylor, para. 19.
[14] Affidavit #1 of R. Wood, para. 53; Affidavit #1 of W. Taylor, para. 38.
[15] Affidavit #1 of W. Taylor, paras. 39-41.
[16] Affidavit #1 of W. Taylor, Exhibit A at 2-3.
[17] Affidavit #1 of R. Wood, Exhibit E at 26.
[18] Affidavit #1 of R. Wood, paras. 12, 35, 38, Exhibit K at 93-119.
[19] Affidavit #1 of R. Wood, paras. 53, 56-59; Affidavit #1 of S. Reimer, paras. 54, 55.
[20] Affidavit #1 of J. Greenman, paras. 37, 39, 54-57.

evangelism and mission to "non-believers"; and (c) the pursuit of an active faith, personal piety and spiritual formation.[21]

18. TWU's Statement of Faith publicly endorses a number of religious priorities considered to be hallmarks of evangelicalism.[22] For instance, it describes the Bible as "the ultimate authority by which every realm of human knowledge and endeavour should be judged" that is to be "believed in all that it teaches, obeyed in all that it requires, and trusted in all that it promises." The Statement of Faith further stresses the importance of living an engaged Christian life, proclaiming that "God's justifying grace must not be separated from His sanctifying power and purpose."

19. TWU maintains an environment that appeals to those individuals who share its evangelical Christian faith,[23] but remains open to all students that desire to join its community and are willing to conduct themselves in a manner respectful of the institution's explicitly evangelical character and ethos.[24] TWU does not require its students to sign or agree with its Statement of Faith.[25] It maintains a campus environment where students and faculty can "explore and discuss all manner of contemporary social, political and religious issues".[26] In order to preserve this open community environment, TWU has a policy on Academic Freedom and also adheres to the Academic Freedom policy of Universities Canada.[27] Students are not censured for holding opinions contrary to those of TWU, even when the curriculum teaches contrary to them.[28]

(iii) Evangelical Religious Beliefs Concerning Marriage and Sexuality

20. In terms of doctrine, evangelical Christians tend to be orthodox and traditional.[29] Consistent with historical Christian teachings, they understand marriage as the expression of a covenantal union between one man and one woman, designed and created by God.[30] The source of this belief is the Biblical creation narrative found in Genesis, which indicates

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[21] Affidavit #1 of J. Greenman, paras. 34-35, 41; Affidavit #1 of S. Reimer, paras. 23, 28.
[22] Affidavit #1 of R. Wood, para. 7, Exhibit B at 6-7.
[23] Affidavit #1 of R. Wood, para. 7, Exhibit B at 6-7.
[24] Affidavit #1 of R. Wood, para. 67; Affidavit #1 of J. Epp Buckingham, para. 62.
[25] Affidavit #1 of R. Wood, para. 51.
[26] Affidavit #1 of R. Wood, para. 46.
[27] Affidavit #1 of R. Wood, paras. 46-47, Exhibit P at 145, Exhibit Q at 146.
[28] Affidavit #1 of R. Wood, para. 51; Affidavit #1 of J. Epp Buckingham, para. 10.
[29] Affidavit #1 of J. Greenman, paras. 34, 40, 42; Affidavit #1 of S. Reimer, para. 28.
[30] Affidavit #1 of J. Greenman, paras. 14, 21, 42.

that God created men and women as "complementary partners, ordered toward one another as people who share together in the responsibility of following God's command..."[31]

21. In evangelical Christianity, the limitation of sexual intimacy to opposite sex marriage is a direct reflection of the moral boundaries delineated by these underlying religious beliefs.[32] Same-sex physical intimacy is not an accepted form of sexual expression to evangelical Christians because it cannot be practiced within marriage, as understood in evangelical religious doctrine.[33] Unmarried persons, regardless of their sexual orientation, are expected to abstain from sexual relationships as a spiritual discipline and act of religious obedience to God.[34]

22. The evangelical Christian sexual ethic must be viewed in light of other important Christian teachings, which hold that same-sex intimacy does not impact on the "intrinsic dignity" of each person that "demands respect".[35] Issues of sexuality are not treated as different from other ways in which all persons fall short of God's standards. Evangelical Christians do not equate a person's conduct with his or her inherent dignity and worth as a "bearer of the image of God".[36] It is considered sinful to engage in homophobic behaviour.[37]

(iv) The Mission of TWU

23. TWU's Mission Statement states:

> 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.[38]

24. The Law Society has acknowledged TWU's mission as "the promotion of evangelical Christian values in the context of providing post-secondary education."[39]

25. Dr. Robert Wood, TWU's Provost, identifies a number of ways in which TWU maintains its distinct evangelical identity, including:

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[31] Affidavit #1 of J. Greenman, para. 17.
[32] Affidavit #1 of J. Greenman, paras. 17-21; Affidavit #1 of S. Reimer, para. 28.
[33] Affidavit #1 of J. Greenman, paras. 24, 48-49.
[34] Affidavit #1 of J. Greenman, para. 24.
[35] Affidavit #1 of J. Greenman, para. 50.
[36] Affidavit #1 of J. Greenman, para. 50.
[37] Affidavit #1 of J. Greenman, paras. 50-52.
[38] Affidavit #1 of R. Wood, para. 52, Exhibit U at 154.
[39] Amended Response to Petition of the Law Society **[LSBC Response]**, para. 41.

(a) Members of the Board of Governors, including the Executive Director of the EFCC and the President of the EFCA, are all evangelical Christians;

(b) TWU maintains membership in numerous Christian organizations, including the Evangelical Fellowship of Canada, Christian Higher Education Canada, and the Council for Christian Colleges and Universities;

(c) Faculty are members of many Christian organizations such as the Canadian Scientific and Christian Affiliation, the Nurses Christian Fellowship International, and the Christian Teachers Association of BC, among others;

(d) Faculty must be involved in a local Christian church to receive tenure;

(e) TWU holds daily chapel services with speakers invited from Christian organizations and churches;

(f) During the past three years, over 100 churches in Canada have made donations to TWU; and

(g) TWU provides grants for students whose parent is a pastor or a missionary.[40]

26. A high percentage of students who enroll at TWU identify as Christian. Recent admission data obtained by TWU for statistical purposes indicates that 84% of students identified themselves as Christians.[41]

27. Section 3(2) remains in the *TWU Act*, by which the Legislature mandates that TWU offer "***university education ... with an underlying philosophy and viewpoint that is Christian***".[42] Consistent with this statutory requirement, TWU's educational programming reflects and furthers its evangelical Christian philosophy and viewpoint.[43]

28. Mr. William Taylor, the Executive Director of the EFCC, explains 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.[44]

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[40] Affidavit #1 of R. Wood, para. 54.
[41] Of the students surveyed, 14% did not respond and only 2% identified themselves as non-Christian or coming from a different faith tradition (Affidavit #1 of R. Wood, para. 16).
[42] Affidavit #1 of R. Wood, para. 9.
[43] Affidavit #1 of R. Wood, paras. 3, 90.
[44] Affidavit #1 of W. Taylor, para. 48.

29. Mr. Taylor explains that an evangelical Christian philosophy of education involves more than the impartation of facts and knowledge. It aims to facilitate character and spiritual development in a manner consistent with evangelical Christian understandings of biblical truth. He explains that "[t]o demand that godly character be separated from the educational enterprise at TWU is to ask it to abandon its Christian philosophy of education," because "faith and practice are inextricably linked".[45]

30. There are a number of ways in which TWU provides its educational programs to achieve an underlying evangelical Christian philosophy and viewpoint. For example, TWU has developed a "Purpose Statement" that explains in some detail its purposes as an evangelical Christian educational institution that seeks "total student development" through a number of means, including a "deepened commitment to Jesus Christ and a Christian way of life".[46]

(v) The Community Covenant

31. As a means of preserving and enhancing their distinct religious identity, evangelical Christian communities commonly adopt codes of conduct that prescribe normative behavioural standards for community membership based on Biblical precepts.[47]

32. The values represented in TWU's Community Covenant are similarly derived from the Bible and from traditional evangelical Christian beliefs. Dr. Greenman comments on the fundamentally evangelical nature of the Community Covenant in these terms:

> The entire document is consistent with contemporary evangelical beliefs and practices related to personal and communal morality. From the standpoint of evangelical Christian theology, the covenant reflects core teachings in a clear and succinct manner. Nothing is included in the statement that is marginal to evangelical moral concerns. Rather, the community covenant reflects both historic patterns of evangelical practice and widely accepted contemporary evangelical theological convictions.[48]

33. The Community Covenant is a significant means by which TWU maintains its religious character, achieves its mission as an "arm of the church",[49] attracts students, faculty, and staff that share its evangelical faith,[50] facilitates the ability of its members to practice and

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[45] Affidavit #1 of W. Taylor, paras. 48, 49.
[46] Affidavit #1 of R. Wood, paras. 59, 62, Exhibit U at 155.
[47] Affidavit #1 of S. Reimer, para. 34.
[48] Affidavit #1 of J. Greenman, para. 58.
[49] Affidavit #1 of R. Wood, para. 69.
[50] Affidavit #1 of R. Wood, para. 67.

strengthen their Christian beliefs in a safe and welcoming environment,[51] and promotes moral and spiritual growth in a manner consistent with the evangelical Christian religion.[52]

34. Dr. Gerald Longjohn, one of very few academics that has studied Christian codes of conduct in the academic setting, explains the benefits of the Community Covenant, including: (a) identifying TWU as a community committed to evangelical Christian principles, (b) inviting the participation of members in the religious community, and (c) fostering a campus atmosphere conducive to the integration of faith and learning.[53]

35. Dr. Samuel Reimer similarly identifies a number of ways in which implementing religiously-based codes of conduct benefit evangelical communities by:

    (a) increasing the strength of the evangelical religious subculture;
    (b) providing members with a sense of meaning and belonging; and
    (c) increasing commitment to evangelical religious organizations such as churches and schools.[54]

36. The content of the Community Covenant is common and consistent with codes of conduct generally adopted by evangelical Christian institutions and by other Christian colleges and universities,[55] including a variety of accredited religious U.S. law schools.[56]

37. Under one provision in the Community Covenant, students agree to abstain from sexual intimacy outside of marriage between one man and one woman while they attend TWU. In 2001, the Supreme Court of Canada ordered the British Columbia College of Teachers ("BCCT") to approve TWU's professional Teacher Education Program, which it had refused to do because it concluded that TWU's Community Standards (the predecessor of the Community Covenant) created "discriminatory practices which are contrary to the public interest and public policy".[57] The Supreme Court of Canada held that:

> Students attending TWU are free to adopt personal rules of conduct based on their religious beliefs provided they do not interfere with the rights of others. Their freedom of religion is

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[51] Affidavit #1 of A. Davies, para. 30; Affidavit #1 of S. Ferrari, paras. 24-25; Affidavit #1 of J. Winter, para. 36.
[52] Affidavit #1 of G. Longjohn, Exhibit C at 19.
[53] Affidavit #1 of G. Longjohn, Exhibit C at 24-25.
[54] Affidavit #1 of S. Reimer, paras. 38-40.
[55] Affidavit #1 of S. Reimer, para. 54; Affidavit #1 of G. Longjohn, Exhibit C at 23-24; Affidavit #1 of J. Greenman, para. 61.
[56] Affidavit #1 of E. Phillips, para. 24, Exhibit N at 455-479; Affidavit #1 of J. Epp Buckingham, paras. 74-77, Exhibit EE, Exhibit FF.
[57] *TWU v. BCCT*, at para. 5. The Community Standards was contained in the "Responsibilities of Membership" document.

> not accommodated if the consequence of its exercise is the denial of the right of full participation in society.[58]

38. The Law Society (now) alleges that the Community Covenant requires LGB persons to "effectively renounce their sexual identity" in order to become members of the TWU religious community, effectively barring them from admission to TWU.[59] This assertion is not correct.

39. TWU accepts all academically-qualified students who wish to study in an evangelical Christian community.[60] TWU does not ask for or consider information regarding the sexual orientation of any of its student applicants.[61]

40. LGB students have attended and do attend TWU. They are welcomed as equal members of TWU's university community and are involved in all aspects of campus life, including sports, clubs, and on-campus employment.[62] Sexual minority students have been respected and accepted by peers and professors.[63]

41. Far from TWU being a place where LGB students are required to "renounce their sexual identity", as the Law Society suggests without any specific evidence, TWU's LGB alumni have specifically deposed to the *positive impact* that attending TWU had:

- Perhaps most significantly, TWU gave me, a previously deeply closeted conservative evangelical kid, the courage to confront my sexuality and begin the process of self-acceptance.[64]
- In fact, I attribute my attending TWU to giving me the tools and self-esteem to come out of the closet as gay.[65]
- With respect to my sexual orientation when I attended TWU, I felt encouraged by others by the open and loving environment. The environment at TWU gave me the courage to come out and reveal my gay sexual orientation to a number of other TWU students, as well as an on-campus Bible study leader, and at least one professor.[66]

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[58] *TWU v. BCCT*, at para. 35.
[59] LSBC Response, paras. 49-50.
[60] Affidavit #1 of J. Epp Buckingham, para. 82.
[61] Affidavit #1 of R. Wood, para. 16; Affidavit #1 of J. Epp Buckingham, para. 82.
[62] Affidavit #1 of A. Strikwerda, para. 4; Affidavit #1 of A. Davies, paras. 23-28; Affidavit #1 of I. Cook, paras. 13-14, 21, 27, 41.
[63] Affidavit #1 of A. Strikwerda, paras. 21-23; Affidavit #1 of I. Cook, paras. 24-26; Affidavit #1 of A. Davies, paras. 27-28.
[64] Affidavit #1 of A. Strikwerda, para. 19.
[65] Affidavit #1 of A. Strikwerda, para. 36.
[66] Affidavit #1 of A. Davies, para. 40.

- I increasingly found members of the TWU community who created a safe place for me to talk about my sexual feelings toward men.[67]

42. TWU provides a supportive environment for LGB students who have struggled with reconciling their faith and sexuality, and have been rejected or ridiculed within the LGB community for their religious convictions.[68]

43. Consistent with the practice of evangelical Christians, TWU stands firmly against homophobia and mistreatment of any individual based on sexual orientation. Any homophobic, disrespectful, or discriminatory remarks or behaviour directed against homosexuals or any harassment or bullying of students for any reason, including as a result of their sexual orientation, is a violation of the Community Covenant and strictly unacceptable.[69]

(b) BRAYDEN VOLKENANT

44. Brayden graduated from TWU in 2012 with a Bachelor of Arts (Business Administration). He had a cumulative G.P.A. of 3.77 and graduated with "Great Distinction".[70]

45. Brayden is a committed evangelical Christian. He deposes that his "identity is entirely defined" by his relationship with Jesus Christ, that his Christian faith is the "foundation" for his life, and that he tries to do "everything" in light of his "faith and Christian identity".[71]

46. Brayden desires to become a lawyer. His plan was to attend TWU's law school, but he is currently unable to because his credentials would not be recognized by the Law Society, a fact which frustrates and offends him.[72]

(c) THE LAW SOCIETY OF BRITISH COLUMBIA

47. The Law Society regulates the legal profession in British Columbia.[73] The Benchers have been granted the power to govern and administer the affairs of the Law Society in

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[67] Affidavit #1 of I. Cook, para. 23.
[68] Affidavit #1 of A. Davies, paras. 18-22, 40-44; Affidavit #1 of A. Strikwerda, paras. 17-19, 21-23; Affidavit #1 of I. Cook, paras. 22-25.
[69] Affidavit #1 of R. Wood, paras. 77-78.
[70] Affidavit #1 of B. Volkenant, para. 8.
[71] Affidavit #1 of B. Volkenant, para. 6.
[72] Affidavit #1 of B. Volkenant, paras. 20-21, 29.
[73] *LPA*.

accordance with the *LPA*.[74] No person may be enrolled as an articled student, or called and admitted as a member of the Law Society, without the approval of the Benchers. The Benchers are the exclusive gatekeepers in controlling who can enter the legal profession in British Columbia.[75]

2. THE SCHOOL OF LAW

(a) DEVELOPMENT OF THE SCHOOL OF LAW

48. TWU's law school (the "**School of Law**") will offer a three year *Juris Doctor* common law degree program (the "**JD Program**")[76] equivalent to programs offered by the 20 publically funded "secular" law schools that are already operating throughout Canada.

49. Opening the School of Law has been part of TWU's long-term plan for over 20 years.[77] TWU undertook an exhaustive process in creating and developing the School of Law, which included:

(a) establishing a law school task force in 2008, comprised of judges, lawyers and academics, to develop TWU's program proposal for the School of Law (the "**Proposal**");[78]

(b) implementing a Curriculum Working Group in 2009, which worked to develop the curriculum plan for the School of Law, including course syllabi;[79]

(c) forming a School of Law Advisory Council consisting of lawyers, academics, and one judge, which was responsible for advising TWU in respect to all aspects of the JD Program's development in 2011;[80]

(d) obtaining independent quality assessments of the Proposal from two external reviewers. The reviewers were Albert H. Oosterhoff, B.A., LL.B., LL.M., Professor Emeritus (Univ. of Western Ontario) and Lyman R. Robinson, Q.C., B.A., LL.B., LL.M., Professor Emeritus (Univ. of Victoria). Mr. Oosterhoff concluded that the Proposal was sound and "highly relevant in the current Canadian market", while Mr. Robinson noted favourably the Proposal's emphasis on "ethical standards and professionalism". All of their recommendations were incorporated into the Proposal;[81]

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[74] *LPA*, s.4(2).
[75] *LPA*, s. 14.
[76] Affidavit #1 of J. Epp Buckingham, paras. 11, 81, Exhibit O at 107.
[77] Affidavit #1 of J. Epp Buckingham, para. 14.
[78] Affidavit #1 of J. Epp Buckingham, para. 16.
[79] Affidavit #1 of J. Epp Buckingham, para. 17.
[80] Affidavit #1 of J. Epp Buckingham, para. 18.
[81] Affidavit #1 of J. Epp Buckingham, para. 19.

(e) review and approval by TWU's Senate and Board of Governors;[82] and

(f) engaging in significant consultation between 2009 and 2012 with a wide variety of groups, including the Law Society, other BC law school deans, and bar associations. None of these groups, including the Law Society, expressed any opposition to the School of Law, either relating to the Community Covenant or otherwise, at any time during this consultative process.[83]

50. Like all degree programs at TWU, the JD Program will meet high quality standards. The Law Society has never taken exception to the quality of the JD Program or indicated that its graduates will not be fit for the practice of law.

(b) CANADA'S FIRST FAITH-BASED LAW SCHOOL

51. The School of Law will be the only Canadian Christian law school specifically designed to meet the "need of evangelical Christian students to receive a legal education that both engage[s] and integrate[s] their core religious beliefs."[84] The JD Program will also meet the needs of religious organizations by training professionals that can offer legal advice from a religiously informed perspective.[85]

52. The Law Society incorrectly portrays the School of Law as a "secular activity", because TWU is not an "insular religious organization", a "theological school" or a "church".[86] TWU's entire curriculum for all academic disciplines engages its underlying theological convictions and overarching religious worldview.[87] To suggest that TWU offers merely "secular degrees" is a mischaracterization that minimizes the religious scope and mission of TWU manifest in all of its educational programming.

(c) APPROVAL OF THE PROPOSAL AND SCHOOL OF LAW

53. In 2010, all Canadian law societies approved and adopted a national requirement that gave the Approval Committee of the Federation of Law Societies of Canada (the "**Federation**") responsibility for reviewing new law degree programs to ensure that they prepare law

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[82] Affidavit #1 of J. Epp Buckingham, para. 20.
[83] Affidavit #1 of J. Epp Buckingham, paras. 23-27.
[84] Affidavit #1 of J. Epp Buckingham, para. 78.
[85] Affidavit #1 of J. Epp Buckingham, para. 78.
[86] LSBC Response, paras. 42, 284.
[87] Affidavit #1 of R. Wood, para. 48.

school graduates for law society admission programs.[88] The Law Society agreed with all other Canadian law societies to change its requirements to accept the Federation's approval based on the "national requirement".[89]

54. TWU thus required approval from the Federation, which assessed whether its future graduates would be adequately prepared for the practice of law. In order to open the School of Law, TWU also required the consent of the Minister of Advanced Education (the "**Minister**") under the *Degree Authorization Act* (the "***DAA***")[90] to ensure the JD Program was of sufficient quality to be offered to students in British Columbia. The Minister regulates TWU and has the legislative power to allow it to grant law degrees; the Law Society's role is to admit students with law degrees to the practice of law.

55. On June 15, 2012, the Proposal was provided to both the Federation and the Minister.[91]

56. Both the Federation and the Minister conducted full and detailed reviews of the Proposal over a period of approximately 18 months. Both of these review processes resulted in TWU being granted consent to offer the JD Program.[92]

(i) Approval by the Federation

57. After delivery of the Proposal, the Federation received submissions from numerous organizations arguing both for and against approval. Many of these submissions raised issues relating to the impact of the Community Covenant on LGB individuals.[93] This is the same "public interest" concern the Law Society now raises as the primary justification for its decision to refuse to admit TWU graduates to the practice of law in BC.[94]

58. The Federation established a Special Advisory Committee chaired by John Hunter, QC (the "**Special Advisory Committee**") to review the issue and determine whether concerns raised in relation to the Community Covenant should affect the Federation's approval of the JD Program for law society admission purposes.

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[88] Affidavit #1 of J. Epp Buckingham, para. 28, Exhibit F at 29-31.
[89] Affidavit #1 of K. Jennings, Exhibit B at 47, Exhibit E at 180, 235.
[90] S.B.C. 2002, c. 24.
[91] Affidavit #1 of J. Epp Buckingham, para. 21.
[92] Affidavit #1 of J. Epp Buckingham, paras. 43, 54.
[93] Affidavit #1 of J. Epp Buckingham, para. 31, Exhibit G at 32-34.
[94] LSBC Response, paras. 5, 312.

59. After obtaining a legal opinion from John Laskin (Torys LLP), the Special Advisory Committee considered *TWU v. BCCT* and other case law, including the 2013 Supreme Court of Canada decision in *Saskatchewan v. Whatcott*.[95]

60. The Special Advisory Committee released its report in December of 2013. It found that none of the concerns with the Proposal, including the concern that the Community Covenant discriminated against prospective LGB applicants, raised any "public interest bar to approval of TWU's proposed law school or to admission of its future graduates to the bar admission programs of Canadian law societies".[96]

61. Following publication of the Special Advisory Committee's report, the Approval Committee released a report giving preliminary approval to the JD Program (the only level of approval available). In its report, the Federation's Approval Committee found that the Proposal was "comprehensive and is designed to ensure that students acquire each competency included in the national requirement".[97]

62. TWU subsequently communicated that it had received approval from the Federation to each of Canada's provincial and territorial law societies, confirming that its graduates would be able to article and be admitted to the bar in those jurisdictions.[98]

(ii) Consent of the Minister

63. In addition to the Federation's comprehensive review process, the JD Program also underwent an exhaustive review by the Minister in regard to its academic quality.

64. The Minister's review of the JD Program involved a multi-step process, consisting of:

(a) a full quality assessment by the Degree Quality Assessment Board ("**DQAB**");[99]

(b) review by a five-person expert panel appointed by DQAB (the "**Expert Panel**") that specifically considered whether any issues might result from consenting to the Proposal in light of the Community Covenant;[100] and

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[95] Affidavit #1 of J. Epp Buckingham, para. 41, Exhibit N at 78, 81-83.
[96] Affidavit #1 of J. Epp Buckingham, paras. 40-42, Exhibit N at 93.
[97] Affidavit #1 of J. Epp Buckingham, paras. 43-44, Exhibit O at 116 (para. 47 of Report).
[98] Affidavit #1 of J. Epp Buckingham, para. 45.
[99] Affidavit #1 of J. Epp Buckingham, para. 47.
[100] Affidavit #1 of J. Epp Buckingham, para. 48.

(c) a site visit by the Expert Panel to TWU on March 26, 2013, which involved a detailed question and answer session addressing, among other things, the feasibility of maintaining successful professional programs at TWU.[101]

65. The Expert Panel was comprised of former deans and an interim dean of Canadian law schools. It specifically considered the impact of the Community Covenant's alleged "discrimination".[102]

66. On April 17, 2013, the Expert Panel provided a report, which raised a number of issues, including those relating to the Community Covenant. TWU replied comprehensively to these concerns on May 17, 2013.[103]

67. On December 17, 2013, the Minister, with the input and recommendation of both the Expert Panel and DQAB, granted consent to TWU offering the JD Program. However, this consent was subsequently revoked on December 11, 2014. The sole reason for the Minister's revocation was the Law Society decision refusing TWU School of Law graduates admission to the British Columbia bar, since professional recognition of graduates was one of the Minister's criteria.[104]

(iii) Acceptance by Other Provincial Law Societies

68. Currently, graduates of the School of Law would be accepted for admission by the Law Societies of Alberta, Saskatchewan, Manitoba, Yukon, PEI and New Brunswick.[105] A number of other law societies are waiting for the courts to resolve the issues raised by three law societies.

69. A decision made by the Nova Scotia Barrister's Society to refuse recognizing graduates of TWU's School of Law was recently held by the Nova Scotia Supreme Court to be outside the Society's authority[106] and an infringement of TWU's *Charter* rights.[107]

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[101] Affidavit #1 of J. Epp Buckingham, para. 49, Exhibit P.
[102] Affidavit #1 of J. Epp Buckingham, para. 48, Exhibit Q at 164.
[103] Affidavit #1 of J. Epp Buckingham, paras. 52-53, Exhibit Q, Exhibit R.
[104] Affidavit #1 of J. Epp Buckingham, para. 54, Exhibit R.1, at 259.3.
[105] Affidavit #1 of J. Epp Buckingham, paras. 56-59, 64, 71-72, Exhibit S, Exhibit T, Exhibit U, Exhibit V, Exhibit AA.1, Exhibit DD.
[106] *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25 [*TWU v. NSBS*] at para.181.
[107] *TWU v. NSBS*, at para. 237.

70. Besides British Columbia, Ontario is the only other jurisdiction in Canada where the JD Program is not recognized. The Ontario Superior Court recently upheld the decision of the Law Society of Upper Canada to reject graduates from the School of Law.[108] The Court accepted that the decision infringed the religious freedom of TWU and Brayden, but decided the breach was justifiable. TWU has sought leave to appeal the decision.

3. THE DECISIONS OF THE LAW SOCIETY OF BRITISH COLUMBIA

(a) RULE 2-27[109]

71. The Law Society's rules require that Canadian law school graduates complete the Law Society Admissions Program before being admitted to the practice of law in BC. Enrollment in the program requires an applicant to demonstrate "academic qualification".

72. Until the Fall of 2013, "academic qualification" under the Law Society Rules meant 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".[110]

73. In September of 2013, in anticipation of TWU's application for a law school, Rule 2-27 was amended by the Law Society to require that common law degree programs come from an "approved" faculty of law. Under the amended Rule 2-27, a faculty of law is *approved* where it receives approval from the Federation, unless the Benchers adopt a resolution declaring that it is not or has ceased to be approved.[111] The addition of a discretionary power to "not approve" a school is inconsistent with the Law Society's earlier commitments to admit applicants from Federation approved programs.[112] While Rule 2-27(4.1) speaks of "approval" of faculties of law, the real issue is the "academic qualification" of an "applicant" under Rule 2-27(3).

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[108] *Trinity Western University v. The Law Society of Upper Canada*, 2015 ONSC 4250.
[109] The Law Society has now changed the numbering of its rules. These submissions will refer to the numbering that was applicable at the time that the decisions were made.
[110] Affidavit #1 of K. Jennings, Exhibit A; Law Society Rules, Rule 2-27.
[111] Affidavit #1 of K. Jennings, Exhibit A; Law Society Rules, Rule 2-27(4.1).
[112] Affidavit #1 of K. Jennings, Exhibit B at 47, Exhibit E, at 180, 235.

74. Having received the Federation's approval in December of 2013, TWU graduates had acceptable academic qualifications unless, and until, the Law Society took the step of declaring the JD program "unapproved".

(b) THE APRIL MEETING

75. At a meeting on February 28, 2014, the Benchers circulated a notice of motion under Rule 2-27(4.1) (the "**April Motion**") that was to be voted at in a Bencher meeting on April 11, 2014 (the "**April Meeting**"). The April Motion stated:

> Pursuant to Law Society Rule 2-27(4.1), the Benchers declare that, notwithstanding the preliminary approval granted to Trinity Western University on December 16, 2013 by the Federation of Law Societies' Canadian Common Law Program Approval Committee, the proposed Faculty of Law of Trinity Western University is not an approved faculty of law.[113]

76. By letter of March 7, 2014, TWU requested that the Law Society explain the issues it considered relevant to exercising its discretion under Rule 2-27(4.1).[114] The Law Society refused to provide any guidance.[115] The Benchers have never adopted any guidelines or criteria to guide their discretion under Rule 2-27(4.1).

77. On March 15, 2014, the Law Society received a legal opinion from Mr. Geoffrey Gomery QC (of Nathanson, Schachter & Thompson LLP) examining the scope of discretion afforded to the Benchers under Rule 2-27(4.1). After considering whether the Law Society could accept the Federation's approval of TWU's JD Program conditional upon TWU abandoning the Community Covenant, Mr. Gomery concluded that :

> ...under Rule 2-27(4.1), the Law Society is confined to acting on grounds that are related to the academic qualification to be offered by the proposed law program and it is not authorized to impose the community covenant condition on unrelated grounds.[116]

78. The Law Society made inquiries in advance of the April Meeting to determine whether there was any evidence that TWU graduates engaged in discriminatory conduct relating to sexual orientation or otherwise. Presumably, this was because the Supreme Court of Canada held in *TWU v. BCCT* that the BCCT could ***only*** deny accreditation of TWU's

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[113] Affidavit #1 of E. Phillips, para. 16, Exhibit G at 210-213.
[114] Affidavit #1 of E. Phillips, para. 19, Exhibit J at 221-222.
[115] Affidavit #1 of E. Phillips, Exhibit K at 223.
[116] Affidavit #1 of K. Jennings, para. 2, Exhibit A at 27.

teacher program based on specific evidence of a risk of discrimination by graduates, not general "public interest" perceptions that the BCCT condones "discriminatory practices".[117]

79. The Law Society investigated its own disciplinary records, and made inquiries of the BC Human Rights Tribunal, the Deans of three British Columbia law faculties, the Teachers Regulation Branch, and the College of Registered Nurses of British Columbia. There was no evidence of discriminatory conduct by TWU graduates.[118]

80. The Benchers defeated the April Motion by a 20-7 vote.[119] The President of the Law Society publically stated that this defeat meant the Law Society "decided to approve" the academic qualifications of TWU graduates.[120]

81. The only concern raised by Benchers at the April Meeting was the Community Covenant. No concerns were raised with the quality of education or that graduates would not be adequately prepared for the practice of law. Nearly all of the Benchers who voted against the April Motion referenced the applicability of *TWU v. BCCT* and found no public interest bar to recognizing the academic qualifications of graduates. **Excerpts from statements made by Benchers who voted to accept TWU graduates are in Appendix "A".**

(c) THE JUNE SPECIAL GENERAL MEETING

82. After the defeat of the April Motion, a Special General Meeting of Law Society members ("**SGM**") was requisitioned by some of the members of the Law Society pursuant to Rule 1-9(2), which provides that:[121]

> (2) The Benchers must convene a special general meeting of the Society on a written request
>
> (a) delivered to the Executive Director,
>
> (b) stating the nature of the business that is proposed to be considered for the meeting, and
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> (c) signed by 5 percent of the members of the Society in good standing at the time the request is received by the Executive Director.

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[117] *TWU v. BCCT*, at paras. 18-19, 38.
[118] Affidavit #1 of E. Phillips, para. 24, Exhibit N at 227-229, Exhibit O at 480-483.
[119] Affidavit #1 of E. Phillips, para. 28, Exhibit S.
[120] Affidavit #1 of E. Phillips, Exhibit U at 596. For readability, these submissions may refer to the April and September decisions as the Law Society "approving" TWU, even though technically the Benchers failed to pass a motion to "not approve" TWU.
[121] Affidavit #1 of E. Phillips at para. 31.

83. Members were asked to consider the following resolution ("**SGM Resolution**") on the basis that the School of Law would not "promote and improve the standard of practice by lawyers":

> 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.[122]

84. Section 28 of the *LPA* is the only legal authority cited in the SGM Resolution. The public interest is not referenced.[123]

85. In its "Notice to the Profession" sent to all Law Society members in advance of the SGM, the Law Society included an advocacy letter from a proponent of the SGM Resolution.[124] However, the Benchers refused TWU's request to also enclose a letter to Law Society members with a Notice to the Profession.[125]

86. The SGM was held on June 10, 2014 and the SGM Resolution passed.[126] Members were not required to be present during the member speeches in order to vote.

87. On July 15, 2014, following the passage of the SGM Resolution, the Benchers received another legal opinion from Mr. Gomery, considering whether reversing the April Motion following a referendum of the members to implement the SGM Resolution would constitute a breach of the Benchers' statutory duties under section 13(4) of the *LPA*. Mr. Gomery advised that:

> ... a resolution directing the Benchers to reverse a determination which they believe to have been legally required of them by the decision in *TWU v. BCCT* is not a binding resolution, because to pass it would be contrary to the Benchers' statutory duties.[127]

(d) THE SEPTEMBER MEETING

88. 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

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[122] Affidavit #2 of T. McGee, para. 15, Exhibit L.
[123] Affidavit #1 of E. Phillips, Exhibit V at 599-602.
[124] Affidavit #1 of E. Phillips, Exhibit V at 603-604.
[125] Affidavit #1 of E. Phillips, paras. 32-33; Affidavit #1 of B. Volkenant, para. 27.
[126] Affidavit #1 of E. Phillips, para. 36, Exhibit X at 611-612.
[127] Affidavit #1 of K. Jennings, para. 2, Exhibit A at 37.

thereby reject TWU graduates. This motion was defeated by a vote of 21-9.[128] Some Benchers affirmed that the law required them to defeat the motion.

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

> Resolved that the Benchers implement the resolution of the members passed at the special general meeting of the Law Society held on June 10, 2014, and declare that the proposed law school at Trinity Western University is not an approved faculty of law for the purpose of the Law Society's admissions program.
>
> (the "**Referendum Question**").[129]

90. The September Motion stated the referendum results would be binding on the Benchers if at least one-third of Law Society members voted and two-thirds of members voted in favour of the resolution. The September Motion also stated that "[t]he Benchers hereby determine that implementation of the Resolution does not constitute a breach of their statutory duties, regardless of the results of the Referendum." The Benchers passed the September Motion by a vote of 20-11.[130] A third motion that would have delayed further action until after the Courts had ruled on matters pertaining to the School of Law was then withdrawn.[131]

91. The Benchers speaking in favour of the September Motion advanced several rationales for doing so, including the following:

- failing to do so would make the Benchers look "unresponsive, undemocratic, and indifferent" to the Law Society membership (Tony Wilson, September 26, 2014);[132]
- it "recognizes the significance of the issue to the membership" (Miriam Kresivo, September 26, 2014);[133]
- it was necessary to fulfill the Benchers' governance obligations (Pinder Cheema, September 26, 2014);[134]
- it would communicate to the membership of the Law Society "that they are respected and that the matter is moving forward" (Martin Finch, September 26, 2014).[135]

Additional excerpts from statements made by Benchers are in Appendix "A".

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[128] Affidavit #1 of E. Phillips, para. 41.
[129] Affidavit #2 of T. McGee, para. 17, Exhibit N, Exhibit O.
[130] Affidavit #1 of E. Phillips, para. 38, Exhibit Y at 613-616.
[131] *Ibid.*
[132] Affidavit #2 of T. McGee, Exhibit O at 539.
[133] Affidavit #2 of T. McGee, Exhibit O at 542.
[134] Affidavit #2 of T. McGee, Exhibit O at 565.
[135] Affidavit #2 of T. McGee, Exhibit O at 570.

92. Not a single Bencher who voted against the April Motion on the basis that this was legally required of them by the *TWU v. BCCT* decision indicated at the September Meeting, or afterwards, that they had changed their mind on the precedential value of that decision, that TWU graduates would not be prepared for practice, or that their view of the applicable legal principles had changed.

93. The referendum was held among Law Society members pursuant to Rule 1-37 of the Law Society Rules. Prior to the vote on the Referendum Question, TWU again requested, and was again denied, the opportunity to include material in a mailing to Law Society members.[136] On October 30, 2014, the Law Society released the results. There were 5,951 BC lawyers (74%) who voted in favour of the Referendum Question and 2,088 (26%) who voted against it.[137]

94. On October 30, 2014, TWU wrote an urgent letter to the Law Society entreating it to make any further decision regarding its prospective graduates based on proper constitutional and legal principles, rather than by accepting a popular vote of the membership. TWU enclosed 11 affidavits of TWU alumni and various experts in evangelical and Christian theology. These set out further factual and contextual evidence concerning, *inter alia*, the importance of the Community Covenant to the TWU community and the harm that would result from the Benchers implementing the Referendum Question.[138] These affidavits are now before the Court as part of the record.

(e) THE REFERENDUM WAS NOT BINDING

95. The September Motion stated that the results of the Referendum Question "will be binding and will be implemented by the Benchers" if quorum is reached. However, the SGM Resolution and Referendum Question are not, and could not be, binding on the Benchers, because these resolutions were not passed pursuant to section 13 of the *LPA*.

96. The referendum was not held at the direction of the members pursuant to section 13(2) of the *LPA*. Instead, it was held pursuant to Rule 1-37, which allows referendums to be held

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[136] Affidavit #1 of E. Phillips, paras. 42-43, Exhibit CC at 642, Exhibit DD at 643.
[137] Affidavit #1 of E. Phillips, para. 47.
[138] Affidavit #1 of E. Phillips, para. 49, Exhibit HH at 651. Affidavits attached at Affidavit #2 of E. Phillips, paras. 4-6, Exhibit A.

at the direction of the Benchers.[139] This is consistent with the Court's statements on the *LPA* and s. 13 in *Gibbs v. Law Society of BC*:

> [37] The Law Society is responsible for the administration of lawyers in the Province of British Columbia. In essence, its statutory responsibility and powers in this respect are in exchange for the monopoly given lawyers to engage in the practice of law pursuant to the *Act*.
>
> [79] ... it is important to distinguish between the power granted to the members of the Society and that granted to its Benchers. These powers are disparate.
>
> [105] Section 13 of the Act provides a form of check/balance by its provision that while the Benchers are not bound by resolutions passed by the members there is a mechanism that if the Benchers do not act on a resolution passed by the members, a referendum may occur which if passed under specific conditions would be binding on the Benchers.[140]

Any resolution of members must take into account the "disparate" powers granted to the Benchers and the members under the *LPA*. Sections 19, 20 and 21 of the *LPA* expressly give the Benchers responsibility for determining requirements for admission to the bar.

97. In any event, according to section 13, a "resolution of a general meeting of the society ***is not binding*** on the benchers except as provided in this section"[141], which has the following requirements:

(a) The resolution was not substantially implemented by the Benchers within 12 months of being adopted;

(b) The Law Society receives a petition from at least 5% of members requesting a referendum;

(c) One-third of Law Society members vote in the referendum;

(d) Two-thirds of those voting vote in favour of the resolution; and

(e) Implementing the resolution would not constitute a breach of the Benchers' statutory duties.

98. Only resolutions that follow the complete section 13 procedure can bind the Benchers. The requirements in (a) and (b) were never met. Twelve months had not passed from the June, 2014 SGM Resolution and no subsequent petition from the members was ever received by

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[139] Rule 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...").
[140] *Gibbs v. Law Society of BC*, 2003 BCSC 1814 [*Gibbs v. LSBC*] at paras. 37, 79 and 105.
[141] *LPA*, s. 13(1).

the Law Society. For the reasons set out below, (e) was also not satisfied as implementing the results of the referendum was a breach of the Benchers' statutory duties.

(f) THE OCTOBER MEETING TO THE PRESENT

99. At a meeting held on October 31, 2014, the Benchers treated the September Motion as binding and voted 25-1, with four abstentions, to implement the SGM Resolution based solely on the results of the referendum (the "**Decision**"). This was done without any substantive debate or discussion by the Benchers, and despite the considerable evidence that a reversal would infringe the rights of TWU and its religious community.[142]

100. TWU filed its judicial review of the Decision on December 18, 2014. The Law Society filed their Response on January 16, 2015. On April 27, 2015, the Law Society amended its Response to raise a number of new issues relating to the Community Covenant's impact on women, common-law spouses and unmarried individuals, and persons that are not evangelical Christians.

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[142] Affidavit #1 of E. Phillips, paras. 50-52; Affidavit #2 of E. Phillips.

C. THE RESPONDENT'S EVIDENCE

101. The Law Society filed an affidavit of Tracy Tso (the **"Tso Affidavit"**), which simply appends affidavits filed in another proceeding as exhibits. TWU objects to this affidavit and to these exhibits. TWU submits that they should be found inadmissible or, in the alternative, given little to no weight.

1. THE EVIDENCE WAS NOT BEFORE THE LAW SOCIETY

102. The exhibits to the Tso Affidavit are not admissible because they were not before the Law Society and they do not fall under an exception to admissibility. They consist of material that was filed in a separate judicial review proceeding brought by Trevor Loke (the **"Loke Petition"**), and subsequently dismissed as moot by this Court.[143]

103. Affidavit evidence may be struck or found inadmissible in whole or in part at the hearing of a petition. If the affidavits or portions of the affidavits are not struck, the Court may elect to ignore or assign no weight to those portions of the affidavit that are improper or the whole of the affidavit.[144]

104. The scope of evidence admissible in a judicial review is much narrower than in a trial. The scope of admissibility on judicial review is generally limited to the record before the decision-maker.[145] That is because the essential purpose of judicial review is the *review of decisions* for their legality. It is not a trial *de novo*. This was described in *Asad*:

> In an application for judicial review, the court determines whether relief under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 (*"JRPA"*) is warranted. The court assesses, on the applicable standard of review, whether a tribunal has made a reviewable error justifying the court's intervention...
>
> .....The court's role is limited to determining whether the tribunal has acted, and made its decision, within its statutory authority or jurisdiction [references omitted].[146]

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[143] See *Loke v. British Columbia (Minister of Advanced Education)*, 2015 BCSC 413.
[144] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2014 BCSC 568 at para. 25,140 [*Ktunaxa Nation*]; *Chamberlain v. School District #36 (Surrey)* (1999), 168 DLR (4th) 222 (B.C.S.C) [*Chamberlain*].
[145] *Ktunaxa Nation*, at paras. 113-118.
[146] *Asad v. Kinexus Bioinformatics Corp.*, 2010 BCSC 33 at paras. 12-13 [*Asad*].

105. This is not different with *Charter* evidence. In *Ktunaxa Nation*, the Court rejected the admission of expert reports for the purpose of characterizing a *Charter* right, stating that such extrinsic evidence "is not admissible where it could and should have been placed before the decision-maker tasked with the responsibility of balancing *Charter* values with statutory objectives."[147]

106. The exceptions to the rule are narrow, such as when allegations are made that a tribunal lacked jurisdiction to make a decision or that it breached rules of procedural fairness, or when evidence assists the court by providing background information.[148]

107. None of the material appended to the Tso Affidavit was before the Benchers, and there is no indication they reviewed or relied on these materials in making the Decision. The Decision was simply the implementation of a vote of Law Society members. The substantive decision of the Benchers was made in April, when they refused to pass the April Motion, thereby accepting TWU graduates.

108. These affidavits do not fall under any of the exceptions to admitting extrinsic evidence. With respect to the obligation of the Law Society to balance the *Charter* rights with the statutory objectives, an "administrative decision-maker can only balance the information before him or her."[149]

109. Conversely, most of the materials relied upon by the Petitioners in this proceeding were specifically before and brought to the attention of the Law Society. TWU was provided with confirmation that these materials had been distributed to the Benchers before the Decision was made.[150] The remaining materials are merely background information, most of which was brought to the Benchers' attention in TWU's submissions.[151]

110. Courts have discouraged attempts by administrative decision-makers to buttress their decisions or improve upon their reasons by the filing of *ex post facto* extrinsic evidence.

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[147] *Ktunaxa Nation*, at para. 134. See also para. 140.
[148] *Asad*, at paras. 16-17; *Ktunaxa Nation*, at paras. 116, 125, 131-134, 150.
[149] *Ktunaxa Nation*, at para. 132.
[150] Affidavit #1 of E. Phillips, para. 49, 50, Exhibit HH.
[151] Affidavit #1 of E. Phillips, paras. 25, 40, 49, Exhibits P, AA & HH.

This practice obfuscates the goal of achieving transparency in administrative decision-making by requiring the petitioner to hit a "moving target" on judicial review.[152]

111. In *Phan*, the Federal Court rejected an attempt of a decision-maker to bootstrap evidence:

> Second, and more fundamentally, the affidavit of the decision-maker is attempting to bootstrap her decision. It is an affidavit in the proceedings before this Court well after a decision has been made. This is not permissible: a judicial review application exists for the purpose of controlling the legality of a decision made by an administrative decision-maker. The goalposts are where they are; they cannot be moved. As discussed by the Federal Court of Appeal in *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299, a decision-maker may not supplement the reasons for the decision on an application for judicial review of that decision:
>
> > [41] The Federal Court appears to have placed no weight on this evidence. I also place no weight on it. This sort of evidence is not admissible on judicial review: *Keeprite Workers' Independent Workers Union et al. and Keeprite Products Ltd.* (1980), 114 D.L.R. (3d) 162 (Ont. C.A.). The decision-maker had made his decision and he was functus: *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848. After that time, he had no right, especially after a judicial review challenging his decision had been brought, to file an affidavit that supplements the bases for decision set out in the decision letter. His affidavit smacks of an after-the-fact attempt to bootstrap his decision, something that is not permitted: *United Brotherhood of Carpenters and Joiners of America v. Bransen Construction Ltd.*, 2002 NBCA 27 at paragraph 33. As a matter of common sense, any new reasons offered by a decision-maker after a challenge to a decision has been launched must be viewed with deep suspicion: *R. v. Teskey*, 2007 SCC 25, [2007] 2 S.C.R. 267.
>
> In the case at bar, not only does this decision-maker seek to supplement, by providing more information about the income calculations, but she seeks to change the decision under review, from one where the Officer lacked discretion and was unable to consider the applicant's request to one where she did consider the applicant's request but merely denied it....The affidavit submitted *ex post facto* is not admissible.[153]

112. Those concerns are apposite here. It would be improper to allow the Law Society to rely on evidence in the Loke Petition because it does not relate to the grounds upon which the Law Society made the Decision. The Benchers made a decision to bind themselves to a referendum of the members, and there is no evidence they considered anything additional to what was before them at the April Meeting.

113. The Law Society cannot be permitted to rely on affidavits from a separate proceeding in support of a decision that it now believes it ought to have made, rather than the decision that it did make. For this reason, it is respectfully submitted that the Tso Affidavit ought to be held inadmissible in its entirety.

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[152] *Sellathurai v. Canada*, [2008] FCA 255 at paras. 46-47; see also *Ktunaxa Nation*, at paras. 131-134.
[153] *Phan v. Canada (Citizenship and Immigration)*, 2014 FC 1203 at paras. 24-25.

2. OBJECTIONS TO AFFIDAVITS EXHIBITED TO MS. TSO'S AFFIDAVIT

114. If the Tso Affidavit is not inadmissible for the aforementioned reasons, it is respectfully submitted that the Court ought to strike portions of the exhibits and assign them no weight. **Appendix B of these Submissions contains a listing of specific portions of the exhibits to the Tso Affidavit to which TWU objects.**

115. The general rule is that an affidavit should only adduce evidence based on direct knowledge, observations, and experience.[154] Evidence and expert reports that are irrelevant, argumentative, contain hearsay, or advocacy are inadmissible.[155] Affidavits containing adjectival and subjective descriptions of events amount to opinion or argument and are generally impermissible.[156]

116. TWU objects to portions of the affidavits of expert and lay witnesses on the following bases:

(a) RELEVANCE

117. It is trite that affidavits and portions of affidavits that do not address the issues at this hearing ought not to be considered by the Court.[157] Significant portions of the Tso Affidavit exhibits have offended this rule.

(b) LACK OF EVIDENTIARY FOUNDATION

118. A statement of fact, belief, or opinion "is only as sound as the facts upon which it is based." Where "[t]here is no factual basis for the opinion stated... [i]t is, therefore, impossible to examine its strength." Further, "this type of evidence is not worthy to be relied upon."[158]

119. The Tso Affidavit exhibits include statements made on mere belief. Many times, the ground or foundation for the affiants' belief or statement is not properly set out. Often, facts are stated that for the purpose of characterizing the TWU community (such as references to "threats", "harassment" and use of "hateful language"). Such statements are

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[154] *Supreme Court Civil Rules*, B.C. Reg. 168/2009, as amended, Rule 22-2(12) and (13); *R v. DD*, 2000 SCC 43 at para. 49.
[155] *Kennedy v. Kennedy*, 2006 BCSC 190 at para. 5 [*Kennedy*].
[156] *Kennedy*, at para. 5.
[157] *Chamberlain*, at para. 24.
[158] *Bedard v. Coquitlam School District No. 43*, [1997] B.C.J. No. 2215 at para. 14.

not grounded in evidence and unjustifiably paint the TWU community in a negative light. Evidence that is merely speculation or that contains stretched inferences is inadmissible.

120. In *Ktunaxa Nation*, Justice Savage held that a written expert report tendered on a judicial review was inadmissible because it lacked adequate foundation and because it was argumentative, which are often related problems:

> Second, the tenor of much of the report is objectionable as either argument or providing conclusory statements without supporting reasoning or data. These statements of opinion are not couched in objective language, do not lend the report a sense of impartiality, and are not helpful to a decision-maker.
>
> No attempt is made to support many conclusory statements by the collection of data and the application of an ascertainable and objective methodology. As stated in *Native Council* at para. 25, "there are occasions where the experts go beyond their expertise, become less than objective, and become too closely aligned with their clients' interests". That seems to be the case with the Walker Report.
>
> ....As there is no reasoning linking facts, or the collection of data, with many conclusory statements, I am unable to form an independent conclusion from this opinion. To accept the opinion would simply be a leap of faith, applying the logical fallacy of *ipse dixit*, in this context, "because he said it".[159]

(c) ARGUMENT AND ADVOCACY

121. The most significant objection to many of the Tso Affidavit exhibits is that they engage in argument and advocacy.

122. Submitting argument in the guise of evidence (expert or lay) in an affidavit is improper, as it confuses the fact finding exercise; experts should not be advocates for or against a party, should not reflect a party's argument, and should not express conclusions of law.[160]

(d) LAY OPINION EVIDENCE

123. The affidavits should state the facts only, without stooping to add the affiants' descriptive opinion of those facts. "Personal opinion or a deponent's reactions to events generally should not be included in affidavits."[161]

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[159] *Ktunaxa Nation*, at paras. 152, 153, 155.
[160] *Chamberlain*, at para. 28; *Brough v. Richmond*, 2003 BCSC 512 at paras. 6, 14-15; *Ktunaxa Nation*, at para. 156.
[161] *Chamberlain*, at para. 28; *Ross River Dena Council v. The Attorney General of Canada*, 2008 YKSC 45 at paras. 13-16.

(e) HEARSAY

124. A number of the Tso Affidavit exhibits include documents from a variety of sources, which are then appended as exhibits by the affiants. Exhibits tendered as evidence of the proof of their contents by a person unrelated to those documents is "written hearsay".[162] Marking a document as an exhibit to an affidavit does not prove its contents unless an affiant with personal knowledge attests to those contents.

125. To the extent that such documents are put in evidence as proof of the fact that the statements were made, they are not objectionable. However, the affiants and the Law Society appear to rely on such documents for the proof of their contents, which is not permissible. To the extent they do so, TWU objects.

3. ADDITIONAL OBJECTIONS TO "EXPERT" AFFIANTS

126. Expert reports must comply with the requirements of the *Supreme Court Civil Rules*, which specifies the form that reports are to take. This Court has held that those requirements and language are imperative; reports which do not conform may be held inadmissible. These requirements include listing assumed facts and documents on which they rely.

127. Expert evidence is only necessary where an ordinary person is unlikely to form a correct judgment about an issue without assistance from a person with specialized knowledge outside the experience and knowledge of the judge.[163] Merely helpful or common sense evidence does not satisfy the necessity requirement. An expert may only give an adequately researched independent, unbiased opinion if it is within his or her realm of experience. If an opinion is unnecessary, it could usurp and distort the fact finding process.[164]

128. Exhibits filed as expert evidence in the Tso Affidavit violate these rules. They contain advocacy, legal conclusions and statements outside of the affiant's area of expertise.

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[162] *L.M.U v. R.L.U.*, 2004 BCSC 95 at paras. 25-37.
[163] *R. v. Mohan*, [1994] 2 SCR 9 at para. 23.
[164] *Homolka v. Harris*, 2002 BCCA 262 at paras. 13, 19.

4. NATURE OF "EXPERT" EVIDENCE IN THE TSO EXHIBITS

129. Much of the evidence submitted by the Law Society in the Tso Affidavit ought to be found inadmissible and struck. The problems with this evidence listed in more detail in Appendix B include:

CATHERINE TAYLOR

130. Dr. Taylor's affidavit is problematic in part because some of her assertions are not supported by the articles she cites. For example:[165]

- Para. 10: "*It is highly likely that some sexual minority students at Trinity Western University are closeted because they are struggling to reconcile their same-sex attractions with the belief system of the faith community, and also because being open about their sexual minority identity would expose them to discrimination.*"
    - At the end of this statement, Dr. Taylor cites Yarhouse 2013. This article does not make this observation.
- Para. 12 – "*Given the great importance of school attachment in the lives of students at faith-based school, and the school community's explicit condemnation of same-sex relationships, the impact of discrimination would likely be more severe among those students than among students of secular colleges.*"
    - For this statement, Dr. Taylor cites "Yarhouse" (but does not say whether she is drawing from Yarhouse's 2009 or 2013 article). Neither of these articles makes this observation.
- Para. 14 – "*Sexual minority students in evangelical Christian colleges are much less likely to have family or peer support than other students, because their family and friends are likely to be part of a similar discriminatory faith community as their school.*"
    - No authority is cited for this claim. The Yarhouse article suggests the opposite:
        - Yarhouse 2009 states: "*Of [the gay students surveyed who attend a Christian college] who have disclosed to family members, both men and women believed that they are viewed positively by mothers, fathers, and siblings*"." (p.101, para. 6).

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[165] "Listening to sexual minorities on Christian College Campus" ([Yarhouse 2009]) & "Sexual Minorities in faith-based higher education" ([Yarhouse 2013]).

- Yarhouse 2009 also states: "*Approximately 81% of this sample rated their friends' view of them after disclosure to be "generally positive" or "positive"*." (p. 102, para. 2)

131. Dr. Taylor's opinions are undermined by the content of one of the articles she frequently cites, in which the authors concluded, after conducting a US study on sexual minorities at Christian higher education campuses:

> It is the opinion of the authors that Christian colleges and universities can maintain their doctrinal stances regarding sexual behavior while still creating space in the campus community for many facets of development....
>
> [T]he majority of students in this sample are not advocating for doctrinal or policy change at faith-based institutions, but they do appear to need a place to make sense of a traditional Christian sexual ethic for their own lived experience.[166]

132. As set out in Appendix B, Dr. Taylor's evidence does not comply with the Rules, lacks any meaningful factual foundation for the opinions expressed and appears to be outside of her realm of expertise. She devolves into argument and advocacy and, in the result, TWU objects to the entire affidavit.

BARRY ADAM

133. Dr. Adam's affidavit does not appear to answer the questions posed to him as recorded in paragraph 4. He was apparently asked about the impact of TWU's Community Covenant but he makes only one oblique reference to TWU in para. 19. He does not indicate what facts he assumes to be true in giving his opinions.

ELLEN FAULKNER

134. Dr. Faulkner's entire affidavit is advocacy. It is replete with adjectival descriptions that are prejudicial and used to advance her arguments. The opinions offered, to the extent they are at all relevant to issues in this proceeding, have no stated or actual factual foundation. For example, she presumes facts such as "verbal threats" and "harassment" (para. 11) at TWU related to the sexual orientation of students. She cites studies related to public high schools (para. 16) that have no relevance, particularly in light of the fact that students are obligated to attend public high school, while TWU students are adults who choose to join an

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[166] Yarhouse 2013, p. 21.

expressly religious community. The long list of objections to her opinions that show Dr. Faulkner to be an advocate are set out in Appendix B.

MARY BRYSON

135. Dr. Bryson's affidavit also contains considerable argument without adequate factual foundation as listed in Appendix B. She also interprets documents and makes legal conclusions. Dr. Bryson filed an affidavit in the judicial review proceedings in Nova Scotia pertaining to the School of Law. That Court found that she made reference to a "hypothetical environment", drew "legal conclusion[s]", engaged in "advocacy on the very matter before the court" and was "openly and unapologetically argumentative".[167]

ELISE CHERNIER

136. The problems with portions of Dr. Chernier's affidavit are also listed in Appendix B. She makes assumptions and statements without foundation (including comments about a "community that denies full humanity to lesbians and gays"). She draws legal conclusions ("TWU is entirely out of step ...[and] ... instituting policies ...[that are] ... a violation of the rights of Canadian citizens"). She also purports to answer the legal question of whether TWU's admissions policies "discriminate against gays and lesbians as a group" (p. 11 of Exhibit "B" of her affidavit). As with the other affiants, these statements show that Dr. Chernier is more of an advocate than an expert.

137. Dr. Chernier also filed an affidavit in *TWU v. NSBS*. The court found that she made "argument", provided non-historical opinion, was "hardly restrained or measured", was "argumentative" in that she did not "leave much doubt about [her] views of Christian moral views". Her evidence was found to be "difficult to fit within the scope of an historical opinion" and contained "strongly worded advocacy".[168] The same is true here.

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[167] *Trinity Western University v. Nova Scotia Barristers' Society*, 2014 NSSC 395 at paras. 47, 48, 59.
[168] *Trinity Western University v. Nova Scotia Barristers' Society*, 2014 NSSC 395 at paras. 31, 34, 38, 40.

D. LEGAL ARGUMENT

1. OVERVIEW

138. The rule of law animates judicial reviews of administrative action and ensures that administrative decision-makers act within their grant of authority: "all exercises of public authority must find their source in law".[169]

139. In making the Decision, the Benchers acted outside their jurisdiction and erred within their jurisdiction. The Decision should be set aside on all of the following grounds:

(a) The Benchers acted outside of their authority in making the Decision:

(i) 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;

(ii) 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

(iii) 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.

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[169] *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 28 [*Dunsmuir*].

2. SUPREME COURT OF CANADA DECISION IN *TWU v. BCCT*

140. It is unusual to have a case that is so similar to one decided previously by the Supreme Court of Canada. *TWU v. BCCT* dealt with acceptance of graduates of a TWU professional program and dealt with a similar religiously-based code of conduct among all members of the TWU community. In both cases, the objection to recognizing the education at TWU is the purported "discriminatory practices" occasioned by that code of conduct.

141. The Supreme Court of Canada's reasoning in *TWU v. BCCT* is relevant to most of the issues in this judicial review.

(a) STATUTORY MANDATES

142. The Law Society operates under a similar statutory framework as the BCCT in *TWU v. BCCT*. The BCCT was the statutory self-governing regulator of teachers. It had as an object "to establish, having regard to the public interest, standards for the education, professional responsibility and competence of its members".[170] However, unlike the Law Society, the BCCT could accredit both individuals ***and accredit programs***.[171] The Law Society only has statutory power to accept individuals who apply for admission.

143. The Decision was with respect to the academic qualification of TWU graduates, which is a matter that the Benchers can consider having regard to upholding the public interest. The statutory mandates, and the matters under contemplation by the BCCT then and the Law Society now, are very similar. As such, the determinations of the Supreme Court of Canada are directly applicable to the Decision and the justifications offered by the Law Society.

(b) SIMILAR CONSIDERATIONS

144. In *TWU v. BCCT*, students were "required" to sign and "commit themselves" to a "Responsibilities of Membership" document containing "Community Standards". It asked students to refrain from "Biblically condemned" practices, including "premarital sex,

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[170] *TWU v. BCCT*, at para. 9.

[171] TWU had originally applied to the Minister, but the BCCT was then created to deal with program approval. Subsection 21(i) of the *Teaching Profession Act* gave the council of the BCCT power to "approve, for certification purposes, the program of any established faculty of teacher education...". *TWU v. BCCT*, paras. 2 and 9.

adultery, homosexual behaviour..."[172] TWU now has the "Community Covenant", by which students agree to abstain from "sexual intimacy that violates the sacredness of marriage between a man and a woman".[173]

145. In *TWU v. BCCT*, the BCCT's motion stated that they decided not to approve TWU's program "because Council still believes the proposed program follows discriminatory practices which are contrary to the public interest and public policy...".[174] The reasons the BCCT gave for rejecting TWU and its graduates were the "requirement for students to sign a contract of 'Responsibilities of Membership in the Trinity Western University Community'"[175] and the effect that signing the Community Covenant had on LGB students:

> Both the *Canadian Human Rights Act* and the *B.C. Human Rights Act* prohibit discrimination on the ground of sexual orientation. The *Charter of Rights* and the *Human Rights Acts* express the values which represent the public interest. Labelling homosexual behaviour as sinful has the effect of excluding persons whose sexual orientation is gay or lesbian. The Council believes and is supported by law in the belief that sexual orientation is no more separable from a person than colour. Persons of homosexual orientation, like persons of colour, are entitled to protection and freedom from discrimination under the law.[176]

146. Like the Law Society, the BCCT sought to rely on a general "public interest" mandate to support its decision.[177] The Court held that while the BCCT could consider alleged discriminatory practices in its review of the public interest,[178] it also had to consider religious freedom and was wrong to have "inferred without any concrete evidence that such views will limit consideration of social issues ...[or] have a detrimental impact on the learning environment..."[179]

147. In other words, the Court held that the "discriminatory practices" were relevant, but only if they negatively impacted on the quality, abilities and professional preparedness of TWU graduates. A general "perception" of discrimination or that the BCCT "condones this discriminatory conduct" was not sufficient to justify the BCCT's decision.[180]

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[172] *TWU v. BCCT*, at para. 10.
[173] Affidavit #1 of W. R. Wood, Exhibit C at 11-12.
[174] *TWU v. BCCT*, at para. 5.
[175] *TWU v. BCCT*, at para. 6.
[176] *TWU v. BCCT*, at para. 6.
[177] *TWU v. BCCT*, at para. 5.
[178] *TWU v. BCCT*, at para. 32.
[179] *TWU v. BCCT*, at paras. 26, 32.
[180] *TWU v. BCCT*, at paras. 12, 18.

148. As most of the Benchers concluded at the April Meeting, *TWU v. BCCT* is similar and applicable. While the Benchers do not have authority over program approval *per se*, the Decision has precluded the School of Law from operating because it directly impacted the criteria for the Minister's consent.

3. THE PROPER STANDARD OF REVIEW

149. There are two standards for judicial review of administrative decision: reasonableness (the deferential standard) and correctness. "Today, the immediate challenge lies in the proper application of the deferential standard of review."[181]

150. A reviewing court can apply different standards of review for different aspects of a decision that attract differing levels of scrutiny.[182]

(a) JURISDICTION AND SUB-DELEGATION

151. In making the Decision, the Law Society had to properly determine the question before it (qualification of graduates) and not make a decision beyond that authority, failing which the Decision is *ultra vires*. No deference is owed when the Benchers act outside of their jurisdiction:

> In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires*....[183]

152. The Law Society is not a regulator of universities or degree programs. That jurisdiction rests with the Minister under the *DAA*.

153. Sub-delegation is also a question of jurisdiction. The Benchers must have correctly exercised their legal authority under the *LPA*, including in delegating the Decision to its

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[181] Joseph Robertson et al., *Judicial Deference to Administrative Tribunals in Canada* (Markham: LexisNexis, 2014) [Robertson] at pp. 3-4.
[182] *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 at para. 51 [*Saguenay*].
[183] *Dunsmuir*, at para. 59.

members. If they did not, the Decision is *ultra vires.* A correctness standard applies to this matter and no deference is owed.[184]

(b) PROCEDURAL FAIRNESS

154. Whether the Law Society complied with its duty of procedural fairness is reviewable on a standard of correctness.[185]

(c) REVIEW OF THE DECISION IF WITHIN THE LAW SOCIETY'S JURISDICTION

155. Where a decision is made within a tribunal's jurisdiction, there is a presumption that the standard of review is reasonableness.[186] For example, a decision-maker is ordinarily afforded deference when interpreting its own statute closely connected to its function, with which it has particular familiarity.[187]

156. The reasonableness presumption can be rebutted. "...*Dunsmuir* consolidated the tenets of the deference doctrine under the umbrella of the 'standard of review analysis': a two-step framework for assessing whether a tribunal decision is owed deference. The first is to see whether the jurisprudence has already satisfactorily determined the standard of review with respect to a particular question."[188]

157. If the jurisprudence is not determinative, the Court then proceeds to a standard of review analysis.[189]

(i) Correctness Standard Has Already Been Established by Precedent

158. *TWU v. BCCT* has already determined the standard of review with regard to this particular category of question on judicial review: correctness.[190] The Supreme Court of Canada framed the category of question as one "dealing with the discretion of an administrative

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[184] *WEN Residents Society v. Vancouver (City)*, 2014 BCSC 965 at para. 111 [*WEN Residents Society*] ("...the City's alleged improper delegation of authority is subject to the same standard of review as the first issue, correctness.").
[185] *Mission Institution v. Khela*, 2014 SCC 24 at para. 79.
[186] *Dunsmuir*, at paras. 54, 146; *Saguenay*, at para. 46.
[187] *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40 at para 55.
[188] Robertson at 79. *Dunsmuir*, at para. 62; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 at paras. 18, 23 [*Catalyst Paper Corp.*] ("To put it in terms of this case, we should ask how courts reviewing municipal bylaws pre-*Dunsmuir* have proceeded").
[189] *Dunsmuir*, at paras. 62-63.
[190] *TWU v. BCCT* at para. 17.

body to determine the public interest".[191] The question is the same as the instant case, even though the context is under the *LPA*, not the *Teaching Profession Act*.

159. Both cases concern self-governing professions.[192] Also, the BCCT made its decision on a "statement of principle" comparable to the Law Society's justification for the Decision. In that case, TWU was "denied because Council still believes the proposed program follows discriminatory practices which are contrary to the public interest and public policy which the College must consider under its [public interest] mandate…", since "[l]abelling homosexual behaviour as sinful has the effect of excluding persons whose sexual orientation is gay or lesbian".[193] Here, the Law Society now says the Decision was "necessary to fulfill its broad statutory mandate under section 3 to act in the public interest" in order to "express its condemnation of the proposed discriminatory admission policy of TWU" that "effectively bars LGB Canadians from attending TWU".[194]

(ii) Circumstances Favour the Correctness Standard

160. Even if *TWU v. BCCT* is not determinative, correctness is the appropriate standard. The reasonableness standard is rebutted if the analysis demonstrates that "the legislature clearly intended not to protect the tribunal's jurisdiction in relation to certain matters."[195] This analysis is contextual, based on the following factors:[196]

    (1) the presence or absence of a privative clause;
    (2) the purpose of the tribunal as determined by interpretation of enabling legislation;
    (3) the expertise of the tribunal; and
    (4) the nature of the question at issue.

161. The focus of the analysis should be on the nature of the question at issue.[197]

Presence of a Privative Clause

162. There is no privative clause in the *LPA*.

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[191] *TWU v. BCCT*, at para. 17.
[192] *TWU v. BCCT*, at para. 52 (L'Heureux-Dubé, J. dissenting).
[193] *TWU v. BCCT*, at para. 6.
[194] LSBC Response, paras. 254, 253, 50.
[195] *Saguenay*, at para. 46.
[196] *Dunsmuir*, at para. 64.
[197] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 [*Mowat*], at para. 16.

Purpose of the Law Society in the context of the LPA

163. In the context of a decision under Rule 2-27(4.1), the Law Society's purpose is to ensure that entrants to the bar will be competent lawyers.[198] Any broader purpose to "uphold and protect the public interest in the administration of justice" must be related to the specific function being performed by the Benchers, namely assessing the academic qualifications of TWU graduates.[199] If the Decision concerned an assessment of the competence of TWU graduates (as it should have), this factor would support deference to the determinations of the Law Society.

164. However, the Decision did not determine or even relate to the competence of TWU graduates. It was a determination that TWU graduates' otherwise acceptable "academic qualifications" should not be recognized under Rule 2-27(4.1) because of the notion that the Community Covenant is "discriminatory". Denying individuals entry to the bar based on non-academic policies of an institution they attended is completely unrelated to the Law Society's purpose in protecting the public interest in assessing the academic qualifications of graduates. Therefore, this factor does not support deference.

Expertise of the Law Society

165. Courts generally defer to a tribunal's specialized expertise in interpreting its home statute.[200] However, deference is only justified when the tribunal is "more expert than the courts and the question under consideration is one that falls within the scope of this greater expertise."[201]

166. The vote concerning the April Motion involved a thorough review of the facts and law, relying on the Federation's conclusion that graduates will have sufficient academic qualifications. The Decision was not based on the "national requirement" or qualification for the practice of law. It was not made within the scope of the Benchers' specialized area of expertise. First, while the majority of Benchers are lawyers, not all are.[202] In any event, the Benchers deferred to the will of Law Society members in making the Decision. Of the

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[198] The focus on this inquiry is "on the particular provision being interpreted by the tribunal": *TWU v. BCCT*, at para. 17.
[199] *LPA*, s. 3.
[200] *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at para. 40 [*McLean*].
[201] *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para. 28.
[202] Up to six Benchers are non-lawyers: *LPA*, s. 5.

8039 lawyers who voted in the referendum,[203] it can hardly be assumed that all had expertise in constitutional or administrative law, or indeed a full understanding of all the legal issues involved (or even the proper function being undertaken, namely the assessment of academic qualifications of graduates). If the Benchers deferred to the members, why should the Court defer to the Benchers?

167. Second, while the Benchers may have expertise in professional standards, they have no expertise in human rights and other statutes implicated in this case.[204] The Law Society was required to consider numerous legal sources in addition to the *LPA*, including the: *Charter*, *Human Rights Code*, *Labour Mobility Act*, S.B.C. 2009, c. 20, *Agreement on Internal Trade Implementation Act*, S.C. 1996, c. 17, Inter-Jurisdictional Practice Protocol, and National Mobility Agreement.[205] The Benchers and the Law Society members have no more expertise than the Court in determining whether the Decision is in accordance with these laws and agreements. Like the BCCT in *TWU v. BCCT*,[206] the Benchers relied on many legal opinions (i.e., someone else's expertise on these issues).[207] This is inconsistent with a finding of specialized expertise.

168. Third, no deference is owed to the Law Society's interpretation of its home statute, as now argued in this judicial review, because it conflicts with the Benchers' prior interpretation of the same statute regarding this same issue. In this litigation, the Law Society now says that it was "necessary" to disapprove of the School of Law;[208] that it had not only the statutory power, but also the ***obligation*** to deny approval. When the Benchers determined the matter on proper grounds, they came to the opposite conclusion.

169. At both the April Meeting and the September Meeting, the Benchers refused to reject TWU graduates on the basis of the Community Covenant. The Benchers stated that they were

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[203] Affidavit #2 of T. McGee, para. 20.
[204] *Wright v College and Association of Registered Nurses of Alberta (Appeals Committee)*, 2012 ABCA 267 at para. 34 ("The primary mandate of the College is to set standards for the nursing profession, not to deal with human rights issues. While the College may have expertise in the area of professional standards, and its home statute, it has no expertise in human rights law...the appropriate standard is correctness").
[205] Administrative decision-makers may interpret and apply the *Charter* and *Human Rights Codes*. However, the expertise of the Law Society must be weighed against the relative expertise of the Court itself (*TWU v. BCCT*, at para. 17).
[206] *TWU v. BCCT*, at para. 17.
[207] Affidavit #1 of E. Phillips, para. 23 (list of legal opinions); Affidavit #1 of Kristina Jennings, Exhibit A (Gomery opinions).
[208] LSBC Response, para. 254.

compelled to make this decision by "law". In other words, they ***had*** to make the decision they now say it was "necessary" ***not*** to make.

170. Later, they reversed themselves, but not for the reasons now relied upon. Instead, the Benchers chose to bind themselves to the results of the members' referendum in deciding whether or not to accept TWU graduates. At the time they decided to hold a referendum, the Benchers indicated that they had discretion to either approve or disapprove of the School of Law.[209] How can it be that the statutory discretion that existed last September to either approve ***or*** disapprove of TWU has now vanished?

171. No deference is owed to the shifting reasons relied upon by the Law Society to defend the Decision. Indeed, deference to what appears to be nothing more than the Law Society's "convenient litigating strategy" would be inappropriate.[210] It is important for maintaining the rule of law that the Law Society's statutory authority be interpreted correctly, and by a Court, not by its own multiple conflicting interpretations.

172. Fourth, the existence of concurrent and non-exclusive jurisdiction in this case is an important factor in rebutting the reasonableness standard.[211] Here, both the Law Society and the Federation exercise jurisdiction over whether TWU will train competent lawyers, while the Minister ensures the academic quality of the JD Program.[212] At best, the Law Society shares jurisdiction with the BC Human Rights Tribunal and the Courts in determining the nature and effect of the Community Covenant.[213]

The Nature of the Question

173. The closer the nature of the question is to what a court decides, the less deference ought to be accorded to a decision-maker. The true nature of the Decision in this case was adjudicative, not quasi-legislative as alleged by the Law Society.[214]

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[209] LSBC Response, paras. 151, 163.
[210] *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988) at 213.
[211] *Saguenay*, at para. 46.
[212] Affidavit #1 of J. Epp Buckingham, para. 47-54; *DAA*, s. 4.
[213] *Saguenay*, at para. 51.
[214] LSBC Response, paras. 105, 303-305.

174. Legislative acts create and promulgate a general rule of conduct or policy without reference to a particular case.[215] By contrast, an adjudicative decision is one where an official or body applies a rule or policy to a particular case.[216] This generally includes a body that must "investigate facts, or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature."[217]

175. Enacting Rule 2-27(4.1) was quasi-legislative in nature, but the Decision was not. The referendum process may give the appearance of being quasi-legislative , but that does not make the nature of the question answered by the Benchers so. This is shown by the nature of the April and September decisions. Submissions from the public and TWU were solicited. Facts were investigated. The Benchers' discussions focused on the legal implications of the matters investigated. Importantly, the Law Society's exercise of discretion was directed at specific persons – namely TWU and its future graduates.

176. The rationale of the Decision (according to the Law Society's current litigation position) appears to be that law schools should not discriminate. It argues that TWU is discriminating and therefore its graduates should not be accepted by the Law Society. In the abstract, the Law Society identified a legal standard, assigned a meaning to that standard, and applied the standard to a particular case. This is analogous to what judges do, not legislatures.

177. As the Decision was adjudicative, it ought to have been made in a suitable manner. Ordinarily, this would: attract an elevated duty of procedural fairness and require an appearance before an impartial arbiter. The case to be met would be set out and reasons explaining the Decision would be provided.[218]

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[215] *WEN Residents Society*, at para. 111.
[216] David Phillip Jones & Anne S. de Villars, Principles of Administrative Law, 3d ed (Scarborough, Ontario: Thomson Canada Limited, 1999) at 85; *Bingo City Games Inc. et al v. B.C. Lottery Corp. et al*, 2005 BCSC 25 [*Bingo City*] at para. 198.
[217] *Bingo City*, at para. 198.
[218] *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 at para. 89, LeBel J., dissenting, but agreeing with the majority that reasons were required ("The importance of a negative decision to the appellants, who as a result found it impossible to build the place of worship they needed to practice their religion, in itself placed the municipality under an obligation to give reasons for its decision.").

178. TWU and its graduates had a vested right following approval by the Federation. That is, TWU's graduates were *de facto* approved and recognized unless the Benchers decided otherwise under Rule 2-27(4.1). This right was taken away by the Benchers. The Decision under Rule 2-27(4.1) directly and significantly impacts TWU's rights, privileges, and interests and those of members of TWU's religious community, including Brayden. The nature of such a decision lends itself to a correctness standard.

179. The Court in *Dunsmuir* said that the reasonableness standard is appropriate where certain questions "do not lend themselves to one specific, particular result".[219] That is not applicable here. Both TWU and the Law Society (now) say that the law demands only one specific result. TWU says the Law Society was not permitted to disapprove TWU's School of Law. The Law Society says that it (and the Province) is "obligated to not approve".[220] The outcome of the Referendum Question is inconsistent with what a majority of Benchers stated in April 2014, namely that the law demands they accept TWU graduates.[221] Courts have cited rule of law concerns in order to apply a standard of correctness where the meaning of a law differs according to the identity of the decision-maker.[222] Consistency and correctness favours a review based on a correctness standard.

180. A correctness standard also applies where the issue involves general questions of law that are important to the legal system and fall outside the administrative decision-maker's area of expertise.[223] Correctness must apply in respect of these questions because "of their impact on the administration of justice as a whole, such questions require uniform and consistent answers."[224] In *Saguenay*, the Court held that "the scope of the state's duty of religious neutrality" is a general question of law important to the legal system.[225]

181. "[T]he existing law tells us little of what is to be considered of central importance to the legal system or how one goes about so classifying an issue. However, it is clear that deference generally dissipates when the tribunal's decision involves concepts such as

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[219] *Dunsmuir*, at para. 47.
[220] LSBC Response, paras. 7, 21.
[221] See Appendix A of these Submissions for an outline of Bencher statements affirming that the law demands the Law Society recognize TWU.
[222] *Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17 at paras. 49-57.
[223] *Saguenay*, at para. 47.
[224] *Dunsmuir*, at para. 60.
[225] *Saguenay*, at para. 51.

'family status' and 'discrimination' or the articulation and application of common law or civil law principles."[226]

182. "Since *Dunsmuir*, the law has evolved to the point where 'all questions of law' that are of central importance to the legal system and outside the scope of the tribunal's expertise are subject to the correctness standard, not just those involving civil or common law principles."[227] The matter before the Law Society was a general question of law. The Court in *TWU v. BCCT* found that the nature of the decision related to "a question of law that is concerned with human rights and not essentially educational matters".[228] Likewise, the Decision was not concerned with the competence of TWU graduates (as it should have been) and is a question of the application of the law.

183. The question of whether graduates of a religious institution can become lawyers is of significant importance to the legal system.[229] If the Law Society is permitted to exclude such individuals from the bar, it might have the authority to exclude or disbar lawyers who have in the past attended institutions that are similar to TWU, such as high schools, universities, charities, or churches. Indeed, if TWU's Community Covenant could be sufficient in itself to justify denying accreditation, it is difficult to see how the same logic would not result in the rejection of members of a particular church.[230] While this may seem like a hyperbolic extension of the Law Society's arguments, the Supreme Court of Canada drew the same conclusion.[231]

184. The question of law in this case requires uniform and consistent answers, particularly given that in making the Decision, the Benchers reversed themselves on the application of legal precedent, which the majority of them originally stated they were obligated to follow. The judicial reviews of the law societies in Nova Scotia and Ontario on this issue also favour

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[226] Robertson at p. 135.
[227] Robertson at p.80, citing *Mowat*m at para 18.
[228] *TWU v. BCCT,* at para. 18 ("The existence of discriminatory practices is based on the interpretation of the TWU documents and human rights values and principles. This is a question of law that is concerned with human rights and not essentially educational matters").
[229] The importance of the issue of admitting individuals to the bar based is of great importance to the legal system: *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 at paras. 37 (McIntyre J., dissenting, but not on this point), as well as 78, 99 (La Forest J.).
[230] *TWU v. BCCT,* at para. 33.
[231] *TWU v. BCCT,* at para. 33 ("if TWU's Community Standards could be sufficient in themselves to justify denying accreditation, it is difficult to see how the same logic would not result in the denial of accreditation to members of a particular church.")

consistency and correctness, failing which TWU graduates will have differential access to law societies across the country based on the same matter: the Community Covenant.

(iii) If the Correctness Standard Does not Apply, the Decision was not Reasonable

185. For all of the foregoing reasons, the Petitioners submit that a correctness standard applies and no deference is owed to the Decision. However, if the standard of review in evaluating the outcome of the Decision is reasonableness, which is not admitted, the Decision must nevertheless fall within a range of possible, acceptable outcomes that are defensible in respect of the relevant facts and law.[232] For the reasons argued below, the Decision cannot withstand scrutiny on a reasonableness standard, either.

(d) THE CHARTER OF RIGHTS

186. Whether the Decision unjustifiably infringes *Charter* rights is reviewed based on the principles in *Doré v. Barreau du Québec*[233] and subsequent cases. This is addressed in more detail below.

4. NO JURISDICTION OVER UNIVERSITIES

187. Under subsection 20(1)(a) of the *LPA*, the ***Benchers*** are authorized to make rules to "establish requirements, including ***academic requirements,*** and procedures for the enrollment of articled students" (emphasis added). Under subsection 21(1)(b), the ***Benchers*** are also authorized to make rules to "establish requirements, including ***academic requirements,*** and procedures for call to the Bar of British Columbia and admission as a solicitor of the Supreme Court" (emphasis added).

188. Rule 2-27(4) and (4.1) expressly pertain to academic requirements of articling students and lawyers. These rules are binding on the Benchers and the Law Society.[234]

189. At the April Meeting, the majority of the Benchers properly turned their minds to the issue of whether TWU graduates would meet academic requirements sufficient to be admitted as

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[232] *Dunsmuir*, at para 47.
[233] 2012 SCC 12 [*Doré*].
[234] *LPA*, s. 11(3).

articled students and then lawyers. The subsequent opposition to the Benchers' decision, including the SGM Resolution and the referendum, were about TWU and its Community Covenant, generally.

190. The Decision was about TWU, not its graduates. It purports to regulate TWU by interfering with its religiously-based non-academic policies, even though the Law Society is not empowered to do so.

191. The jurisdiction of the Law Society is narrower than it was for the BCCT. The BCCT had authority to approve programs and was ***also*** the regulator of teachers. It was legislatively empowered to "approve, ***for certification purposes***, the program of any established faculty of teacher education or school of teacher education" (emphasis added).[235] By contrast, the Law Society (admittedly) is only a regulator of the legal profession and, under that authority, is empowered to admit graduates who are of good character and fit to enter the legal profession.

192. Yet, the Benchers passed a motion that TWU "is not an approved faculty of law", and not in respect of the academic qualifications of its graduates. The provincial government, not the Law Society, has the exclusive authority to approve the School of Law to enable it to grant degrees under the *DAA*.[236] The Law Society is not given authority to approve or regulate universities or their law schools in the *LPA*.

193. The Law Society is entitled to create a standard to assess whether a student is or will be qualified; it is not entitled to judge the policies of a law school that have no impact on academic qualification. The Supreme Court of Nova Scotia correctly recognized that the Nova Scotia Barristers Society (NSBS) was also without authority to regulate TWU:

> The NSBS has no authority whatsoever to dictate directly what a university does or does not do. It could not pass a regulation requiring TWU to change its Community Covenant any more than it could pass a regulation purporting to dictate what professors should be granted tenure at the Schulich School of Law at Dalhousie University, what fees should be charged by the University of Toronto Law School, or the admissions policies of McGill. The legislation, quite sensibly, does not contain any mechanism for recognition or enforcement of NSBS regulations purporting to control how university law schools operate because it was never intended that they would be subject to its control. If it did, the operations of every law

[235] *TWU v. BCCT*, at para. 9 citing *Teaching Profession Act*, R.S.B.C. 1996, c. 449, s. 21(i).
[236] Affidavit #1 of J. Epp Buckingham, para. 47-54.

> school in the country would be subject to the varying requirements of, potentially, 14 law societies. Each could require, for its purposes, that harassment policies reflect its protocols and the human rights legislation in its own jurisdiction, or require admission policies that prefer the equity-seeking group that each law society determines has been most historically disadvantaged.
>
> The NSBS cannot do indirectly what it has no authority to do directly. TWU or any other law school can do whatever it wants. It need not worry about a NSBS regulation that requires it to do anything. But the NSBS has used the arbitrary on-off definition of "law degree" to impose a penalty on the graduate. When a body purporting to act under legislative authority imposes a sanction in response to non-compliance with its directives, that's regulation. The NSBS is attempting to regulate TWU and its policies.[237]

194. By focusing on the sectarian nature of TWU and the Community Covenant, the Decision was made with an unauthorized purpose and in a discriminatory manner not permitted by the *LPA*.

195. The Decision is an attempt to regulate TWU as a university. This is evidenced by the only Bencher to substantively speak at the October 31, 2014 hearing (Mr. Crossin, QC), who said that the Law Society is "ready and willing to enter into discussion with TWU regarding amendment of TWU's Community Covenant" for the purposes of being approved.[238] The Law Society cannot encourage, convince, or force an institution or its students to give up a religious belief or religious rule on which it is based.

196. The Law Society seeks to use its statutory monopoly over the profession to "convince"[239] TWU to change its (lawfully exercised) religious beliefs. This is not an authorized exercise of its discretion under the *LPA* to assess academic qualifications for admission to the bar.

197. In any event, the Decision violates the Law Society's duty of religious neutrality and is *ultra vires* the *LPA*. As stated by Bencher David Crossin, QC, 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.[240]

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[237] *TWU v. NSBS*, at paras. 174-175.
[238] Affidavit #1 of E. Phillips, para. 51, and Exhibit II at 662 (Meeting minutes).
[239] LSBC Response, paras. 253.
[240] Affidavit #1 of E. Phillips, Exhibit I at 582.

198. The Benchers are empowered to make rules to establish "standards and programs" and "requirements" for the education and competence of applicants to the bar.[241] These rules are binding on them and the Law Society.[242] Disapproving a law school is not establishing a rule, standard or requirement for applicants, but attempting to regulate a university by "express[ing] its condemnation" of the Community Covenant in order to "convince TWU to change its policy"[243] upon pain of its graduates being denied access to the bar.

5. THE BENCHERS IMPROPERLY SUBDELEGATED THEIR AUTHORITY

199. A statutory decision maker must exercise its authority itself or it offends the principle of *delegatus non potest delegare* – a delegate cannot delegate. Sub-delegation is only permitted when it is authorized by statute, either expressly or by necessary implication.[244]

200. The Benchers illegally sub-delegated by basing the Decision solely on the will of the members, as expressed in the referendum. This is not statutorily authorized.

201. There is only one authorized manner a members' resolution can be binding on the Benchers: the referendum procedure brought by members under s. 13 of the *LPA* (assuming that the result does not breach the Benchers' statutory duties). The referendum procedure was not followed. The *LPA* does not authorize the Benchers to bind themselves to a members' vote by their own motion, as occurred in this case with the September Motion. This point was recognized by Bencher Joseph Arvay, QC in debating the September Motion, who said that directing a binding referendum at that stage was "not a legal option" and did not meet "the letter of the Act".[245] Sections 19, 20 and 21 of the *LPA* expressly give authority to the Benchers in respect of admitting persons to the practice of law. Even Rule 2-27(4.1), which is binding on the Law Society, says that a decision is to be made by "the Benchers". Indeed, a Decision under Rule 2-27(4.1) could ***only*** be made by the Benchers.

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[241] *LPA*. s. 3(c), s. 20(1)(a), s. 21(1)(b).
[242] *LPA*, s. 11(3).
[243] LSBC Response, paras. 253.
[244] *Vic Restaurant Inc. v. City of Montreal*, [1959] S.C.R. 58; Brown and Evans, *Judicial Review of Administrative Action in Canada* (looseleaf), 13-15.
[245] Affidavit #2 of T. McGee, Exhibit O at 582.

202. The *LPA* authorizes the Benchers to govern and administer the affairs of the Law Society, as well as ensure applicants to the bar are competent to become barristers and solicitors.[246] It does not authorize the Benchers to delegate their statutory powers to make rules respecting academic requirements to the members of the Law Society, or anyone else. The Benchers are only authorized to delegate certain duties or power of decision to the executive director or the executive committee, if they make a rule doing so.[247]

203. There is no statutory basis for a decision under Rule 2-27(4.1) (a determination of academic requirements) to be made by the members,[248] unlike some decisions members are authorized to make under the *LPA*.[249] There is no indication the legislature ever intended for Law Society members to be able to disqualify graduates of certain law schools from being admitted to the bar, or to exercise a separate public interest mandate under s. 3 (if this section creates any separate authority or was relied upon by the Benchers, which is denied).

204. The following have been found examples of illegal sub-delegation: a Minister delegating his authority by adopting licencing terms voluntarily established by various private licencees, where the Minister failed to maintain any control or authority over those ultimately responsible for making the decision;[250] a city passing a bylaw requiring prior approval from the Chief of Police to obtain a liquor licence, where the Chief of Police could "refuse his approval upon any ground which he considered sufficient"[251]; and where no standard, rule or condition was prescribed for guiding whether or not approval should be given.[252]

205. Similarly, the Benchers delegated their control over a determination under Rule 2-27(4.1) because: (a) they gave the members the opportunity to "veto" their decision to approve TWU graduates upon any ground the members desired; (b) the Decision was blindly

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[246] *LPA*, s. 4(2), s. 19(1).
[247] *LPA*, s. 8(a), 10(2).
[248] The Benchers are specifically authorized to delegate certain decisions to the credentials committee. Section 21(1)(a) of the *LPA* states that the Benchers may make rules to "delegate any or all authority and responsibility under this Part, other than rule-making authority, to that committee." See also s. 9(2) of the *LPA*: ("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.").
[249] For example, section 12 of the *LPA* mandates that members must approve changes to certain rules concerning the governance of the Law Society.
[250] *Heisler v. Saskatchewan (Minister of Environment and Resource Management)*, 1999 SKQB 156.
[251] *Vic Restaurant Inc. v. City of Montreal*, at 76 (para. 62) (emphasis added).
[252] *Vic Restaurant Inc. v. City of Montreal*, at 82-83 (para. 78), 100 (paras. 139-141).

determined *a priori* by the September Motion[253] and the results of the Referendum Question, without any assurance that those voting in the referendum were acquainted with and applied the relevant rule, criteria, facts, or law; and (c) the Benchers did not specify any criteria or direction upon which this decision was to be made nor reserve their authority to review the members' decision.

206. A statutory decision-maker binding itself to a non-binding plebiscite has been found an illegal sub-delegation. In *Oil Sands Hotel (1975) Ltd. v. Alberta (Gaming and Liquor Commission)*,[254] the provincial government adopted a policy to honour communities who wished to ban gaming machines. Under this policy, the gaming Commission cancelled its contracts with retailers in communities that held a non-binding referendum to remove the gaming machines. The Court found:

> The Commission acted only when "requested" to do so by a municipality and on every "request" received, it is apparent that its actions were determined, not by it, but by the government's previously stated policy and the results of plebiscites.
>
> There is no provision in the Act which authorizes the Cabinet or any member thereof to give binding or any directions to the Commission and there is no provision which authorizes the Commission to delegate its decision-making powers concerning VLTs to any other body or to a portion of the public. The fact that the delegation is founded on a democratic vote does not make it statutorily authorized or proper. The terminations were made therefore for political reasons and certainly for reasons outside the provisions of the Act....[255]

207. Likewise, in the September Motion, the Benchers purported to bind themselves to the will of the members in the Referendum Question under Rule 1-37.[256] They then blindly implemented the results of the referendum. This sub-delegation was not authorized by statute and was *ultra vires*.

6. THE LAW SOCIETY FETTERED ITS DISCRETION

208. Fettering of discretion occurs when a decision-maker does not genuinely exercise independent judgment in a matter, such as when it binds itself to a policy or another

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[253] The September Motion specifically provides that "The [SGM] Resolution will be binding and will be implemented by the Benchers".
[254] 1999 ABQB 218 [*Oil Sands Hotel*].
[255] *Oil Sands Hotel*, at paras. 39-40.
[256] There was no substantive discussion at the October 31, 2014 Benchers meeting that passed the Decision.

person's opinion.[257] It is an abuse of discretion for a statutory decision maker to fetter its discretion by policy, contract, or plebiscite. Similarly, it is an abuse of discretion for a decision-maker to permit another person to dictate its judgment.[258] The Court in *Oil Sands Hotel* found that the decision-maker acting upon a plebiscite "allowed other bodies and individuals to exercise the authority committed to it", and thereby "disabled or fettered itself from exercising its own discretion in any and each individual case."[259]

209. A decision produced by a fettered discretion is "per se unreasonable" because:

> [a]ny decision that draws upon something other than the law – for example a decision based solely upon an informal policy statement without regard or cognizance of law, cannot fall within the range of what is acceptable and defensible and, thus, be reasonable as that is defined in *Dunsmuir* at paragraph 47. A decision that is the product of a fettered discretion must *per se* be unreasonable.[260]

210. There are two ways that the Decision was a result of fettering. First, the Benchers decided that the members would dictate the Decision, disabling their independent discretion and judgment. The September Motion stated that the vote on the Referendum Question "will be binding and will be implemented by the Benchers" and its implementation would not breach the Benchers' statutory duties, "regardless of the results".

211. The Benchers permitted a non-binding vote of the members to control their judgment. There is no evidence that the Benchers considered anything other than the results of the Referendum Question in making the Decision. They closed their mind to any other considerations, despite having evidence before them as to the harm that they would cause.[261]

212. Second, the Benchers fettered their discretion by binding themselves to a blanket policy, if the real reason for the Decision is found in the Law Society's *ex post facto* litigation position. In *Lloyd v. British Columbia (Superintendent of Motor Vehicles)*, the Court of Appeal reversed a driving suspension on the basis that the decision-maker "did not enter

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[257] David Jones & Anne de Villars', Principles of Administrative Law, 5th ed. (Toronto: Thomson Carswell, 2009) at pp. 192-193.
[258] *Roncarelli v. Duplessis*, [1959] SCR 121[*Roncarelli*] at 157-158 (Martland J. approving *Jaillard v. City of Montreal*): "Cancellation of a permit by the Commission at the request or upon the direction of a third party, whoever he may be, is not a proper and valid exercise of the power conferred upon the Commission by s. 35 of the *Act*. The Commission cannot abdicate its own functions and powers and act upon such direction."
[259] 1999 ABQB 218 at para. 42.
[260] *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299 at para. 24.
[261] Affidavit #1 of E. Phillips at paras. 50-51 and Exhibit II at 662.

into any inquiry at all as to whether or not the appellant was or was not, by virtue of any reason, unfit to drive a motor vehicle. He formed no opinion of the appellant's fitness at any time, and never at any time put his mind to that question."[262]

213. In *B.C. College of Optics Inc. v. The College of Opticians of B.C.*, the College of Opticians of BC refused to recognize the academic qualifications of individuals who graduated from one particular educational institution. The Court held that the College fettered its discretion by relying on the independent judgment of a third party who accredited optician schools:

> ...the College cannot close its mind to the possibility that, in an individual case, there may be other evidence capable of demonstrating that an institution's graduates meet an acceptable academic standard. If an applicant believes it has such evidence, the College fetters its discretion when it excludes or discounts that evidence in advance.[263]

214. The Decision does just that. The Benchers disabled their discretion under the *LPA* by binding themselves to a fixed blanket policy set by Law Society members that TWU law graduates are "unfit" to practice law in advance. Rule 2-27(4) was enacted to fulfill the Law Society's duty to protect the public interest by ensuring the academic competence of lawyers and of applicants for call and admission.[264] The Decision prematurely closed the Benchers' minds to evidence that a future individual applicant graduating from TWU's School of Law would be competent and fit for entry to the bar (which was the only conclusion supported by the evidence before the Benchers). The Benchers thereby wrongfully fettered their discretion.

7. THE LAW SOCIETY DENIED PROCEDURAL FAIRNESS

215. A duty of fairness is imposed where "a decision is administrative and affects the rights, privileges or interests of an individual."[265] The Decision was administrative and affected the rights of members of TWU's religious community, including Brayden, to practice law. A duty was imposed on the Law Society to act fairly.

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[262] (1971), 20 D.L.R. (3d) 181 (B.C.C.A.) at 188-189 (para. 18).
[263] 2014 BCSC 1853 at para. 29. The Court also said that, similar to the Law Society's adoption of the National Requirement, "There is nothing unreasonable or improper in the College adopting a policy about the evidence it will normally require in order to be satisfied that an institution offers acceptable professional education" (para. 28).
[264] *LPA*, ss. 3(c) and 19.
[265] *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 at para. 20 [*Baker*].

216. Interested parties must be given a meaningful opportunity to present their case "fully and fairly."[266] The degree to which a person affected by a decision may participate depends on the circumstances.[267] The more important the decision is to the interested parties, the "more stringent the procedural protections that will be mandated."[268] High procedural fairness is owed when a decision affects one's ability to practice their profession.[269]

217. The principal purpose of the duty of procedural fairness is "to provide a meaningful opportunity for those interested to bring evidence and arguments that are relevant to the decision to be made to the attention of the decision-maker, and correlatively, to ensure that the decision-maker fairly and impartially considers them."[270] Those interested must be afforded notice with respect of, and to make representations to, "evidence which affected the disposition of the case."[271]

218. While TWU was able to make submissions to the Benchers, it did so without being told the grounds upon which the Law Society would assess the academic qualifications of the School of Law's graduates or the grounds upon which the decision would be made. Given the adjudicative nature of the issues, it was incumbent on the Law Society to notify TWU of the case it had to meet. Had the Benchers done so, perhaps they would not so easily have sub-delegated the ultimate decision to the Law Society membership.

219. TWU was also denied an opportunity to make submissions to members before the SGM meeting[272] or with the ballots for the Referendum Question,[273] even though the Law Society delivered a submission of a proponent of the SGM Resolution to its membership.

220. This is a breach of procedural fairness since the individual Law Society members became *de facto* responsible for the outcome of the Decision. Individuals were permitted to vote on

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[266] *Ibid*, at para. 30.
[267] *Ibid*, at paras. 23-27.
[268] *Ibid*, at para. 25.
[269] *Pacific Booker Minerals Inc. v. British Columbia (Minister of the Environment)*, 2013 BCSC 2258 at paras. 144-145.
[270] *R.G. Facilities (Victoria) Ltd. v. British Columbia (Liquor Control and Licensing Branch*, 2009 BCSC 630) at para. 43.
[271] *Kane v. University of British Columbia* (1980), 1 S.C.R. 1105 at para. 36
[272] Affidavit #1 of E. Phillips, paras. 32-33, Exhibit V at 603; Affidavit #1 of B. Volkenant, para. 27.
[273] Affidavit #1 of E. Phillips, paras. 42-43, Exhibit CC at 642, Exhibit DD at 643.

the SGM Resolution and Referendum Question without hearing any of the speeches at the SGM or the submissions offered by TWU. He who hears must decide.[274]

221. The Court in *Baker* said that "if the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness."[275] Furthermore, "if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded."[276]

222. TWU had a legitimate and reasonable expectation that the academic requirement component of its JD Program proposal would be assessed on the Federation's uniform national requirement, as adopted by the Law Society. The Law Society failed to adhere to the legitimate expectations of TWU, including those created by the Law Society's undertaking at the time that TWU submitted its JD Program proposal.

223. TWU also had a legitimate and reasonable expectation that a re-hearing, re-considering, and re-deciding of the April Motion would only occur in light of any legally significant change in circumstances. There was no change in circumstances.

224. The Law Society acted unfairly and without procedural fairness in the SGM Resolution. Denial of a right to a fair hearing will render the decision of that hearing void.[277] As stated by Le Dain J. speaking for the Supreme Court of Canada, "...the denial of a right to a fair hearing must always render a decision invalid...."[278] Procedural fairness requires the Decision to be rendered as invalid and void.

8. THE DECISION WAS INCORRECT AND UNREASONABLE

225. For the following reasons, the Decision cannot survive scrutiny under a reasonableness review, let alone the applicable correctness review. The Decision cannot be justified at

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[274] *Mehr v. The Law Society of Upper Canada*, [1955] SCR 344 at 351.
[275] *Baker*, at para. 26.
[276] *Baker*, at para. 26.
[277] *Newfoundland Telephone Co. v. Newfoundland (Public Utilities Board)*, [1992] S.C.R. 623 at para. 40.
[278] *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 at para. 23.

law, and lacks transparency and intelligibility, which are the hallmarks of a reasonable decision.

(a) CORRECTNESS AND REASONABLENESS DEFINED

(i) Correctness

226. The Court in *Dunsmuir* explained how to apply the correctness standard of review:

> 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.[279]

(ii) Reasonableness

227. The Supreme Court of Canada has stated that, in order to be reasonable, a decision must be justifiable, transparent, and intelligible, or else it "will be unlawful."[280] It has more recently stated that a Tribunal's *reasoning* is required to be transparent and intelligible.[281]

228. Justification, intelligibility, and transparency are achieved "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes".[282]

229. For a decision to be lawful, "the reasons for and record of the decision must 'in fact or in principle support the conclusion reached'".[283] In the context of a reasonableness standard, "[c]ourts should not substitute their own reasons" for that of the decision-maker.[284] On the other hand, if the reasons are non-existent or cannot be discerned, "and if the record before the administrative decision-maker does not shed light on the reasons why the administrative

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[279] *Dunsmuir*, at para. 50.
[280] *Mission Institution v. Khela*, at para. 73. It should be noted that in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [*NLNU v. Newfoundland*] Abella J. stated that the adequacy of the reasons is not an independent basis for quashing a decision, but must be assessed in the context of the outcome.
[281] *Saguenay*, at para. 50.
[282] *NLNU v. Newfoundland*, at para. 16.
[283] *Mission Institution v. Khela*, at para. 73.
[284] *NLNU v. Newfoundland*, at para. 15.

decision-maker decided or could have decided in the way it did, the requirement that administrative decisions be transparent and intelligible is not met."[285]

230. The breadth of defensibility and acceptability in a reasonableness review "takes its colour from the context."[286] The degree of deference owed to the Benchers if a reasonableness standard applies is determined by the words and context of the *LPA*.[287] To be reasonable, the Decision must be made

> within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis*, [1959] S.C.R. 121), in line with general principles of administrative law governing the exercise of discretion...[288].

231. The Law Society cannot create or use policy objectives or statements to extend their jurisdiction and displace the explicit text of the *LPA*.[289]

232. The Decision should be quashed. It is incorrect and is also unreasonable.

(b) THE DECISION WAS INCORRECT AND UNREASONABLE IN THE CONTEXT OF RULE 2-27(4.1) AND THE *LEGAL PROFESSION ACT*

(i) The Review of a Decision is Contextual and Limited by the Statute

233. In interpreting the *LPA*, the words of a statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the Act, and the intention of the legislature.[290]

234. The process and the outcome of the Decision must conform to the "rationale of the statutory regime set up by the legislature".[291] In *Roncarelli v. Duplessis*, the Supreme Court of Canada held that one could not revoke a liquor licence from an individual because of his association with a religious community. Rand J. stated:

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind

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[285] *Leahy v. Canada (Citizenship and Immigration)*, 2012 FCA 227 at para. 121.
[286] *Catalyst Paper Corp.*, at para. 18.
[287] *Catalyst Paper Corp.*, at para. 18; *Dunsmuir*, at para. 151 (Binnie J.).
[288] *Baker*, at para. 53.
[289] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 at paras. 11-12 [*CRTC Reference*]; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 74.
[290] *CRTC Reference*, at paras. 11-12
[291] *Catalyst Paper Corp.*, at para. 25.

> of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute.[292]

235. Binnie J. in *Dunsmuir* affirmed Rand J. in *Roncarelli*. A decision that falls outside the perspective of the legislature's intention is unlawful.[293]

236. This is one of those cases that Moldaver J. referred to in *McLean* (and applied in *Mowat*[294]), where "the ordinary tools of statutory interpretation" lead to only one "single reasonable interpretation" of the *LPA*:

> In those cases, the "range of reasonable outcomes" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 4) will necessarily be limited to a single reasonable interpretation — and the administrative decision maker must adopt it.[295]

237. An application of Rule 2-27(4.1) in this circumstance only permits one interpretation and the Law Society must adopt it; if "the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable — no degree of deference can justify its acceptance".[296] The Law Society has less room to maneuver in its Decision than one turning on "factual appreciation, fact-based discretions, administrative policies, or specialized experience and expertise not shared by the reviewing court".[297] In the instant case, accepting graduates of TWU is the only lawful conclusion, given that there has never been an objection to their "academic qualification".

(ii) The Scope of Rule 2-27(4.1) in the Context of *Legal Profession Act*

238. The specific question before the Benchers was whether a future applicant to the bar (via applying for articling or transferring from another jurisdiction[298]) who graduates from TWU's School of Law has adequate "academic qualification" under Rule 2-27(3)(b) to become a competent lawyer.

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[292] *Roncarelli*, at p. 140.
[293] *Dunsmuir*, at para. 151 (Binnie J.), quoting *Roncarelli v. Duplessis*.
[294] *Mowat*, at para. 64 ("...the text, context and purpose of the legislation clearly show that there is no authority in the Tribunal to award legal costs and that there is no other reasonable interpretation of the relevant provisions").
[295] *McLean*, at para. 33.
[296] *McLean*, at para. 38.
[297] *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 at para. 14 (a case involving discrimination and statutory interpretation involves relatively narrow range of acceptability).
[298] Under Rule 2-49(1)(e)(i), an application for call and admission from another province or territory must have a recognized academic qualification under Rule 2-27(4).

239. Section 19 of the *LPA* charges the Benchers with ensuring that applicants admitted to the bar are of good character and repute, and are competent and fit to practice law.[299] Under subsections 11(3) and 21(1)(b), the Benchers are authorized to make binding rules establishing requirements, including "academic requirements", for applicants for call and admission.[300]

240. This is consonant with the relevant object of the *LPA*, that the Law Society uphold and protect the public interest in the administration of justice by ensuring the "competence of lawyers."[301] There is no evidence the legislature intended that the Benchers disqualify otherwise competent individuals from practicing law based on policies of the university from which they graduate that do not negatively impact on their academic preparedness. In the *LPA,* the legislature charged the Benchers with ensuring competent ***individuals*** are practicing law in accordance with protecting the administration of justice, and not to use these statutory provisions to "send a message"[302] or to "express its condemnation" of an ***institution's*** religiously-based policies.[303]

241. The Law Society has established binding rules pursuant to these specific statutory provisions. Rule 2-27 was established for "Enrolment in the Admission Program".[304] Under Rule 2-27(3), applicants for enrolment, including any TWU School of Law graduate, will have to deliver certain listed items to the Executive Director, including: "(b) proof of academic qualification under subrule (4)". Rule 2-27(4) establishes what constitutes "academic qualification" under Rule 2-27(3), which is the successful completion of a J.D. or LL.B. from an "approved common law faculty of law".[305] In this sense, "approved" relates to the quality of the education provided in the applicable faculty of law as it is concerned with graduates' "academic qualifications."

242. As such, the question under Rule 2-27(4.1) is whether JD Program graduates will be academically qualified such that they are competent to article and practice law in British

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[299] *LPA*, s. 3(b), s. 19(1).
[300] *LPA*, s. 3(c), s. 20(1)(a), s. 21(1)(b).
[301] *LPA*, s. 3(b) and (c).
[302] LSBC Response, para. 245.
[303] LSBC Response, para. 253.
[304] This is the heading above Rule 2-27.
[305] Until the Law Society was notified of TWU's application and the Rules were changed in 2013, the Rules stated that any graduate with a bachelor of laws from a common law faculty in a Canadian university has the requisite academic qualifications (see LSBC Response, para. 70).

Columbia. Provided TWU graduates are taught law to the same standards as other approved law faculties and are professional prepared for practice, they ought not to be automatically disqualified to enter the legal profession.

243. As stated by Mr. Gomery, "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".[306]

(iii) The Decision is Incorrect and Unreasonable in the Context of Rule 2-27(4.1)

244. Refusing to admit TWU graduates because of the Community Covenant is beyond the scope of the Benchers' authority under the *LPA*. They ought to have confined the exercise of their statutory powers to ensuring that applicants from TWU would be properly instructed on the law and their duties as lawyers, including that they would not discriminate as lawyers.[307]

245. The Supreme Court of Canada has said that "a liberal and purposive interpretation cannot supplant a textual and contextual analysis simply in order to give effect to a policy decision different from the one made by" the legislature.[308] A wide, liberal interpretation of the *LPA* does not permit the Benchers to supplant the text and context of its enabling statute within a decision under Rule 2-27(4.1). There is no power for the Law Society to discriminate against applicants to the bar who attended TWU based on grounds unrelated to their competency to become lawyers.

246. The only criterion of Rule 2-27(3)(b) is that a person must be academically qualified. Rule 2-27(4) deals ***only*** with "academic qualification" and therefore Rule 2-27(4.1) cannot grant the Benchers authority to "not approve" a faculty of law in their untrammelled discretion based on conceptions of the "public interest" detached from "academic qualification". Any

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[306] Affidavit #1 of K. Jennings, Exhibit A at 29.
[307] Even though the Law Society, through the Federation of Law Societies, ensures the curriculum taught meets certain standards, it does not interfere with how law schools grade students, which is a greater indicator of competence than what law students are taught.
[308] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at para. 62.

purpose other than competence or whether an applicant would cause harm practicing law is improper and outside the scope of the *LPA*.[309]

247. Any interpretation of academic qualification ***must*** be related to how the Federation approves law schools, since Rule 2-27(4.1) says that "a common law faculty of law is approved if it has been approved by the Federation". The Federation approves law schools on the basis of a "national requirement" that sets out core competencies that law schools must teach students.[310] With the exception of a requirement for a professional responsibilities course, "the national requirement does not address how the required competencies should be taught."[311] Those competency requirements exemplify an "'outcomes' based approach"[312] related to three areas: skills competencies, ethics and professionalism understanding, and substantive legal knowledge.[313]

248. The Decision was not related to the national requirement or the competence of TWU graduates, which the Law Society admits.[314] TWU graduates will meet all the requirements set out in the national requirement. None of the competency requirements relate to the Community Covenant. None of the discussions between the Federation and Law Society before the national requirement was approved focused on non-academic policies.[315]

249. It is undisputed that the Decision did not rely on any academic or professional shortcoming of the JD Program, actual or perceived, or upon the quality of graduates TWU would produce.[316] The Federation's approval of TWU's JD Program is presumptively determinative of whether graduates of TWU meet the Law Society's statutory objectives, since the Law Society has adopted the Federation's national requirement for academic standards and TWU's JD Program has met that requirement.

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[309] *Catalyst Paper Corp.*, at para. 28.
[310] Affidavit #1 of K. Jennings, Exhibit B at 44-47.
[311] Affidavit #1 of J. Epp Buckingham, Exhibit O at 113.
[312] Affidavit #1 of J. Epp Buckingham, Exhibit O at 113 (with the exception of professional responsibility, which must be a separate course).
[313] Affidavit #1 of J. Epp Buckingham, Exhibit O at 113.
[314] LSBC Response, para. 230.
[315] Affidavit #1 of K. Jennings, Exhibits B-I.
[316] LSBC Response, para. 230.

250. The Decision also lacks intelligibility and justification. The Law Society maintains the Decision was based on the fact that the JD Program was "tainted"[317] by the religious beliefs embodied in the Community Covenant.[318] The Benchers cannot ban graduates any more than they can ban law students who are "tainted" for attending a particular church, attending an all-girls high school or university, or being a member of a contentious political party.

251. The Community Covenant is only relevant to the Law Society's discretion in this case if there were specific, concrete evidence that TWU graduates are not academically prepared for the practice of law or, as found by the Supreme Court of Canada, if they would discriminate as lawyers because they hold the beliefs embodied in the Community Covenant. [319] This is what the Supreme Court of Canada meant in *TWU v. BCCT* when it stated that "[t]he freedom to hold beliefs is broader than the freedom to act on them".[320] The freedom to hold "discriminatory beliefs" does not mean a lawyer can discriminate in practice. If lawyers discriminate in their conduct, the Law Society can take action. Hence, the Law Society's Code of Professional Conduct which prohibits lawyers from discriminating against any person.[321] As stated by Bencher Ken Walker, QC at the April Meeting: "The Law Society of British Columbia is not a belief regulator. We are a conduct regulator…"[322]

252. The ordinary language, purpose, and intent of the *LPA* does not permit applicants to be denied entry to the legal profession in order for the Law Society to "condemn"[323] and refuse to "condone"[324] their affiliation with TWU, a religious institution, any more than Quebec could deny Mr. Roncarelli a liquor licence to condemn and refuse to condone his affiliation with the Jehovah Witnesses.[325]

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[317] LSBC Response, para. 183.
[318] LSBC Response, para. 183.
[319] *TWU v. BCCT,* at paras. 32, 38.
[320] *TWU v. BCCT,* at para. 36.
[321] Code of Professional Conduct for British Columbia, Law Society of British Columbia, Section 6.3-5 ("A lawyer must not discriminate against any person").
[322] Affidavit #1 of E. Phillips, Exhibit T at 586.
[323] LSBC Response, para. 253.
[324] LSBC Response, para. 232.
[325] *Roncarelli,* at pp. 141, 156, 183-184.

253. The Law Society justifies the Decision on an anticipated "beneficial policy outcome", rather than a defensible interpretation of the *LPA* and the law. There is no evidence that the Benchers ever considered the text, context, and purpose of the *LPA* in making the Decision[326] (although they did at the April Meeting). The Supreme Court of Canada recently admonished a tribunal that based its decision on a "beneficial policy outcome" at the expense of the text, context, and purpose of its home statute.[327] The Law Society cannot defend the Benchers' exercise of discretion by substituting a policy in place of a reasonable interpretation of their discretion under the *LPA*.

(c) THE LAW SOCIETY CANNOT REJECT TWU ON THE BASIS OF PERCEPTION

254. The Law Society argues that the Decision was reasonable and "necessary" because it cannot condone, sanction, or endorse TWU's unacceptable "discriminatory" admissions policy, which "[e]ffectively prohibit[s] LGB persons from attending TWU".[328]

255. The Law Society cannot be said to have given its "imprimatur" or approval to the Community Covenant simply by accepting its graduates on the same terms as applied to everyone else.[329] TWU does not seek approval of its Community Covenant from the Law Society and, in fact, the Law Society is precluded under the *Charter* from opining on the validity or legitimacy of the religious beliefs contained in the Community Covenant.[330] The legality of the Community Covenant does not rest on the approval of the Law Society, but on determinations of the BC legislature, the *Charter* and the *Human Rights Code*.

256. The same argument was advanced and rejected in *TWU v. BCCT*. The BCCT argued approving TWU would be contrary to public policy by creating "perception that the BCCT condones this discriminatory conduct".[331] The Supreme Court rejected this argument:

> Indeed, if TWU's Community Standards could be sufficient in themselves to justify denying accreditation, it is difficult to see how the same logic would not result in the denial of accreditation to members of a particular church. The diversity of Canadian society is partly

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[326] At the October 31, 2014 meeting, there was no discussion or debate at the meeting other than implementing the Referendum Question: Affidavit #1 of E. Phillips, para. 51, and Exhibit HH at 662 (Meeting minutes).
[327] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at para. 64.
[328] LSBC Response, paras. 254, 291, 229, 312, 232.
[329] LSBC Response, paras. 81, 249.
[330] *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at para. 51 [*Amselem*]; *Saguenay*, at paras. 72, 74.
[331] *TWU v. BCCT*, at para. 11. See also paras. 5, 18-19.

> reflected in the multiple religious organizations that mark the societal landscape and this diversity of views 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.[332]

257. If the Law Society cannot "condone" or "endorse" TWU ***as an institution*** because it holds "discriminatory" religious beliefs, it is hard to see why it could also not screen, prohibit, and disbar other applicants holding similar or unpopular beliefs.

258. By focusing on the institution (over which it has no statutory authority), the Law Society ignores that it is denying individuals (over whom it does have authority) the ability to practice law without regard to their competence, merit, or abilities. This is not reasoned decision-making and ought to be rejected.

(d) The Decision Conflicts with the Law Society's Approval of the National Requirement

259. The Decision also conflicts with the Law Society's prior approval and implementation of the National Requirement, the text of which states that a Federation accepted degree satisfies the competency requirements:

> An applicant for entry to a bar admission program ("the applicant") must satisfy the competency requirements by either,
>
> a. successful completion of an LL.B. or J.D. degree that has been accepted by the Federation of Law Societies of Canada ("the Federation"); or
>
> b. possessing a Certificate of Qualification from the Federation's National Committee on Accreditation.[333]

As such, the Decision lacks intelligibility and justification.

(e) It was Wrong to Allow the Members Dictate the Decision

260. The implementation of the SGM Resolution was *ultra vires*, and its implementation is a breach of the Benchers' statutory duties.

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[332] *TWU v. BCCT*, at paras. 33, 36 (emphasis added).
[333] Affidavit #1 of K. Jennings, Exhibit B at 47, Exhibit E at 180, 235.

261. The *LPA* was never intended for members to make decisions disqualifying an individual based on religious belief. A decision can only be upheld if it conforms to the "rationale of the statutory regime set up by the legislature".[334]

262. Under the *LPA*, the roles and duties of the Benchers and Law Society members are disparate.[335] The members are not given the authority to directly make decisions for the Law Society. Indeed, section 12 of the Act provides that Benchers ***may*** make, amend, or rescind rules relating to 10 specific categories if approved by two-thirds of the members.[336] Until recently, the members were permitted to set the practice fee.[337] Thus, the members may affirm or reject the Benchers' rules in only certain areas. Notably, rules respecting "applicants" are not included on the section 12 list.[338]

263. Section 13 of the *LPA* provides the only scenario in which Benchers must implement a member decision. However, even if the members' resolution is passed under this scenario, section 13(4) of the *LPA* stipulates that "[t]he benchers ***must not*** implement a resolution if to do so would constitute a breach of their statutory duties."

264. Implementing the SGM Resolution was a breach of the Benchers' statutory duties for three reasons.

265. First, it would be unthinkable that the legislature intended for Law Society members to determine an applicant's access to the bar and their individual rights based on a majority vote. If this were permitted, individuals could be excluded from the practice for almost any reason without meaningful legal recourse. The *LPA* sets out very specific procedural safeguards when a decision of this nature is to be made. For instance, procedural rules and processes have been put in place to protect lawyers in handling complaints and in matters of discipline.

266. There are also specific rules and conditions put in place where a member is to be disbarred. The members of the Law Society cannot exclude a specific group of prospective lawyers by

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[334] *Catalyst Paper Corp.*, at para. 25.
[335] *Gibbs v. LSBC*, at para. 79.
[336] *LPA*, s. 12(3).
[337] *Gibbs v. LSBC*, at para. 6 (formerly section 23(1)(a) and 12(1)(j) of the *LPA*, repealed in 2012).
[338] *LPA*, s. 11(1).

resolution any more than disbar existing ones simply by disapproving of their law school. Even if they could, the process would have to be sensitive to the important rights at stake and a decision could not be made on just any grounds.

267. Second, both the Benchers and the Law Society are bound by Rule2-27 to consider only "academic qualification" pursuant to s. 11(3) of the *LPA*.

268. Third, disqualifying individuals from practicing law based on attending TWU is contrary to the law and therefore a breach of the Benchers' statutory duties. The Decision breaches the Benchers' statutory duties contrary to s. 13(4) of the *LPA* by breaching the *Human Rights Code* and the *Charter,* and not applying the law as determined by the Supreme Court of Canada in *TWU v. BCCT.*

269. The Benchers are statutorily bound to follow and apply their own rules and the law, as was previously acknowledged by a majority of them when they rejected motions in April and September to disapprove. If "the law" required the Benchers to approve TWU, they breached their statutory duties in eventually voting to disapprove TWU without any factual or legal change.[339] This was made clear to the Benchers in the legal advice they received from Mr. Gomery.[340] The only change in circumstance was the member vote; there was no change to the law or the facts. There was no legal justification for the Benchers to reverse themselves. Fundamental rights are not determined by popular vote, even if those voting are lawyers.[341] To quote Bencher Lynal Doerksen at the September Meeting: the referendum showed that "TWU is in need of protection from us".[342]

270. In *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, the Supreme Court of Canada found that an unreasonable outcome occurred because the decision-maker misapplied caselaw.[343] In *Irving Pulp & Paper*, the Supreme Court of

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[339] See Appendix A of these Submissions for an outline of Bencher statements affirming that the law demands the Law Society recognizes TWU.
[340] Affidavit #1 of K. Jennings, Exhibit A at 37.
[341] *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at para. 58 [*Loyola*].
[342] Affidavit #1 of T. Lesberg, Exhibit "B", p. 77, lines 17-20.
[343] *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 at para. 37 ("Because the Board's finding of unfairness was based on what was, in my respectful view, a misapplication of the *CCH* factors, its outcome was rendered unreasonable").

Canada agreed that "*previous cases* shape the contours of what qualifies as a reasonable decision *in this case*":[344]

> Respect for prior arbitral decisions is not simply a nicety to be observed when convenient. On the contrary, where arbitral consensus exists, it raises a presumption — for the parties, labour arbitrators, and the courts — that subsequent arbitral decisions will follow those precedents. Consistent rules and decisions are fundamental to the rule of law....
>
> Thus, while arbitrators are free to depart from relevant arbitral consensus and march to a different tune, it is incumbent on them to explain their basis for doing so. As this Court has stressed, "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" (*Dunsmuir*, at para. 47). Because judges are not mind readers, without some explanation, whether implicit or explicit, for a board's departure from the arbitral consensus, it is difficult to see how a "reviewing court [could] understand why the [board] made its decision"... Reasonableness review includes the ability of courts to question for consistency where, in cases like this one, there is no apparent basis for implying a rationale for an inconsistency.[345]

271. The Law Society had not rebutted its determination that "the law,"[346] as the Benchers understood it in April and September should be followed. It was unreasonable for the Benchers to reverse their vote on the April Motion and in the September vote based on "the law" in the absence of additional evidence relevant to the question of academic qualification of TWU graduates.

(f) THE DECISION IS NOT INTELLIGIBLE, TRANSPARENT, OR JUSTIFIED

(i) The Decision Conflicts with the April Motion and September Motion

272. The Decision was not intelligible, transparent, and justified in the context of the two failed prior attempts to disapprove TWU. A recent Alberta Court of Appeal decision found that a subsequent conflicting interpretation of a statute by a decision-maker was found to be unreasonable. In that case, the decision-maker decided that a tax did not apply to certain leases; several years later, it found that the tax did apply. Could the decision-maker change its mind? No. The reasonableness of the subsequent decision had to be judged on whether the two interpretations could stand together:

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[344] *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 [*Irving Pulp & Paper, Ltd.*] at para. 75 (Rothstein and Moldaver JJ. in dissent, but not on this point) and paras. 16 and 6 (Abella J.: previous jurisprudence is "a valuable benchmark against which to assess the arbitration board's decision in this case").
[345] *Irving Pulp & Paper, Ltd.*, at paras. 78-79 (Rothstein and Moldaver JJ. in dissent, but not on this point).
[346] See Appendix A of these Submissions, as well as the September transcript at Affidavit #2 of T. McGee, Exhibit O at 515.

> In the context of a public statute, the rule of law and the boundaries of administrative discretion arguably cannot be served in the face of arbitrary, opposite interpretations of the law....
>
> While some statutory provisions may be amenable to different, yet reasonable interpretations, ***it is difficult to conceive of meaningful legislation that would allow diametrically opposed interpretations, both of which are reasonable, not to mention correct.***[347]

273. The decisions for and against TWU graduates cannot reasonably stand together. The Benchers voted for TWU, twice, before they voted against TWU. They voted to recognize graduates because "the law" required that result.[348] The Benchers then voted a different way based on a popular vote of lawyers.

274. If the law required the Benchers to accept TWU graduates, it is inexplicable why a diametrically opposite interpretation could be held as reasonable or correct. No reasons or rationale were provided for the Law Society reversing its vote on the April Motion. If the law changed from April to October, the principles of justification, intelligibility, and transparency required the Benchers to say so.

275. The lack of explanation for making the Decision raises a number of critical questions that demonstrate that the Decision is unreasonable. What was the reasoning of the Law Society members in voting for the SGM Resolution and in the Referendum Question? If the Decision was not based on the member vote, but on TWU discriminating, what definition of "discrimination" is being used to reject TWU graduates? How does TWU violate this undefined standard? Does a violation mean an applicant to the bar is not competent (i.e., "academically qualified") for admission? What must TWU do to correct it? Must TWU remove the Community Covenant altogether, or simply not enforce it? These unanswered questions demonstrate the lack of intelligibility and transparency, making it impossible to divine the Law Society's reasoning when it made the Decision (without consulting the Law Society's litigating position).

(ii) <u>The SGM Resolution is Flawed</u>

276. The Decision is also incorrect and unreasonable because it was based on the vote on the Referendum Question, which ratified a flawed SGM Resolution. The SGM Resolution was

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[347] *Altus Group Limited v Calgary (City)*, 2015 ABCA 86 at paras. 23, 27 (emphasis added).
[348] See Appendix B for the Benchers' comments.

flawed because it relied exclusively on section 28 of the *LPA* as authority for making a decision under Rule 2-27(4.1). This statutory rationale is not related to the rationale suggested by the Law Society. The SGM Resolution states:

> - 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 promote and improve the standard of practice by lawyers;[349]

277. Section 28 of the *LPA* states that "[t]he benchers may take any steps they consider advisable to promote and improve the standard of practice by lawyers, including…".

278. Rejecting TWU graduates does not "promote and improve" practice standards. The Law Society does not say this or even mention section 28 in defending the Decision. This is strange, given that it was the only legal authority cited in the SGM Resolution. Instead, the Law Society now says it implemented the SGM Resolution to prevent discrimination by TWU.[350] Preventing discrimination by a third party educational institution is completely unrelated to lawyers' "standard of practice". Therefore, the justification underlying the members' vote affirmed by the Decision is unintelligible.

(iii) The Decision is Not a Standard, nor Based on a Standard

279. The Decision is not a standard or requirement. The Law Society's object is to uphold the public interest in the administration of justice by establishing "standards and programs" for the education and competence of applicants for admission to the bar. The Benchers meet that object by making rules to establish academic requirements.[351]

280. The Decision is not based on any standard. There is no general, intelligible standard embodied in the rules or articulated by the Benchers upon which the Decision can be understood given that it was clearly not based on "academic qualification" of graduates.

281. A discretionary decision is arbitrary if not based on relevant criteria. A decision affecting the rights of TWU and its students made according to majority will, not standards, is

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[349] Affidavit #2 of T. McGee, Exhibit K at 438-439.
[350] LSBC Response, para. 312.
[351] *LPA*. s. 3(c), s. 20(1)(a), s. 21(1)(b).

arbitrary and contrary to the rule of law. In *Roncarelli*, the Supreme Court of Canada rebuked such arbitrary discretion:

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute....Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted.
>
> To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred. There was here not only revocation of the existing permit but a declaration of a future, definitive disqualification of the appellant to obtain one: it was to be "forever" and to warn others that they similarly would be stripped of provincial "privileges" if they persisted in any activity directly or indirectly related to the Witnesses and to the objectionable campaign.[352]

282. Similar to *Roncarelli*, the Law Society now justifies the Decision as a measure to "advise" and "condemn" TWU so TWU will "change its policy".[353] The Law Society, in this proceeding, has summoned up a host of reasons related to the Community Covenant.[354] However, these reasons are merely litigating positions. If they are sufficient to successfully defend the Decision, the Law Society has still not established an objective standard that can be applied in the future. This prejudices TWU and its graduates, is contrary to the rule of law, and is ultimately unreasonable.

(g) THE PUBLIC INTEREST

(i) The "Public Interest" Was Not Used to Justify the Decision and Did Not Require Disapproval

283. The Law Society's litigating position is that the Law Society made the Decision because it was "necessary"[355] in the public interest.[356]

284. The record does not support that *ex post facto* justification. Neither the SGM Resolution nor the Decision refers to the "public interest" provisions contained in section 3 of the *LPA*.

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[352] *Roncarelli*, at pp. 141, 142.
[353] LSBC Response, paras. 5, 253.
[354] Indeed, the Law Society later amended its Response to Petition with new rationale for the Decision (based on the Community Covenant's affirmation of life "from conception until death") that was never raised by the Benchers.
[355] LSBC Response, *inter alia*, paras. 254, 319.
[356] LSBC Response, *inter alia*, paras. 5, 319.

285. When the Decision was made, there was no discussion or debate related to the motion, other than a statement by the Bencher who proposed the motion to disapprove TWU that the Benchers must ensure the public interest in the administration of justice is protected.[357]

286. The September Motion contradicts the notion that rejecting TWU graduates is necessary in the public interest. The September Motion stated that "implementation of the Resolution does not constitute a breach of their statutory duties, regardless of the results of the Referendum."[358] The Benchers determined that either result would be acceptable to them. This is acknowledged by the Law Society in its Response, saying that "both accrediting TWU and refusing to accredit would be consistent with its statutory duties".[359]

287. It is illogical for the Law Society to also argue that rejecting TWU graduates was "necessary" in the public interest, when accepting them was also in the public interest.

288. It is also inconsistent with the record. The Law Society cannot tell its members one thing in making their decision (i.e., either choice is legal), but then later tell the Court the opposite (i.e., only one choice is legal).

(ii) Even if the Public Interest was Relied On, Its Scope has Limits

289. The Law Society says the Decision protects the rights and freedoms of LGB individuals[360] and that it is empowered by statute to make the Decision "to uphold and protect the public interest in the administration of justice by... preserving and protecting the rights and freedoms of all persons".[361]

290. The scope of the Law Society's ability to consider the "public interest" is not unlimited. The meaning of "public interest" is to be construed in the context of the statute.[362] The words "public interest" do not make their meaning a matter of policy entirely within the

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[357] Affidavit #1 of E. Phillips, para. 51, and Exhibit HH at 662 (Meeting minutes).
[358] Affidavit #2 of T. McGee, Exhibit P at 587.
[359] LSBC Response, para. 151, as well as 163, 172.
[360] LSBC Response, *inter alia*, paras. 248 ("Such approval would serve to discredit the legal profession....and harm its essential role in protecting the rights of all persons"), 252-254.
[361] *LPA*, s. 3(a).
[362] *Lindsay v. Manitoba (Motor Transport)* (1989), 1989 CarswellMan 324, 62 D.L.R. (4th) 615 (Man. C.A.) at para. 39.

decision maker's jurisdiction, since it is the legislature and not the decision maker that establishes the "policy", or the object or the purpose, of the legislation.[363]

291. The Law Society's interpretation defies any limiting principle and leads to a broad overreach of jurisdiction. If the Law Society is correct, the Benchers would also have jurisdiction to disbar or deny access to the bar on "public interest grounds" to any person who attended or is a member of a private organization whose policies are deemed by the Law Society to be contrary to *Charter* values. The Law Society would presumably also have the jurisdiction to disbar or deny entry to the bar to a person who took Law 12 in a Christian high school or law classes in their undergraduate degree at TWU or other schools with similar Community Covenant provisions. It cannot be right that the Law Society's jurisdiction extends this far. It is, after all, not a regulator of universities.

292. The Court in Nova Scotia put this well:

> Recognizing a degree from a law school that "unlawfully discriminates" is argued to be not in the public interest. The public interest in the practice of law does not extend to how law schools function. Neither the degree of moral outrage directed toward the policy, nor the extent to which it is deemed to be in the public interest to attack it, change that. It does not expand the NSBS authority into areas where it would otherwise not have jurisdiction. It does not act as a self-standing grant of jurisdiction....
>
> ....If the public interest in the practice of law in Nova Scotia can be interpreted to include issues at universities that grant law degrees but do not affect the quality of their graduates it would justify expansively broad NSBS regulatory involvement. In argument, counsel for the NSBS said that the NSBS just would not use that public interest jurisdiction to intervene in matters that were "incidents", such as invitations to politically or morally offensive guest speakers or, presumably, to things like the resolution of individual human rights complaints, the hiring and dismissal of teaching staff or the granting of tenure. But it could potentially intervene in dealing with "systemic" issues. Presumably that would mean that a university policy on harassment that was considered weak or ineffective could come under NSBS scrutiny, as could personnel or human resources policies, insufficiently robust affirmative action admission or hiring policies and even policies on who may or may not be invited to speak at the law school. It would permit the NSBS to require universities in other Canadian jurisdictions to comply with Nova Scotia law, even if that law conflicted with the law of their own province.[364]

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[363] *Lindsay v. Manitoba (Motor Transport)*, at para. 36.
[364] *TWU v. NSBS*, at paras. 176, 178.

(iii) No Public Interest Reason to Deny TWU

293. It cannot be that an established religious educational community such as TWU is somehow against the public interest. TWU was chartered by the legislature to provide education based on an underlying Christian philosophy.[365] The Supreme Court of Canada has already recognized that the BC legislature did not consider that TWU's religious character was against the public interest, in part because it has passed bills in its favour and accredited its educational programs.[366]

294. The BCCT argued it could deny approval of TWU because "the proposed program follows discriminatory practices which are contrary to the public interest" since the Community Covenant's predecessor (the Community Covenant contained in the Responsibilities of Membership) excludes "persons whose sexual orientation is gay or lesbian" and that individuals of "homosexual orientation, like persons of colour, are entitled to protection and freedom from discrimination under the law".[367]

295. However, the Supreme Court said that the BCCT could not deny approval of TWU on the basis of the effects of its admission policy on potential LGB students. It could only consider the Community Covenant in relation to a TWU graduate's "suitability for entrance into the profession of teaching"[368] and "the impact of TWU's admission policy on the public school environment".[369] In other words, it could only examine the impact of the Community Covenant on matters within the jurisdiction of the decision-maker, which in this case is the preparedness of graduates for the practice of law.

296. Put another way, the admission of TWU graduates would not be contrary to "the public interest in the administration of justice". The definition of "administration of justice" in the *Justice Administration Act* is not binding, but it is instructive: "*the provision, maintenance, and operation of the courts, correctional centres, and law enforcement for the prosecution*

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[365] *An Act Respecting Trinity Western University*, S.B.C. 1969, c. 44, s. 3(2), as amended.
[366] *TWU v. BCCT*, at paras. 32, 35.
[367] *TWU v. BCCT*, at paras. 5-6.
[368] *TWU v. BCCT*, at para. 13.
[369] *TWU v. BCCT*, at para. 35.

of offences and provision of adequate legal services."[370] As applied here, the administration of justice concerns how justice is achieved by the legal profession.

297. Graduates of the JD Program will be required to swear the Barristers' and Solicitors' Oath, promising to "uphold the rule of law and the rights and freedoms of all persons according to the laws of Canada and the province of British Columbia".[371] Graduates of TWU will be bound by all of the same professional rules as other lawyers and there is nothing to suggest that they will be inadequately prepared for practice. On the contrary, the evidence is clear that TWU's graduates will uphold the Barristers' and Solicitors' Oath, including its requirements regarding non-discrimination, just like every other lawyer.[372]

298. The Special Advisory Committee concluded that "there will be no public interest reason to exclude future graduates of the program from law society bar admission programs":[373]

> The Court also made it clear in BCCT that the assessment of the public interest cannot be based solely on the religious precepts of the school, or in this case, the proposed school and that the admissions policy requiring students to adhere to the Community Covenant is not sufficient to establish unlawful discrimination. Absent evidence for example, that graduates of the proposed law school would engage in discriminatory conduct or would fail to uphold the law, freedom of religion must be accommodated. No such evidence has been brought to the attention of the Special Advisory Committee; nor is it aware of any.[374]

299. The Decision fails to protect and uphold the public interest by undermining the constitutional rights and freedoms of members of TWU's community, whom the Supreme Court of Canada said were "free to adopt personal rules of conduct based on their religious beliefs provided they do not interfere with the rights of others".[375]

(h) THE DECISION WAS BASED ON IRRELEVANT CONSIDERATIONS AND NOT ON EVIDENCE

300. A decision-maker must not act on the basis of irrelevant considerations.[376] A discretionary decision made on the basis of considerations irrelevant to the object and text of the

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[370] *Justice Administration Act*, RSBC 1996, c. 234, s. 1.
[371] Affidavit #1 of E. Phillips, Exhibit T at 571 (also contained in Affidavit #2 of T. McGee, Exhibit J).
[372] Affidavit #1 of N. Hebert, paras. 18-20; Affidavit #1 of S. Ferrari, paras. 32-33.
[373] Affidavit #1 of J. Epp Buckingham, Exhibit N at 93.
[374] Affidavit #1 of J. Epp Buckingham, Exhibit N at 84 (para. 37 of Report).
[375] *TWU v. BCCT*, at para. 35.
[376] *Roncarelli*, at pp.140-142.

empowering legislation is *per se* unreasonable,[377] unfair, and therefore "unlawful"[378]. In *TWU v. BCCT*, the BCCT wrongly acted on irrelevant considerations:

> The order of mandamus was justified because the exercise of discretion by the BCCT was fettered by s. 4 of the Act and because the only reason for denial of certification was the consideration of discriminatory practices. 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.[379]

301. The view of the Law Society members is irrelevant to whether TWU graduates are or will be competent. If the Benchers considered TWU's "discriminatory practices" according to their litigating position, that too is irrelevant since they considered the religious precepts of TWU instead of the impact of TWU's religious beliefs and practices on the practice of law.

302. In 1950, the BC Court of Appeal held that the Law Society could refuse to admit an applicant to the bar on the mere basis that his belief in communism and membership in a communist organization was dangerous and against the public interest.[380] Three years later, the Supreme Court of Canada held that this reasoning offended the rule of law:

> There is no law in this country against holding such views nor of being a member of a group or party supporting them. This man is eligible for election or appointment to the highest political offices in the province: on what ground can it be said that the legislature of which he might be a member has empowered the Board, in effect, to exclude him from a labour union? or to exclude a labour union from the benefits of the statute because it avails itself, in legitimate activities, of his abilities?
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> ...
>
> ....I am unable to agree, then, that the Board has been empowered to act upon the view that official association with an individual holding political views considered to be dangerous by the Board proscribes a labour organization. Regardless of the strength and character of the influence of such a person, ***there must be some evidence that, with the acquiescence of the members, it has been directed to ends destructive of the legitimate purposes of the union, before that association can justify the exclusion of employees from the rights and privileges of a statute designed primarily for their benefit.***[381]

303. Similarly in *Roncarelli*:

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[377] *Malcolm v. Canada (Fisheries and Oceans)*, 2014 FCA 130 at para. 35; *Mission Institution v. Khela*, at para. 74.
[378] *Mission Institution v. Khela*, at para. 73. *Dunsmuir*, at para. 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."), finding that "The reasoning process of the adjudicator was deeply flawed" (para. 72).
[379] *TWU v. BCCT*, at para. 43.
[380] *Martin v. Law Society of British Columbia*, 1950 CarswellBC 168, [1950] 3 D.L.R. 173.
[381] *Smith & Rhuland v. The Queen*, at pp. 98, 100 (paras. 10, 13) (emphasis added).

> To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred.[382]
>
> ....The religious beliefs of the appellant and the fact that he acted as bondsman for members of the sect in question had no connection whatever with his obligations as the holder of a licence to sell alcoholic liquors. The cancellation of his licence upon this ground alone therefore was without any legal justification. Moreover, the religious beliefs of the appellant and his perfectly legal activities as a bondsman had nothing to do with the object and purposes of the *Alcoholic Liquor Act*...[383]

304. In 1989, the Supreme Court overturned the prohibition of non-citizens from admission to the bar in British Columbia as citizenship is irrelevant to the practice of law.[384]

305. In *TWU v. BCCT*, the Supreme Court of Canada applied these principles. The Supreme Court of Canada found the BCCT's focus on the Community Covenant was "disturbing" and held that the BCCT acted without evidence and outside its jurisdiction:

> Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected.
>
> ....For the BCCT to have properly denied accreditation to TWU, it should have based its concerns on specific evidence. It could have asked for reports on student teachers, or opinions of school principals and superintendents. It could have examined discipline files involving TWU graduates and other teachers affiliated with a Christian school of that nature. Any concerns should go to risk, not general perceptions.[385]

306. Before its April decision, the Benchers sought evidence of discrimination regarding TWU students from a wide variety of sources.[386] There was no evidence that TWU students or graduates discriminate as students, employers, or in their professional capacities. Most pertinently, there is no evidence that TWU graduates who have already been admitted to the British Columbia bar discriminate. Accepting TWU graduates does not harm the administration of justice. Students do not need to attend TWU to become lawyers. As the Supreme Court of Canada recognized, TWU is "not for everybody"; it is "designed to address the needs of people who share a number of religious convictions".[387]

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[382] *Roncarelli* at p. 141 (Rand J.).
[383] *Roncarelli*, at pp.183-184 (Abbott J.).
[384] *Andrews v. Law Society of British Columbia*, at paras. 60-62, 99 (La Forest J.: "I see no sufficient additional dimension to the lawyer's function to insist on citizenship as a qualification for admission to this profession").
[385] *TWU v. BCCT*, at paras. 36, 38.
[386] Affidavit #1 of E. Phillips, Exhibit N at 227-229, Exhibit O at 480.
[387] *TWU v. BCCT*, at para. 25.

307. The Law Society says that because some LGB students may be excluded from TWU, they would have fewer opportunities to enter the legal profession.[388] The creation of additional opportunities to attend law school cannot be construed as a disadvantage when the existing number of law school seats available to all students will not decrease. TWU would expand options for potential law students, not limit them.

308. This point was recognized by the Special Advisory Committee, which wrote that "approval of the TWU law school would not result in any fewer choices for LGBT students than they have currently" but would "expand the choices for all students".[389] There were 390 law schools seats in BC before the JD Program was approved, there will be 390 law school seats if the Decision stands, and there will be those same 390 seats available to students if TWU is approved. If anything, religious students will attend TWU instead of public law schools, thus creating more opportunities for LGB and non-evangelical students to attend other law schools.[390]

(i) FAILURE TO CONSIDER RELEVANT MATTERS

309. Even if the Benchers took into account the concerns now articulated by the Law Society in this judicial review, their Decision nevertheless failed to consider highly relevant factors.

310. There were three motions at the September Meeting. The first motion was to declare that TWU was "not approved". That motion failed (again), presumably because the majority of Benchers had not changed their views as expressed in April. The second motion (the September Motion) was that the SGM Resolution "will be binding and will be implemented by the Benchers" if passed by the members in a referendum.[391]

311. The members voted to reject TWU graduates. The Benchers considered only the referendum results. There was no debate or discussion among the Benchers before they voted in October.[392] They ignored all other relevant considerations.

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[388] LSBC Response, paras. 264-272.
[389] Affidavit #1 of J. Epp Buckingham, Exhibit N at 89.
[390] Affidavit #1 of S. Ferrari, para. 31; Affidavit #1 of J. Winter, para. 41.
[391] Affidavit #2 of T. McGee, Exhibit N at 512, 514.
[392] Affidavit #1 of E. Phillips, para. 51, and Exhibit HH at 662 (Meeting minutes).

312. A decision-maker failing "to take into account a highly relevant consideration is just as erroneous as the improper importation of an extraneous consideration."[393] A decision-maker must turn its mind to all factors that are relevant to carry out its statutory duties.[394]

313. In *TWU v. BCCT*, the Supreme Court said that the BCCT failed to consider a number of important considerations, including "not taking into account the impact of its decision on the right to freedom of religion of the members of TWU"[395] and other factors. The BCCT failed to consider TWU private character, that it is protected under the *Human Rights Code*, the legislature's establishment of TWU, the burden placed on TWU graduates, and the total absence of any concrete evidence that TWU graduates would have a detrimental effect on the learning environment in schools.[396]

314. The Decision ignored highly relevant considerations, including some of the same considerations set out in *TWU v. BCCT*:

(i) The *Charter* and *Human Rights Code*

315. The Law Society failed to recognize that the equality rights of the *Charter* are not infringed by the Community Covenant. The Supreme Court of Canada stated that, as a private institution, the "*Charter* does not apply" to TWU.[397] Because of this, properly determining the scope of rights avoided a conflict of equality and religious freedom rights.[398]

316. The Law Society, like the BCCT, ought to have given weight to the fact that the unique religious character of TWU is protected under the *Human Rights Code,* section 41 of which states:

> If a ***charitable***, philanthropic, ***educational***, fraternal, ***religious*** or social organization or corporation that is not operated for profit has as a ***primary purpose the promotion of the interests*** and welfare ***of an identifiable group*** or class of persons ***characterized by*** a physical or mental disability or by a common race, ***religion***, age, sex, marital status, political belief, colour, ancestry or place of origin, ***that organization or corporation must not be considered to be contravening this Code because it is granting a preference*** to members of the identifiable group or class of persons. (Emphasis added)

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[393] *Oakwood Development Ltd. v. St-François Xavier*, [1985] 2 SCR 164 at para. 15.
[394] *Ibid.*
[395] *TWU v. BCCT*, at para. 33.
[396] *TWU v. BCCT*, at para. 32.
[397] *TWU v. BCCT*, at para. 25.
[398] *TWU v. BCCT*, at para. 29.

317. In *Caldwell v. Stuart*, the Supreme Court of Canada held that the predecessor of s. 41 permitted a Roman Catholic school to insist that their teachers abide by certain religiously defined moral standards as a condition of continued employment. In its decision, the Court affirmed that s. 41 is a ***rights granting*** provision, deserving of an expansive interpretation:

> It is therefore my opinion that the courts should not in construing s. 22 consider it merely as a limiting section deserving of a narrow construction. This section, while indeed imposing a limitation on rights in cases where it applies, also confers and protects rights. I agree with Seaton J.A. in the Court of Appeal where he expressed this thought in these words:
>
> > This is the only section in the Act that specifically preserves the right to associate. Without it the denominational schools that have always been accepted as a right of each denomination in a free society, would be eliminated. In a negative sense s. 22 is a limitation on the rights referred to in other parts of the Code. ***But in another sense it is a protection of the right to associate. Other sections ban religious discrimination; this section permits the promotion of religion.***[399]

318. The *Caldwell* decision was applied by the Court of Appeal in *Nixon*:

> Section 41 of the *Human Rights Code* is intended, in my opinion, to give, in cases within it, the right not to associate. Implicit, in my opinion, is that freedom of association includes freedom from association.[400]

319. The Supreme Court of Canada in *TWU v. BCCT* repeatedly stated that the *Human Rights Code* expressly protects TWU's religious and associational rights to maintain the Community Covenant:

> 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. (para. 25);
>
> British Columbia's human rights legislation accommodates religious freedoms by allowing religious institutions to discriminate in their admissions policies on the basis of religion. (para. 28);
>
> *The Human Rights Code*, R.S.B.C. 1996, c. 210, specifically provides for exceptions in the case of religious institutions, and the legislature gave recognition to TWU as an institution affiliated to a particular Church whose views were well known to it. (para. 32);
>
> It cannot be reasonably concluded that private institutions are protected but that their graduates are de facto considered unworthy of fully participating in public activities. (in referring to s. 41 of the *Human Rights Code*) (para. 35).

320. Additionally, the Law Society ought to have considered that the Decision constitutes unlawful discrimination under the *Human Rights Code*. Under section 14 of the *Human*

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[399] *Caldwell v. Stuart*, [1984] 2 S.C.R. 603 at p. 626 (para. 37) (emphasis added).
[400] *Vancouver Rape Relief Society v. Nixon*, 2005 BCCA 601 at para. 84; leave to SCC refused, 31633 (Feb. 1, 2007).

Rights Code, the Law Society is prohibited from excluding and discriminating against any person from membership because of their religion.[401] The Decision discriminates against evangelical Christians who graduate from TWU because of their religion and their choice to be educated within an expressly evangelical Christian community.

(ii) TWU is a Religious Institution

321. The Benchers failed to recognize that the BC legislature expressly mandated TWU to be Christian under the *TWU Act*:[402]

> 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.

The Supreme Court of Canada in *TWU v. BCCT* recognized that TWU is still "associated with the Evangelical Free Church of Canada"[403] 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".[404]

(iii) The Law Society Treats TWU Differently

322. The Law Society says that "the public perception and legitimacy" of the legal profession and the "public's faith and confidence" in the administration of justice would be undermined if the Law Society "accepts that it is permissible for a law school to discriminate against certain groups in our society."[405]

323. In this regard, the Law Society's Decision creates an arbitrary distinction. The Law Society does not look at the conduct policies of any other law school in determining whether their graduates will have the necessary "academic qualification". Only TWU.

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[401] *Human Rights Code*, RSBC 1996, c. 210.
[402] *An Act Respecting Trinity Western University*, S.B.C. 1969, c. 44, s. 3(2), as amended.
[403] *TWU v. BCCT*, at para. 1.
[404] *TWU v. BCCT*, at para. 35.
[405] LSBC Response, para. 249.

324. In the United States, a number of faith-based Christian law schools have been accredited by the American Bar Association. Many of them, such as Boston College[406] and Notre Dame,[407] require adherence to religiously based codes of conduct containing provisions similar to those contained in the Community Covenant respecting same-sex sexual intimacy. This information was before the Law Society when it made its April decision.[408]

325. The Law Society does not ban applicants to the bar from these law schools.[409] It admits applicants who obtained their undergraduate degree from an institution that has conduct policies similar to TWU, since the national requirement requires two years of undergraduate studies from a university.[410] The Law Society has not prevented these individuals from being admitted to the bar, nor disbarred existing lawyers from such law schools. Graduates of TWU are being treated in a discriminatory manner.

326. The Law Society admits applicants from other universities that are permitted to discriminate. For example, the University of Manitoba is permitted to discriminate against faculty based on age.[411] The University of Toronto and York University also discriminated on the basis of age.[412]

327. There is simply no evidence that admitting applicants from law schools that permit certain lawful types of discrimination harm the "public's faith and confidence" in any way.

(iv) *Civil Marriage Act*

328. The Decision also ignores that it is not against the public interest to hold a view on marriage that is different than the status quo. The preamble to the *Civil Marriage Act* that recognized same-sex marriage states that "it is not against the public interest to hold and publicly express diverse views on marriage".[413] Parliament recognized that marriage had

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[406] Affidavit #1 of E. Phillips, Exhibit N at 464 ("As a Catholic, Jesuit institution of higher learning, Boston College adheres to the Church's teaching with respect to sexual intimacy. Consequently, sexual activity outside the bonds of matrimony may be subject to appropriate disciplinary sanctions").
[407] Affidavit #1 of E. Phillips, Exhibit N at 476, 478 (....students who engage in sexual union outside of marriage may be subject to referral to the University Conduct Process").
[408] Affidavit #1 of E. Phillips, Exhibit N at 228.
[409] Such individuals are admitted through a "Certificate of Qualification" obtained by the Federation.
[410] Affidavit #1 of K. Jennings, Exhibit D at 164, Exhibit E at 180, 212.
[411] *University of Manitoba Act*, C.C.S.M., c. U60, s. 61.1(2)-(4).
[412] *Mckinney v. University of Guelph*, [1990] 3 S.C.R. 229.
[413] *Civil Marriage Act*, S.C. 2005, c. 33 (preamble).

both civil and religious components and wanted to be clear that organizations (such as TWU) should not be "deprived of any benefit" or subject to any "sanction" because of a religious belief that marriage is "the union of a man and woman to the exclusion of all others".[414]

(v) Other Considerations

329. The Decision is contrary to the Law Society's legal obligations under the *Labour Mobility Act*, S.B.C. 2009, c. 20 and *Agreement on Internal Trade Implementation Act*, S.C. 1996, c. 17. Under these Acts, a BC regulator such as the Law Society is legally required to recognize equivalent out-of-province certifications without looking behind their credentials.[415] The Decision has the effect of excluding TWU graduates who would be recognized in other provinces.[416] The Law Society is not entitled to exclude out of province certifications, without evidence that demonstrates that there is a material difference in educational outcomes which result in a deficiency in a "critical skill, area of knowledge or ability", or obtaining the permission of the Province.[417] A more fulsome argument on this point is located in TWU's Submissions to the Law Society.[418]

330. This is similar to the Law Society's agreement with Canada's law societies. The National Mobility Agreement, ratified by all of Canada's law societies on October 17, 2013, provides that the Law Society "will require no further qualifications" from lawyers entitled to practice law in their home jurisdiction.[419] TWU graduates who enter the bar in Alberta are not entitled to practice in BC due to the Decision.[420]

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[414] Affidavit #1 of K. Jennings, Exhibit O at 624-625 (the then Minister of Justice, Hon. Irwin Cotler, then defended the *Civil Marriage Act* as not affecting "religious marriage, religious institutions or religious beliefs and in fact expressly protects them").
[415] *Labour Mobility Act*, S.B.C., 2009, c. 20, s. 3(4) (if an applicant is certified elsewhere, "the regulatory authority (b) must issue any certification required").
[416] Law Society Rule 2-49(e)(i): "An applicant for call and admission on transfer from another jurisdiction in Canada must deliver the following to the Executive Director: (e) proof of academic qualification (i) as required of applicants for enrolment under Rule 2-27(4)."
[417] *Agreement on Internal Trade*, Article 708(2)(a)-(b); the Law Society is also required to post a Notice of Measure to Achieve a Legitimate Objective under Article 708(3); *Labour Mobility Act*, s. 2 (permission of the Minister of Justice and Minister of Jobs, Tourism and Skills Training required).
[418] Affidavit #1 of E. Phillips, Exhibit P at 503.
[419] Affidavit #1 of K. Jennings, Exhibit L at 341 (s. 2), 342 (s. 4), 347 (s. 32).
[420] Law Society Rule 2-49(e)(i), which requires an applicant to possess the academic qualifications under Rule 2-27(4).

331. The Decision further ignores that TWU graduates will enhance diversity in the legal profession. This will be Canada's first private law school. It will also be the only faith-based law school.

(j) CONCLUSION ON REVIEW OF DECISION ON ADMINISTRATIVE LAW GROUNDS

332. For all of the foregoing reasons, the Court should quash the Decision as it is contravenes the *LPA* and the Law Society's own rules, ignores the law (including the *Human Rights Code*) and is not based on legitimate, intelligible or supportable considerations. This is apart from the breaches of the *Charter*, which will be addressed next.

9. THE *CHARTER*

333. The Law Society is required to exercise its statutory discretion in accordance with the *Charter*.[421] The proper approach to assessing the *Charter* issues in this case should follow the approach in *Doré* and *Loyola*:

(a) Would accepting TWU graduates engage the *Charter* and limit the rights of LGB individuals?[422]

(b) Does the Decision breach the *Charter* rights of TWU and Brayden?[423]

(c) In assessing the impact of the relevant *Charter* protections in context, was the Decision a proportionate balancing of *Charter* rights with the applicable statutory objectives?[424]

334. The Petitioners submit that the answers are as follows:

(a) Accepting TWU graduates does not engage the *Charter* or infringe LGB rights.

(b) The Decision breaches the Petitioners' *Charter* rights.

(c) The Law Society failed to properly balance *Charter* rights with the applicable statutory objectives under the *LPA*.

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[421] *Doré*; *Andrews v. Law Society of British Columbia.*
[422] *Loyola*, at paras. 35, 38; *Doré*, at paras. 7, 54.
[423] *Ibid.*
[424] *Loyola*, at para. 39; *Doré*, at paras. 7, 43-45, 55-58.

(a) ACCEPTING TWU GRADUATES WOULD NOT ENGAGE THE *CHARTER* RIGHTS OF LGB INDIVIDUALS

335. The Law Society now says that it, as well as the Provincial Government, are "obligated to not approve" TWU's School of Law.[425] It argues that "[a]pproving of TWU…is therefore prohibited by section 15 of the *Charter*"[426] and "would have a severe impact on the *Charter* rights of LGB persons in BC seeking admission to law school."[427]

336. The Law Society errs when it equates the effect of the Community Covenant with its own actions. An examination of sections 15 and 32 of the *Charter* demonstrate that: (i) accepting TWU graduates would not result in the Law Society breaching the *Charter*; and (ii) when properly delineated, there is no conflict between the freedoms of religion, expression and association and the right to equality under the *Charter*.

(i) Accepting TWU Graduates Does Not Breach the *Charter*

337. The Law Society's logic appears to be that it cannot "facilitate or endorse" a private institution whose "discriminatory conduct" breaches the *Charter*.[428] It suggests that because the Law Society is subject to the *Charter*, accepting TWU graduates as lawyers while the Community Covenant remains in place would constitute a breach of its own *Charter* obligations.[429]

The Charter *Does Not Apply to TWU*

338. The *Charter* does not apply to TWU. Section 32(1) limits the application of the *Charter* to entities characterized as "government" or those that engage in "governmental activity".[430] TWU is not "government" and does not carry out a governmental activity.

339. In *McKinney v. University of Guelph*, the Supreme Court of Canada held that the *Charter* does not apply to public universities, even though they receive public funding and perform

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[425] LSBC Response, paras. 7, 21, 272.
[426] LSBC Response, para. 270, as well as 14, 183, 272.
[427] LSBC Response, para. 270, as well as 264.
[428] LSBC Response, paras. 270, 232.
[429] LSBC Response, para. 183.
[430] *Sagen v. Vancouver Organizing Committee for the 2010 & Paralympic Winter* Games, 2009 BCCA 522 at para. 32 [*Sagen BCCA*] (varied on different grounds), leave to appeal to S.C.C. refused, 33439 (Dec. 22, 2009).

a role directly linked to government priorities.[431] This has been applied in a number of other cases.[432] Since TWU is a private university, the *Charter* ***cannot*** apply to it.

The Law Society Cannot Indirectly Apply the Charter *to TWU*

340. Neither government bodies nor the courts should lose sight of the directional nature of the *Charter*. The *Charter* operates as a protective shield against government action. It should not be used as a sword in the hands of government to cut down private rights, including those of TWU and those who voluntarily wish to join its religious community. The *Charter* is not in itself "authorization for governmental action".[433] Courts have repeatedly stated that the *Charter* cannot be used in this manner.[434]

341. The Law Society's position improperly conflates its own activities with those of TWU and imposes *Charter* obligations on TWU.

342. In *Sagen*, the Court of Appeal affirmed the dismissal of a claim against the Vancouver Organizing Committee for the 2010 Olympic Winter Games ("**VANOC**") for offering Men's Ski Jumping but not Women's Ski Jumping. Various levels of government heavily funded VANOC and appointed directors to it. VANOC contracted with the International Olympic Committee ("**IOC**") to offer and deliver the Olympics. The claimants argued that VANOC was subject to and violated s. 15(1) of the *Charter*, even though the IOC had the authority to determine the events that were offered.[435]

343. The Court accepted the trial judge's reasoning,[436] saying that even if VANOC was subject to the *Charter*, the *Charter* does not protect individuals from the discriminatory policy of a private party that is not controlled by government:

> The case authorities support the view that, in determining the scope of the application of the *Charter* to an entity such as VANOC, it is necessary to look not only to the activities or function of the entity itself but also to the nature or function of the specific act or decision of the entity that is said to infringe a *Charter* right. Regardless of whether VANOC's hosting of the Games can properly be considered to be a governmental activity because of the substantial commitments made by the several levels of government to secure and hold the Games in

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[431] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 272-275 (paras. 39-46) [*McKinney*].
[432] See *BC Civil Liberties Association v. University of Victoria*, 2015 BCSC 39 and the cases cited therein.
[433] *McKinney*, at 261 (para. 21).
[434] *R. v Akpalialuk*, 2013 NUCJ 12 at para. 68; *R v. Lefort*, 2004 BCPC 44 at para. 26.
[435] *Sagen BCCA*.
[436] *Sagen BCSC*, at para. 121.

> Vancouver, ***it is clear on the facts that neither government nor VANOC had any authority either to make or to alter the decision of the IOC not to include a women's ski jumping event in the 2010 Games. The decision of the IOC not to add women's ski jumping as an event in the 2010 Games is not a "policy" choice that could be or was made by any Canadian government and the staging by VANOC of only those events authorized by the IOC cannot reasonably be viewed as furthering any Canadian government policy or program.***
>
> ...the appellants' claim of discrimination based on s. 15(1) of the *Charter* fails.[437]

344. The *Charter* does not protect individuals from policies (i.e., the Community Covenant) of private parties (i.e., TWU). As stated by the Supreme Court of Canada in *TWU v. BCCT*:

> 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.[438]

345. The Decision was not necessary to avoid a *Charter* violation, nor would acceptance of TWU graduates violate the rights of LGB persons.[439] The Law Society cannot cause any infringement because it does not have any control over the Community Covenant.

346. When TWU's character as a private religious community is considered, it cannot be argued that "approval [of TWU] by a public body would clearly violate the rights of LGB persons."[440] The Law Society fails to recognize that the government can, and often must, permit private entities to carry on activities that would breach the *Charter* (if the *Charter* applied to them), without itself breaching the *Charter*.

347. In *United Church of Canada v. Anderson*, it was argued that *Charter* rights were violated when the government enacted a statute (the *United Church of Canada Act*) establishing the church. That argument was rejected:

> Although churches may be created by statute, nonetheless they are in law private bodies like universities and trade unions. The government legislation which creates them only facilitates

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[437] *Sagen BCCA*, at paras. 49-50 (emphasis added).
[438] *TWU v. BCCT*, at para. 25.
[439] LSBC Response, para. 272.
[440] LSBC Response, para. 272.

> their legal existence -- they remain private bodies (*McKinney*, per La Forest J. at p. 637 D.L.R.).[441]

348. At most, acceptance of TWU graduates by the Law Society under the *LPA* facilitates the JD Program. In so doing, the Law Society does not breach its *Charter* obligations any more than the government did by recognizing and creating the United Church of Canada by statute.

349. Indeed, the government is frequently called upon to facilitate the activities of private bodies that would breach the *Charter*, if the *Charter* applied. Surely, the government does not breach the *Charter* by facilitating the incorporation of a Catholic society while it maintains "discriminatory practices" by refusing to hire non-Catholics. Nor could the government require the society to abandon these practices in order to secure the benefits associated with incorporation.

350. The Court in *McKinney* concluded that the mandatory retirement policies of Ontario universities would violate s. 15 of the *Charter*. However, the policies were entitled to remain in place at those universities because the university itself was not subject to the *Charter*. By the Law Society's reasoning, the government would have breached its *Charter* obligations every time it recognized, approved, or funded new degree programs at the Ontario universities so long as they maintained their discriminatory policies.

351. The Community Covenant cannot offend the *Charter* if the policies of public institutions are not subject to the *Charter*. Neither does the Law Society offend the *Charter* by recognizing the academic credentials of TWU graduates. If the Law Society's position were correct, it would make the exemption of private activity from the *Charter* under s. 32(1) practically meaningless.

352. The Supreme Court of Canada in *McKinney* warned that applying the *Charter* to private activities could "strangle the operation of society" and "seriously interfere with freedom of contract":

> ***To open up all private and public action to judicial review could strangle the operation of society and, as put by counsel for the universities, "diminish the area of freedom within which individuals can act"***. In *Re Bhindi and British Columbia Projectionists* (1986), 29

[441] (Gen. Div.) (1991), 2 OR (3d) 30 (S.C.) at para. 41.

> D.L.R. (4th) 47, Nemetz C.J., speaking for the majority of the British Columbia Court of Appeal, made it clear that such an approach could seriously interfere with freedom of contract. It would mean reopening whole areas of settled law in several domains....
>
> ....It would significantly undermine the obvious purpose of s. 32 to confine the application of the *Charter* to legislative and government action to apply it to private corporations, and it would fly in the face of the justifications for so confining the *Charter* to which I have already referred....
>
> .... Unless, then, it can be established that they form part of government, the universities' action here cannot fall within the ambit of the *Charter*. That cannot be answered by the mere fact that they are incorporated and perform an important public service. Many institutions in our society perform functions that are undeniably of an important public nature, but are undoubtedly not part of the government. These can include railroads and airlines, as well as symphonies and institutions of learning. And this may be so even though they are subjected to extensive governmental regulations and even assistance from the public purse.[442]

353. As stated by the Court in *McKinney*, the *Charter* is "***not intended to cover activities by non-governmental entities created by government for legally facilitating private individuals to do things of their own choosing...***".[443] Applying the *Charter* to concerns related to the Community Covenant, directly or indirectly, would significantly interfere with the freedoms of those who wish to be part of TWU's community.

354. If the *Charter* were applied in the way proposed by the Law Society, it would impose an enormous burden on government to examine the private views and actions of each private actor affected by a governmental consent, license, or approval. The government would have to consider the underlying beliefs and conduct of each private organization to ensure its activities did not breach the *Charter*, before giving its approval. For example, if a government body responsible for granting zoning approval, or any other governmental license, is compelled to apply the *Charter* to a church's statement of beliefs or practices, few religious organizations would ever be able to obtain regulatory approvals necessary to carry on their private activities.

355. Freedom of belief, conduct, and contract will be hindered if the government forces individuals and organizations to conform to select *Charter* values. This would allow the government to extend the *Charter*'s application into the private sphere merely by deciding

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[442] *McKinney*, at 262, 265-269 (paras. 23, 30, 35) (emphasis added).
[443] *McKinney*, at 269 (para. 31) (emphasis added).

to regulate a private activity. This contradicts the idea of constitutionally constrained government.

356. The Law Society's position now appears to be that it can reject TWU graduates until TWU changes its internal policies to become *Charter* compliant, notwithstanding that TWU is exempt from the *Charter*. This is illogical, and effectively circumvents the requirement that a private entity first be found to be carrying out a "governmental activity" before *Charter* obligations can be imposed on it. The Law Society is attempting to do indirectly what it cannot do directly: impose *Charter* obligations upon TWU.

(ii) There is no conflict between the Petitioners' rights and the right to equality

357. The Supreme Court of Canada found in *TWU v. BCCT* that "any potential conflict [of rights] 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". Equality and religious freedom rights were not in conflict "in reality".[444] The Court found that there was no conflict, because "one must consider the true nature of the undertaking and the context in which this occurs".[445] When considering TWU's undertaking as a private educational community serving a specific religious subculture, no conflict of rights arises.

358. The Law Society says it must balance the right to freedom of religion held by TWU and Brayden against the rights of those who might not attend the School of Law because of the Community Covenant.[446]

359. The Law Society characterizes the Community Covenant as a discriminatory "admissions covenant"[447] that prevents access on equal terms. However, if the Community Covenant limits admission, as the Law Society alleges, this begs the question: to where does it limit admission? Clearly, it can only limit admission *to* ***TWU***, not admission to ***the legal profession***.[448]

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[444] *TWU v. BCCT*, at paras. 29, 32.
[445] *TWU v. BCCT*, at paras. 34, as well as 25, 32, 35.
[446] LSBC Response, paras. 207-212.
[447] Subsection A of the LSBC's Response is entitled "TWU and the Admission Covenant".
[448] LSBC Response, para. 44.

360. This gives rise to a second question: does s. 15(1) guarantee anyone an equal right to be admitted to TWU? If the answer to this question is no, then the *Charter* rights of those who cannot attend TWU equally are not engaged in these circumstances. How can the Law Society purport to balance *Charter* rights that are not engaged?

361. The text of section 15(1) has been carefully – and deliberately – limited to addressing inequalities arising out of discriminatory application ***of the law***. The Decision is law. The Community Covenant is not. It assists in defining the religious character of a private evangelical Christian educational community.

362. Section 15(1) protects against differential treatment by governmental actors, but not against differential treatment by private entities:

> [Section 15] is not a general guarantee of equality; ***it does not provide for equality between individuals or groups within society in a general or abstract sense, nor does it impose on individuals or groups an obligation to accord equal treatment to others***.[449]

363. The Law Society maintains that approval of the School of Law will diminish access to the legal profession for LGB persons.[450] This is incorrect. The JD Program can only serve to enhance the availability of law school seats for everyone. The School of Law would only increase opportunity.

364. However, even if this were not true, the fact remains that TWU has no legal obligation to create law school seats in a manner that benefits everyone equally, particularly given its mandate to serve the evangelical Christian community. The *Charter* does not apply to TWU and its right to maintain its religious community is protected by the *Human Rights Code*.

365. TWU, and not the Law Society, is responsible for creating and offering the JD Program. TWU's JD program does not arise from a decision of the Law Society or any other government body to create additional law school spaces in British Columbia.[451]

366. The Law Society, and not TWU, is responsible for controlling admission to the legal profession. It is the Law Society that has, in effect, instituted an "admissions policy" that

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[449] *Andrews v. Law Society of British Columbia*, para. 7 (emphasis added).
[450] LSBC Response, paras. 264-266.
[451] Affidavit #1 of R. Wood, para. 31; Affidavit #1 of J. Epp Buckingham, para. 14.

discriminates against TWU and bars its graduates from obtaining equal access to the legal profession in British Columbia. Unlike TWU, the Law Society is bound by the *Charter* and the *Human Rights Code*, and cannot deny admission on discriminatory grounds, including the religious beliefs practices by TWU and its community.

367. It is not for the Law Society to balance the *Charter* "rights" of those who say they would not attend TWU because of the Community Covenant, because a *Charter* right to equal access to TWU does not exist. As noted by the Supreme Court of Canada:

> TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions. [452]

(b) THE DECISION BREACHES THE *CHARTER* RIGHTS OF TWU AND BRAYDEN

368. The Decision unjustifiably infringes on the s. 2(a), s. 2(b), s. 2(d) and s. 15(1) *Charter* rights of TWU and members of the TWU religious community, including Brayden, whose *Charter* rights must be interpreted generously.[453]

(i) Section 2(a) – Religious Freedom

369. The Decision violates the religious freedom of Brayden, TWU and other members of TWU's community under s. 2(a) of the *Charter*. The Nova Scotia Supreme Court and Ontario Divisional Court both held that a refusal to accept TWU graduates because of the Community Covenant is a breach of freedom of religion.[454]

370. Freedom of religion under s. 2(a) encompasses the right to hold a belief and the right not to be constrained to act upon that belief. The latter aspect encompasses the state neutrality concept most recently cited in *S.L.*[455] and *Saguenay*. Both of these aspects are engaged.

Freedom of Religion Protects Group Rights, including TWU itself

371. Religious belief and practice is about both personal beliefs and religious relationships. As recently noted by the Supreme Court of Canada:

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[452] *TWU v. BCCT*, at para. 25.
[453] *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 at paras. 76, 114.
[454] *Trinity Western University v. The Law Society of Upper Canada*, 2015 ONSC 4250 at para.81; *TWU v. NSBS*, at para. 237.
[455] *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7 [*S.L.*].

> The Court has also found that freedom of religion is not merely a right to hold religious opinions but also an individual right to establish communities of faith (see *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567). And while this Court has not dealt with the issue, there is support for the view that "the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection" of freedom of religion (*Hutterian Brethren*, at para. 131, per Abella J., dissenting [...]).[456]

372. In *Loyola*, the Supreme Court of Canada more expressly found that:

> Religious freedom under the *Charter* must therefore account for the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions.[457]

The Law Society's Refusal violates State Neutrality

373. Based on the Law Society's justification of the Decision, it violates the s. 2(a) rights of TWU and its religious community because the Law Society would not be acting neutrally towards religion.

374. The Decision penalizes TWU and its community for associating together on the basis of shared religious beliefs. The state must not interfere with, and must "abstain from taking any position" on, religion and religious beliefs.[458] In *S.L.*, the Court said that:

> Therefore, following a realistic and non-absolutist approach, ***state neutrality is assured when the state neither favours nor hinders any particular religious belief, that is, when it shows respect for all postures towards religion***, including that of having no religious beliefs whatsoever, while taking into account the competing constitutional rights of the individuals affected.[459]

375. The Decision hinders and disrespects TWU and its community's evangelical religious beliefs regarding marriage and human sexuality, which are reflected in the Community Covenant. It penalizes a specific religious perspective of marriage and sexuality. A refusal to accept TWU graduates based on disagreement with the Community Covenant involves a determination of whether the religious beliefs of TWU are valid, beneficial, or acceptable. The Law Society is not permitted to make such a determination.

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[456] *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 [*Mounted Police Association*] at para. 64.
[457] *Loyola*, at paras. 60 and 91 (McLachlin C.J.).
[458] *Saguenay*, at para. 72.
[459] *S.L.* at para. 32 (emphasis added).

376. Neutrality is violated when the Law Society favours a secular view of marriage and sexuality that excludes private religious belief on those topics.[460] "True neutrality presupposes abstention, but it does not amount to a stand favouring one view over another."[461] Instead of remaining neutral, the Law Society is taking sides and disqualifying TWU and its community from full participation in society.

377. The Decision coerces TWU and other religious communities to abandon their beliefs in order to obtain state benefits. As stated in *Saguenay*:

> I note that a neutral public space does not mean the homogenization of private players in that space. Neutrality is required of institutions and the state, not individuals (see *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at paras. 31 and 50-51). On the contrary, ***a neutral public space free from coercion, pressure and judgment on the part of public authorities in matters of spirituality is intended to protect every person's freedom and dignity***.[462]

378. The Law Society is now expressly trying to "convince"[463] (i.e., pressure and coerce) the TWU community to abandon its religious practices on marriage in order to gain acceptance of its law graduates. This is a coercive burden on a religious community to disregard its religious beliefs in order to fully participate in society. The Law Society is not being "neutral", but is providing a disincentive for the TWU community to retain its religious character. Religious and non-religious beliefs are not kept on equal footing.

379. As famously stated by Dickson J. (as he then was): "A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and ***codes of conduct***".[464] The Community Covenant is a private religious code of conduct that is protected by the *Charter*. The Law Society must be neutral towards it and accommodate it.

Interference with Religious Beliefs and Practices

380. Under s. 2(a), the test for an infringement of freedom of religion is found in *Amselem*, as restated in *S.L.*:

(a) Does the claimant have a sincerely-held religious belief that has a nexus with religion?

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[460] *Saguenay*, at paras. 83, 88.
[461] *Saguenay*, at para. 134.
[462] *Saguenay*, at para. 74 (emphasis added).
[463] LSBC Response, para. 253.
[464] *Big M Drug Mart Ltd.*, at para. 94 (emphasis added).

(b) Has there been, or will there be, an interference with that belief which prevents the claimant from acting in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial?[465]

Sincere Religious Belief

381. There is no doubt that TWU and its community hold a sincere belief about abstaining from sexual intimacy outside of heterosexual marriage.[466] As stated by Dr. Greenman:

> The entire [Community Covenant] is consistent with contemporary evangelical beliefs and practices related to personal and communal morality. From the standpoint of evangelical Christian theology, the covenant reflects core teachings in a clear and succinct manner. Nothing is included in the statement that is marginal to evangelical moral concerns. Rather, the community covenant reflects both historic patterns of evangelical practice and widely accepted contemporary evangelical theological convictions.[467]

382. In order to meet the first part of the test, TWU and its community should have a practice or belief that "calls for a particular line of conduct...***irrespective of whether a particular practice or belief is required*** by official religious dogma or is in conformity with the position of religious officials".[468] The Court in *Amselem* expanded on this point, saying that requiring someone "to prove that his or her religious practices are supported by a mandatory doctrine of faith, leaving it for judges to determine what those mandatory doctrines of faith are, would require courts to interfere with profoundly personal beliefs".[469]

383. Therefore, the Law Society cannot justify its decision on the basis that studying in a law School with a religious code of conduct is not a "'necessary precondition' to practicing evangelical Christianity", that "abiding by the tenants [sic] of the faith would [not] be impossible without access to a law school", or that "evangelical faith does not require insulation from non-adherence".[470]

384. The evidence is clear that the requirement to abstain from sexual intimacy outside of heterosexual marriage is part of a larger set of religiously-based expectations for appropriate conduct in an evangelical Christian community. Attendance in schools such as TWU strengthens the evangelical community as adherents "are socialized by these

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[465] *Amselem*, at para. 56; *S.L.*, para. 22-24; *Hutterian Brethren*, at para. 32; *Loyola*, at paras. 134, 138; *Saguenay*, at para. 86.
[466] Affidavit #1 of J. Greenman.
[467] Affidavit #1 of J. Greenman, para. 58
[468] *Amselem*, at para. 56 (emphasis added).
[469] *Amselem*, at para. 49.
[470] LSBC Response, paras. 282, 283.

institutions to be more committed to evangelical beliefs and values".[471] Environments with codes of conduct in a university setting are "conductive to moral and spiritual growth".[472] In particular, the Community Covenant:

> places a high emphasis on mutual moral responsibility for the desired campus community – a community that is protected from influences that are detrimental to personal spiritual growth, a community that fosters personal spiritual discipline and growth in wisdom, and a community that is restorative in nature for individuals who are struggling. Additionally, I would expect that the Community Covenant benefits the TWU community by safeguarding an atmosphere that is conducive to the integration of faith and learning.[473]

385. The Community Covenant is important for TWU to achieve its religious and educational goals, as "an arm of the Church" and to provide education with an underlying Christian philosophy.[474]

Interference with Religious Freedom

386. The question of whether a rejection of TWU graduates interferes with religious belief and practice is analyzed on an objective basis.[475]

387. Any burden that is "capable of interfering with religious belief or practice" infringes s. 2(a).[476] In *Big M Drug Mart*, the Court characterized freedom as embracing "both the absence of coercion and constraint, and the right to manifest beliefs and practices".[477] "[C]oercion includes indirect forms of control which determine or ***limit alternative courses of conduct available to others***".[478] Not approving TWU because of its religious beliefs would withhold a benefit available to individuals from other law schools for reasons related directly to religious beliefs and religious association.

388. The Law Society's position is similar to the BCCT refusing to accredit TWU. The Supreme Court of Canada acknowledged that a coercive burden would be placed on TWU if accreditation were refused:

> There is no denying that the decision of the BCCT places a burden on members of a particular religious group and in effect, is preventing them from expressing freely their

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[471] Affidavit #1 of S. Reimer, para. 41.
[472] Affidavit #1 of G. Longjohn, Exhibit C at 19.
[473] Affidavit #1 of G. Longjohn, Exhibit C at 25.
[474] Affidavit #1 of J. Greenman, paras. 58-60, 61; Affidavit #1 of W. Taylor; Affidavit #1 of R. Wood; Affidavit #1 of S. Reimer; Affidavit #1 of G. Longjohn.
[475] *S.L.*, at para. 2.
[476] *Hutterian Brethren*, at para. 34.
[477] *Big M Drug Mart* Ltd. at para. 95.
[478] *Big M Drug Mart Ltd.*, at para. 95 (emphasis added).

> religious beliefs and associating to put them into practice. If TWU does not abandon its Community Standards, it renounces certification and full control of a teacher education program permitting access to the public school system. Students are likewise affected because the affirmation of their religious beliefs and attendance at TWU will not lead to certification as public school teachers unless they attend a public university for at least one year.[479]

389. The same applies here. The Decision denies TWU and the members of its community the right to full participation in society and a benefit provided to graduates of any other law school. This was aptly put by the Supreme Court in *TWU v. BCCT*:

> It cannot be reasonably concluded that private institutions are protected but that their graduates are *de facto* considered unworthy of fully participating in public activities..... 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.[480]

390. In *Loyola*, the Supreme Court held that a decision not to approve Loyola's religiously based curriculum "demonstrably interferes with the manner in which the members of an institution formed for the very purpose of transmitting Catholicism, can teach and learn about the Catholic faith. This engages religious freedom protected under s. 2 (a) of the *Charter*."[481]

391. Likewise, the Decision interferes with the manner that TWU supports and strengthens its religious community. The Law Society's "attempt to convince TWU to change its policy" is improper pressure on TWU to revoke or amend the Community Covenant in order for its graduates to be accepted.[482] TWU's graduates could be recognized by the Law Society only if the TWU community abandoned aspects of its Christian character or its students attended a different law school.

392. The Law Society suggests that freedom of religion is not infringed because members of the evangelical community can "obtain a law degree elsewhere."[483] Applying the logic of the Law Society, there would have been no breach of freedom of religion in *Hutterian Brethren*, since the Hutterian Brethren would be able to maintain their beliefs without

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[479] *TWU v. BCCT*, at para. 32.
[480] *TWU v. BCCT*, at para. 35.
[481] *Loyola*, at para. 61.
[482] *Loyola*, at para. 34.
[483] LSBC Response, para. 283.

having driver's licenses. There would have been no breach in *Loyola*, because the school could have changed the way it taught religion or its students could obtain religious instruction in church. An infringement is made out where the state impedes one's "ability to act in accordance with his or her beliefs".[484]

393. Removing or denying a benefit as a result of religious belief imposes a burden on, and hinders, religious belief. The Court in *Whatcott* approved of Dickson J.'s statement (as he then was) in *Big M Drug Mart* that the:

> ...essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person choses, 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.[485]

394. In fact, the interference with TWU would be worse, and more purposive, than in *Hutterian Brethren*. That case dealt with a facially neutral regulation of general application that inadvertently captured the plaintiff because of the particulars of their religious beliefs. Even so, the Court accepted that the state's failure to accommodate their religious beliefs and practices infringed s. 2(a). Here, the Decision is based on the specific disapproval of TWU's religious beliefs that results in a complete ban on TWU graduates from entering the legal profession in BC. To the Law Society, this is a "marginal impact".[486]

395. The Law Society's suggestion that TWU operates in a secular space contradicts *TWU v. BCCT*.[487] The Supreme Court of Canada repeatedly stressed that TWU remains a "private institution", the nature of which is constitutionally protected.[488] The Community Covenant is an important component of TWU's religious character and how it delivers education with an underlying philosophy and viewpoint that is Christian.[489]

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[484] *Saguenay*, at para. 85.
[485] *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 SCR 467 [*Whatcott*] at para. 159 (emphasis added).
[486] LSBC Response, para. 296.
[487] LSBC Response, paras. 279-284.
[488] *TWU v. BCCT*, at paras. 25, 34, 35, 43.
[489] Affidavit #1 of W. Taylor, para. 48; Affidavit #1 of R Wood, para. 67; Affidavit #1 of S. Reimer, paras. 34, 38-40; Affidavit of J Greenman, para. 58.

396. The evidence is also clear that members of TWU's community rely on the Community Covenant to "remain faithful" to their religious convictions, pursue their "spiritual goals" and "develop a mature Christian faith":[490]

- From my experience, the shared community values at TWU created a unique and special sanctuary for its students. I personally found it easier to adhere to Biblical sexual intimacy standards while at TWU, where students were expected to practice behaviour consistent with these standards compared to the secular schools I attended.[491]

- The community atmosphere at TWU was not one where my moral discipline had to constantly be tested. To me, being at TWU was a place that I could feel comfortable being myself and discussing and practicing my religious values without the concern of being ridiculed or put down...[492]

- As a Christian, I found it particularly helpful that TWU's Community Standards corresponded to my religious beliefs. Specifically in relation to my sexual orientation, the Community Standards asked me not engage in sexual activity outside of marriage between a man and a woman, which was the very thing I was eager not to do because of my religious beliefs. I greatly appreciated living in a community where that was the standard that was expected of me and others. Because the environment at TWU was supportive of Christian faith and morality, it encouraged me to live my Christian life in the way that I believe it should be practiced.[493]

397. The Decision also interferes with the religious beliefs of LGB members of TWU's religious community that attend TWU specifically because it provides a hospitable environment to reconcile their sexuality and faith:

- ...people who do not share my faith or my moral worldview, whether gay or straight, cannot understand why it is important for me to sacrifice my desire to engage in certain forms of sexual behaviour in order to remain consistent with my religious beliefs...In this way, I have found that it is very valuable to participate in Christian communities.....In my experience, the presence of the Community Standards [now the Community Covenant] ensured a safe learning environment for me...[494]

- TWU was instrumental in developing a maturity to my faith. Among other things, attending TWU greatly assisted me in reconciling my sexuality with my faith....Perhaps most significantly, TWU gave me, a previously deeply closeted conservative evangelical kid, the courage to confront my sexuality and begin the process of self-acceptance.[495]

- While attending TWU, I appreciated this culture at TWU that respected and encouraged abstinence, or abstaining from sexual intimacy outside of the Christian understanding of

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[490] Affidavit #1 of A. Davies, paras. 32, 33, 36, Affidavit #1 of A. Strikwerda, Affidavit #1 of S. Ferrari.
[491] Affidavit #1 of S. Ferrari, paras. 24-25.
[492] Affidavit #1 of J. Winter, para. 37.
[493] Affidavit #1 of A. Davies, paras. 31-33.
[494] Affidavit #1 of A. Davies, paras. 16, 30.
[495] Affidavit #1 of Arend Strikewerda, para. 18-19.

> marriage. This was consistent with my evangelical Christian religious beliefs and background, which strongly encouraged that.[496]

398. TWU provides a supportive environment for these Christian students, including those who have been rejected or ridiculed within the LGB community for their religious convictions.[497] One TWU student felt "not accepted", "rejected", isolated, and "disdained" at a public university for being a gay evangelical.[498] In contrast, TWU "helped [him] pursue [his] spiritual goals, including not engaging in homosexual conduct, because [he] was spending most of [his] time in an environment with other Christian believers who shared [his] beliefs"[499]. TWU strengthens the faith and self-acceptance of evangelical sexual minority students.[500]

399. Pressuring and coercing TWU to change its religious character would hinder and interfere with the ability of all members of its religious community to practice and strengthen their religious commitments.

(ii) Section 2(b) – Freedom of Expression

400. Section 2(b) holds that everyone is entitled to freedom of "thought, belief, opinion, and expression". Free expression provides for "individual self-fulfillment, finding the truth through the open exchange of ideas, and the political discourse fundamental to democracy".[501] If any activity conveys or attempts to convey a meaning, it has expressive content and it *prima facie* falls within the scope of s. 2(b) protection.

401. Under s. 2(b) of the *Charter*, TWU as an institution is protected.[502] Individuals, such as TWU's students, are also protected. When BCCT denied TWU accreditation of a teacher program solely on the basis of the Community Covenant, the Supreme Court of Canada said that this act placed "a burden on members of a particular religious group and in effect, is preventing them from ***expressing freely their religious beliefs***..."[503]

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[496] Affidavit #1 of Iain Cook, para. 19.
[497] Affidavit #1 of A. Davies, paras. 18-22.
[498] Affidavit #1 of A. Davies, paras. 20-21.
[499] Affidavit #1 of A. Davies, para. 33.
[500] Affidavit #1 of A. Strikwerda, paras. 17-23; Affidavit #1 of I. Cook, paras. 22-25; Affidavit #1 of A. Davies, paras. 40-44.
[501] *Whatcott*, para. 65, citing *Irwin Toy Ltd v. Quebec (Attorney General)*, [1989] 1 SCR 927 at p. 968 (para. 23) [*Irwin Toy*].
[502] *Irwin Toy.*
[503] *TWU v. BCCT*, at para. 32 (emphasis added).

402. The Decision interferes with TWU's ability to express the collective views of the religious community that it serves. The Community Covenant reflects TWU's identity and is a significant means by which TWU maintains a unique environment to provide post-secondary education with an underlying Christian philosophy. As stated by Dr. Longjohn:

> ...signing an agreement (whether called the community covenant or the code of conduct) was understood by administrators and students alike as indicative of the signers' commitment to reinforce the values expressed by the covenant in their individual choices (Longjohn, 2013). Students interviewed understood that the policies, even if they disagreed with them, were part of the university's identity (Longjohn).[504]

403. Even LGB students that disagree with the sexual morality portions of the Community Covenant acknowledge its important expressive content:

> I do not agree with TWU's position on homosexual marriage, but even though I would like to see this aspect of the Community Covenant change one day, I continue to appreciate that the Community Covenant defines the expectations of TWU's community and reflects the view of most of that religious community.[505]

404. Viewed in context, the expression engrained in the Community Covenant is respectful, asking community members to love and show respect for one another. Those who hold minority religious views in society (including evangelicals at TWU) find comfort in being with others who share their expressed beliefs.

405. The private expression embodied in the Community Covenant, between people and an institution who share common beliefs and values, is protected expression under s. 2(b) of the *Charter*, regardless if some people might find it offensive. Freedom of expression is guaranteed so that everyone can manifest their beliefs "however unpopular, distasteful or contrary to the mainstream".[506] Any limit or burden on this expression is a violation of the *Charter* right of TWU and its students. As stated by Rothstein J. in *Whatcott*, "Freedom of religious speech and the freedom to teach or share religious beliefs are unlimited, except by the discrete and narrow requirement that this not be conveyed through hate speech."[507]

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[504] Affidavit #1 of G. Longjohn, Exhibit C at 3.
[505] Affidavit #1 of A. Strikwerda, para. 34, as well as para. 20.
[506] *Irwin Toy*, at 968 (para. 42).
[507] *Whatcott*, at para. 97.

(iii) Section 2(d) – Freedom of Association

406. Section 2(d) of the *Charter* guarantees everyone the fundamental right to freedom of association. The Supreme Court of Canada has defined freedom of association as, "the freedom to combine together for the pursuit of common purposes or the advancement of common causes."[508] In *Mounted Police Association*, the Supreme Court of Canada stated that "[b]y banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires".[509]

407. Like all *Charter* rights, freedom of association is to be given a generous and purposive interpretation.[510] This protects not only the bare right to join or form an association, but extends further to protect the associational activities of private organizations: "[i]t suffices to note that a purposive interpretation of s. 2(d) confers *prima facie* protection on a broad range of associational activity",[511] which include three classes of activities:

> (1) the right to join with others and form associations;
> (2) the right to join with others in the pursuit of other constitutional rights; and
> (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities.[512]

408. An infringement of s. 2(d) is made out where a law or state action "substantially interferes"[513] or "substantially impairs"[514] these activities.

409. In this case, the protected associational activity includes education with an underlying Christian philosophy, obtained within an evangelical Christian community. People choose TWU in order to study in a Christian community:

- When I chose to attend TWU, I made a conscious decision to go to a university that maintained and espoused expressly evangelical Christian beliefs.[515]
- I decided to attend TWU for a number of reasons....The fact that TWU was a Christian school was also a big draw, as my Christian faith is an essential part of my life and my family's life. I was also drawn by...the emphasis on a Christian community.[516]

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[508] *Reference re Public Service Employee Relations Act (Alta)*, 1987 CarswellAlta 580, [1987] 1 SCR 313 at para. 27 [*Alberta Reference*].
[509] *Mounted Police Association*, at para. 58.
[510] *Mounted Police Association*, at para. 30.
[511] *Mounted Police Association*, at para. 60.
[512] *Mounted Police Association*, at para. 66.
[513] *Mounted Police Association*, at paras. 71, 81, 121.
[514] *Fraser v. Ontario (Attorney General)*, 2011 SCC 20 at para. 64.
[515] Affidavit #1 of Natalie Hebert, para. 9.

- ...my desire to receive an education from professors who understood my Christian faith in a community that respected and adhered to my Christian moral values was of utmost importance to me.[517]

- I attended TWU for a number of reasons. I knew I wanted to go into medicine. TWU offered a degree that is a prerequisite for medical school. I appreciated that TWU would be a Christian community that had a good science faculty.[518]

- I believe that the opportunity I had at TWU to develop close relationships of spiritual mentorship with my professors, and spiritual kinship with my fellow students, was enhanced because of the fact that TWU maintained itself as a Christian campus, committed to the realization of a Christian ideal.[519]

- ... having lived in many different communities throughout my life, both religious and non-religious, I am convinced that TWU's Christian community is a rare and valuable thing. I generally felt very secure and valued within TWU's community and by other community members. It was a safe and comforting environment to practice my Christian beliefs.[520]

410. Both TWU's promotion of evangelical education and its members' participation in an evangelical educational community are fundamentally associational in nature. Neither goal can be achieved individually. Section 2(d) empowers TWU and its members to collectively achieve these goals without state interference.

411. The pursuit of these objectives is protected by s. 2(d), in part, because they represent the collective expression of the constitutional right to freedom of religion enjoyed by both TWU and its membership. The emergence of freedom of association as a means to "[permit] the growth of a sphere of civil society largely free from state interference", has been historically linked with "the protection of religious minority groups."[521] The right of religious groups to the protection of s. 2(d) in pursuing activities that constitute "the collective exercise of freedom of religion" is settled law.[522]

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[516] Affidavit #1 of Iain Cook, para. 10.
[517] Affidavit #1 of J. Winter, paras. 15-16.
[518] Affidavit #1 of A. Strikwerda, paras. 5, 20.
[519] Affidavit#1 B. Vokenant, para. 14.
[520] Affidavit #1 of I. Cook, para. 21.
[521] *Mounted Police Association*, at para. 56.
[522] *Alberta Reference*, at para. 187; *PIPS v. Northwest Territories*, [1990] 2 SCR 367, at para. 38; *TWU v. BCCT*, at paras. 9, 17, 34.

412. TWU community members benefit from associating together. Evangelical Christians in particular tend to engage in organizations of likeminded people in order to sustain and grow their faith:

> Distinctive identities, behaviours and moral codes strengthen commitment to the subculture, and thus strengthen the subculture. If there are clear and salient differences between evangelicals and most others in society, then there is a desire to participate in organizations within the subculture (like evangelical churches or schools) because humans like to interact with others like them (called "homophily" among sociologists).
>
> If evangelicals participate in churches, schools, and other evangelical organizations, the subculture is strengthened because evangelicals are socialized by these institutions to be more committed to evangelical beliefs and values. Hence, research clearly shows that those who attend evangelical churches are much more likely to hold evangelical beliefs and moral values.[523]

413. The Community Covenant is not a peripheral aspect of shared communal life at TWU. It is a "significant means" by which TWU governs its religious association, with a view to maintaining its evangelical character.[524] Brayden describes the importance of the Community Covenant in fostering an evangelical culture amongst members of TWU's community in these terms:

> When I went to TWU I was asked to abide by certain community standards in respect to my conduct and behaviour while a student at the university. As an evangelical Christian, I already believed much of what was expressed by these standards....The community atmosphere at TWU was not one where my moral discipline had to be constantly tested. To me, TWU was a place that I could feel comfortable discussing and practicing my religious values without the concern of being ridiculed and put down.[525]

414. Even students attending TWU who are not Christian recognize the importance of the Community Covenant in defining the communal aspects of campus life at TWU:

> Although when I signed the Responsibilities of Membership [now the Community Covenant] I was not a practicing Christian, I respected what I believed TWU was trying to accomplish in requiring its students to adhere to these moral guidelines – to create an environment hospitable to the religious beliefs of the majority of Christian students and faculty attending there.[526]

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[523] Affidavit #1 of S. Reimer, paras. 40-41.
[524] Affidavit #1 of R. Wood, para. 67.
[525] Affidavit #1 of B. Volkenant, paras. 15, 17.
[526] Affidavit #1 of N. Hebert, para. 17.

415. Section 2(d) has also been held to protect "the freedom to work for the establishment of an association, to belong to an association, to maintain it, ***and to participate in its lawful activity without penalty or reprisal***."[527]

416. The penalty for associating with TWU's School of Law is a refusal to be admitted to the legal profession. This is unlawful. Individuals are not free to work in concert towards collective ends if the state penalizes them for associating with others on the basis of their common religious beliefs.

417. The Law Society concedes that individual evangelical Christians who believe same-sex intimacy is sinful are welcome in the Law Society.[528] However, if individuals maintaining these beliefs may be admitted to the Law Society, how can it be that those who choose to receive their legal education within a religious community living out these same beliefs must be excluded? The freedom to associate must mean that the state cannot deny a benefit available to others on the basis that one chooses to associate with a particular community.

418. The Decision forces students wishing to attend TWU to either: (a) exercise their associational rights by joining TWU's religious community, but forego an opportunity to be admitted to the Law Society; or (b) refrain from associating with TWU by attending a public law school, resulting in their "state enforced isolation" from TWU's religious community.

419. In requiring such a choice, the Law Society substantially interferes with the associational rights of Brayden and other students who desire to attend the School of Law. Indeed, the creation of this "state-enforced isolation" from TWU's evangelical community strikes at the very heart of the freedom of association guaranteed by s. 2(d). This burden was explicitly recognized by the Supreme Court of Canada in *TWU v. BCCT* when it said that "[t]here is no denying" that the BCCT decision places a burden on TWU and its community by effectively preventing them "from expressing freely their religious beliefs and ***associating*** to put them into practice".[529]

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[527] *Alberta Reference*, at para. 189, per Le Dain (emphasis added).
[528] LSBC Response, para. 12.
[529] *TWU v. BCCT*, at para. 32 (emphasis added).

420. It is not necessary that an activity be supported by individual constitutional rights in order to be protected under s. 2(d); associational rights under the *Charter* are collective rights that "inhere in" and protect associations themselves.[530] An individual's constitutional rights cannot be lost by doing in concert that which he or she may lawfully do alone.[531]

421. The Law Society's notion that an evangelical Christian who believes same-sex intimacy is sinful is not only fit for admission to the Law Society but "a valuable contribution to the diversity of the legal profession" when he or she attends a public law school but becomes in every case unacceptable by attending TWU, is absurd.[532] If s. 2(a) protects the right of individuals to be admitted to the Law Society without regard to their religious beliefs when they have graduated from a secular law school, as surely it does, this right cannot be forfeited by practicing these same beliefs in association with other like-minded individuals at TWU. At a minimum, s. 2(d) "[protects] the right to do collectively what one may do as an individual."[533]

422. The Law Society says that adoption by TWU and its members of the Community Covenant makes it against the public interest to recognize graduates from the School of Law.[534] In contrast, the Supreme Court of Canada has recognized the important correlation between s. 2(d) and the right of private citizens and organizations to determine and control "the immediate circumstances of their lives, ***and the rules, mores and principles which govern the communities in which they live***...".[535]

423. A private association, such as TWU, cannot be said to be free where it is required to adapt its "rules, mores and principles" to comply with the dictates of state regulators, rather than the priorities of its membership. Refusal to admit graduates from the School of Law on the basis of the Community Covenant substantially interferes with the ability of individuals like Brayden "to interact with, support, and be supported by their fellow humans in the varied activities in which they choose to engage".[536]

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[530] *Mounted Police Association*, at para. 62.
[531] *Mounted Police Association*, at para. 34.
[532] LSBC Response, para. 311.
[533] *Mounted Police Association*, at para. 36.
[534] LSBC Response, paras. 13-14.
[535] *Mounted Police Association*, at para. 35 quoting *Alberta Reference* (emphasis added).
[536] *Alberta Reference*, at para. 92.

424. The impact of the Law Society's Decision on freedom of association is even greater in British Columbia than in other jurisdictions, as the loss of Law Society approval in this province resulted in the Minister withdrawing consent for the School of Law.[537]

(iv) Section 15(1) - Equality

425. An infringement under section s. 15(1) of the *Charter* is established if:

(a) the Decision, on its face or in its impact, creates a distinction based on an enumerated or analogous ground; and

(b) the Decision creates disadvantage by failing to respond to the actual capacities and needs of members of the evangelical Christian religion, and instead imposes burdens or denies them benefits in a manner that has a disproportionate effect on those members, or has the effect of reinforcing, perpetuating or exacerbating their disadvantage.[538]

426. Evangelical Christians are a distinct Canadian subculture[539] and a religious minority.[540] Section 15 of the *Charter* clearly prohibits discrimination against them on the basis of their religion.

The Decision Creates a Distinction

427. Brayden is an evangelical Christian who desires to study law at TWU, an evangelical Christian university. Brayden will sign the Community Covenant, which indisputably articulates and implements the religious beliefs of the evangelical Christian community served by TWU,[541] and which reflects many of his own personally held religious beliefs.[542]

428. By choosing to attend TWU and by agreeing to abide by a Biblically inspired code of conduct reflecting his own evangelical religious values, Brayden and other TWU graduates become, by virtue of the Decision, unconditionally prohibited from obtaining membership in the Law Society. The distinction made between Brayden and other applicants to the Law Society is based on his choice to align himself with the evangelical religious values embodied in the Community Covenant by attending TWU.

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[537] Affidavit #1 of J. Epp Buckingham, para. 54, Exhibit R.1.
[538] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at paras. 19-20, 22; see also *Quebec (Attorney General) v A.*, 2013 SCC 5 at para. 323.
[539] Affidavit #1 of S. Reimer, para. 27.
[540] Affidavit #1 of J. Greenman, para. 39.
[541] Affidavit #1 of J. Greenman; Affidavit #1 of G. Longjohn.
[542] Affidavit #1 of B. Volkenant, para. 15.

The Decision Creates a Disadvantage

429. There is no evidence that Brayden would in any other respect be unfit to practice law; on the contrary, his personal and academic achievements make him a model candidate.[543] Notwithstanding that, the Law Society would reject him because of his choice to participate in an evangelical religious educational community. This imposes an arbitrary disadvantage on him based on an expression of his religious belief, without consideration for his individual merits and capacities. This is the very definition of discrimination, as described by Mcintyre J. in *Andrews*:

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. ***Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.***[544]

430. *Andrews* dealt with a discriminatory requirement resulting in the denial of admission to the Law Society for a class of individuals who were qualified in all other respects.[545] The burden imposed on non-citizens in *Andrews* was that permanent residents who had received their legal education abroad were obligated to wait a minimum of three years before they could obtain citizenship and be admitted to the Law Society. The burden for Brayden is much greater, as the Decision would result in an absolute and indefinite denial of his ability to practice law in British Columbia. This is a disproportionate disadvantage compared to those from other law schools who are freely admitted.

431. The Supreme Court of Canada recognized that requiring TWU students to choose between affirming their religious beliefs by attending TWU, and obtaining a degree leading to professional certification, results in an unconstitutional disadvantage and burden:

> ***There is no denying that the decision of the BCCT places a burden on members of a particular religious group*** and in effect, is preventing them from expressing freely their religious beliefs and associating to put them into practice. If TWU does not abandon its Community Standards, it renounces certification and full control of a teacher education program permitting access to the public school system. ***Students are likewise affected***

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[543] Brayden graduated from TWU with "Great Distinction", and earned a cumulative GPA of 3.77. Moreover, he was in leadership in his capacity as captain of TWU's soccer team (Affidavit #1 of B. Volkenant, paras. 7-8).
[544] *Andrews v. Law Society of British Columbia*, at para. 19.
[545] *Andrews v. Law Society of British Columbia*, at para. 30.

> ***because the affirmation of their religious beliefs and attendance at TWU will not lead to certification as public school teachers unless they attend a public university for at least one year.***[546]

432. In the same way that the BCCT's decision created an unacceptable burden, the Decision forces evangelical Christians, like Brayden, to choose between studying at TWU with fellow evangelical Christians and practicing law in British Columbia. This is prohibited under section 15(1).

433. In order to comply with section 15(1), the Decision must "respond to the actual capacities and needs of the members"[547] of the evangelical Christian community. The Decision breaches section 15(1) by failing to respond to the unique needs of evangelical Christian students like Brayden who are more likely than others in society to want to study in an environment that specifically incorporates, affirms and strengthens their religious beliefs.[548]

434. Brayden explains the benefits he received from studying in TWU's distinctly Christian community in these terms: "...the opportunity I had at TWU to develop close relationships of spiritual mentorship with my professors, and spiritual kinship with my fellow students, was enhanced because of the fact that TWU maintained itself as a Christian campus, committed to the realization of a Christian ideal."[549]

435. Numerous evangelical alumni of TWU have given similar evidence, particularly concerning how the Community Covenant assisted them in remaining faithful to their evangelical beliefs.[550]

436. This specific need of evangelical Christians to study in an environment conducive to their religious beliefs and practices was recognized by the Court in *TWU v. NSBS*:

> Of course, in the experience of most people, the study of law is a purely secular activity. In that view a religious person can attend a law school and govern himself or herself by whatever religiously informed code of conduct he or she decides to adopt. What others do is up to them. Some will follow those rules and some will not. From the point of view of those who are not Evangelical Christians that just makes sense
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> ...

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[546] *TWU v. BCCT*, at para. 32 (emphasis added).
[547] *Kahkewistahaw First Nation v. Taypotat*, at para. 20.
[548] Affidavit #1 of S. Reimer, paras. 40-41.
[549] Affidavit #1 of B. Volkenant, para. 14.
[550] Affidavit #1 of S. Ferrari, para. 25; Affidavit #1 of J. Winter, para. 34; Affidavit #1 of A. Davies, para. 32; Affidavit #1 of I. Cook, para. 19.

> ***To Evangelical Christians it does not. Their religious faith governs every aspect of their lives.*** When they study law, whether at a Christian law school or elsewhere, they are studying law first as Christians. Part of their religious faith involves being in the company of other Christians, not only for the purpose of worship. They gain spiritual strength from communing in that way. They seek out opportunities to do that. Being part of institutions that are defined as Christian in character is not an insignificant part of who they are. Being Christian in character does not mean excluding those of other faiths but does require that everyone adhere to the code that the religion mandates. ***Going to such an institution is an expression of their religious faith. That is a sincerely held belief and it is not for the court or for the NSBS to tell them that it just isn't that important.***[551]

437. The Law Society says that Brayden must be denied the benefit of an evangelical Christian legal education until TWU abandons the Community Covenant. However, a significant part of evangelical religious identity is defined by participating in institutions that are distinguished specifically by their distinctly Christian character. The School of Law was designed to meet the needs of such evangelical students, many of whom have attended secular universities, including law schools, and felt marginalized and isolated as a result of their religious beliefs.[552]

438. In failing to give recognition to the specific needs of evangelical Christians to commune together by participating in institutions defined by their common religious ethos, the Decision fails to meet the requirements of section 15(1).

Conclusion on Section 15(1)

439. The purpose of section 15(1) of the *Charter* is to further substantive equality:

> The central s. 15(1) concern is substantive, not formal, equality...At the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?[553]

440. Achieving substantive, as opposed to formal, equality may require that different standards be applied to different groups.[554] Attaining the goal of substantive equality for religious minorities, such as evangelical Christians, requires that their sincerely held religious beliefs be accommodated. The Supreme Court of Canada held that accommodation of religious

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[551] *TWU v. NSBS*, at paras. 229-230 (emphasis added).
[552] Affidavit #1 of J. Legaree, paras. 19-20; Affidavit #1 of N. Hebert, para. 16; Affidavit #1 of B. Volkenant, para. 22; Affidavit #1 of A. Davies, paras. 19-20; Affidavit #1 of J. Winter, paras. 37-40.
[553] *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 2.
[554] *Andrews v. Law Society of British Columbia*, at para. 19.

beliefs is an "integral aspect" of the right to equality in Canada.[555] The Decision must conform to this constitutional norm if it is to be found consistent with the *Charter*.

441. Far from accommodating Brayden's and other students' evangelical religious beliefs, the Decision singles them out and penalizes them by making the price for exercising their right to attend an evangelical School of Law the inability to practice their chosen profession.

(c) THE DECISION WAS NOT A PROPORTIONATE BALANCING OF *CHARTER* RIGHTS WITH THE APPLICABLE STATUTORY OBJECTIVES UNDER THE *LPA*

442. A decision that breaches the *Charter* may be justifiable if the decision-maker has proportionately balanced the relevant *Charter* values with the statutory objectives.[556] "[T]o be defensible, a decision must accord with the fundamental values protected by the *Charter*."[557] If not, the decision is disproportionate, unreasonable, and will be quashed.

(i) The Statutory Objective

443. The first step in *Doré* is to examine the statute and consider the statutory objective.[558] In the context of a decision under Rule 2-27(4.1), the relevant objective under the *LPA* is to ensure that applicants are competent and fit to practice law.[559] The Court has recognized that the purpose of the discretion conferred under the *LPA* is "to enable the benchers to maintain high professional standards in the practice of law".[560]

444. As previously discussed, if "preserving and protecting the rights and freedoms of all persons" is a separate objective under s.3 of the *LPA*, it is relevant insofar as it affects "the administration of justice". This relates to individuals who are or may be admitted to the bar, but not every person and private institution in British Columbia. Even if this is a relevant objective, upholding the rights and freedoms of Brayden, TWU and the members of its community must also be considered.

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[555] *Commission Scolaire Régionale De Chambly v. Bergevin*, [1994] 2 S.C.R. 525 at 544-545.
[556] *Doré*, at paras. 32, 56-57.
[557] *Loyola*, at para. 37.
[558] *Doré*, at para. 55.
[559] *LPA*, s. 3(b)-(c), s. 19(1).
[560] *Pierce v. Law Society (British Columbia)*, 1993 CarswellBC 1203 at para. 51, 103 D.L.R. (4th) 233 (B.C.S.C.).

(ii) What is proportionate?

445. The Supreme Court of Canada recently described proportionate balancing:

> A proportionate balancing is one that gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate. Such a balancing will be found to be reasonable on judicial review.[561]

446. In *Loyola*, the Court said that a proportionate decision is one that ensures that *Charter* rights "are affected as little as reasonably possible"[562], and "are limited no more than is necessary given the applicable statutory objectives".[563]

(iii) The Decision was Not Proportionate

447. This Decision is not proportionate and is therefore unreasonable.

448. First, proportionality requires that decision-makers actually consider the *Charter* and undertake a balancing of the statutory objectives in making their decision. Failing to do so is an error of law and automatically creates a disproportionate result. In *Loyola*, the Court found that the decision was disproportionate on the ground that the decision-maker gave "no weight to the values of religious freedom engaged by the decision".[564] There was "no balancing of freedom of religion in relation to the statutory objectives. The result was a disproportionate outcome that does not protect *Charter* values as fully as possible in light of those statutory objectives."[565] In another recent case, the BC Court of Appeal held that the Law Society erred by failing to consider an individual's *Charter* rights.[566]

449. Unlike the decision in April to accept TWU graduates, the Law Society did not undertake a balancing of the *Charter* protections with the statutory objectives in making the Decision. It simply bound itself to the results of the Referendum Question, and made the Decision

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[561] *Loyola*, at para. 39.
[562] *Loyola*, at para. 40.
[563] *Loyola*, at para. 4, as well as 31, 114.
[564] *Loyola*, at para. 68.
[565] *Loyola*, at para. 68.
[566] *The Law Society of British Columbia v. Zoraik*, 2015 BCCA 137 at paras. 18, 38 (Law Society Benchers failed to address the *Charter* issues raised, although "it was incumbent on the Benchers to consider" them).

without any discussion. There is no indication that any weight was given to the rights asserted by TWU.[567] This is necessarily disproportionate and unreasonable.

450. Second, it was not "necessary" or required[568] that the Law Society breach TWU and Brayden's rights and freedoms to achieve its objectives. Rejecting TWU graduates is not necessary to achieving the goal of developing competent lawyers fit to practice law or preventing discrimination in the legal profession. In fact, it is not even related to those objectives and certainly does not minimally impair those rights.

451. Rejecting TWU graduates does not achieve the goal of upholding the rights and freedoms of anyone. In fact, it denies qualified persons the right to practice law in BC on account of their religion and association with a particular religious community. As recognized by Justice La Forest in *Andrews*, this is a serious infringement:

> On a more mundane level, the essential purpose behind occupational licensing is to protect the public from unqualified practitioners. But as Lenoir points out (at p. 547), citizenship has not been shown to bear any correlation to one's professional or vocational competency or qualification. Like him, I see no sufficient additional dimension to the lawyer's function to insist on citizenship as a qualification for admission to this profession....
>
> ....I would conclude that although the governmental objectives, as stated, may be defensible, it is simply misplaced vis-à-vis the legal profession as a whole. However, even accepting the legitimacy and importance of the legislative objectives, the legislation exacts too high a price on persons wishing to practice law in that it may deprive them, albeit perhaps temporarily, of the "right" to pursue their calling.[569]

452. The Decision exacts too high a price on TWU, its community, and the larger religious population in Canada. As stated by the Supreme Court of Canada in *Loyola*:

> Ultimately, measures which undermine the character of lawful religious institutions and disrupt the vitality of religious communities represent a profound interference with religious freedom.[570]

453. The Law Society would have TWU remove the Community Covenant or, at least, change it to reflect secular values. If TWU were compelled to change its religious character, there would be no private educational space where its religious community could flourish. Instead, evangelicals wishing to obtain a law degree in a supportive environment would

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[567] Those rights were asserted by TWU prior to the Benchers making the Decision. See Affidavit #1 of E. Phillips, Exhibit P at 484, Exhibit AA at 617 and Affidavit #2 of E. Phillips, Exhibit A.
[568] *Loyola*, at paras. 4 (limitation on *Charter* rights shall be "no more than is necessary"), 31.
[569] *Andrews v. Law Society of British Columbia*, at para. 99, 102.
[570] *Loyola*, at para. 67.

have only American law schools as an option. This would force individuals to obtain additional schooling in order to obtain a Certificate of Qualification from the Federation to practice in BC. What makes the Decision even more disproportionate is that graduates of those law schools with similar codes of conduct are academically qualified to practice law in British Columbia. It is therefore absurd to call the Decision "necessary".

454. The Decision would not only prohibit TWU graduates from practicing law in BC, it could threaten the existence of public recognition of all TWU's programs and degrees, including the teacher education program that was protected in *TWU v. BCCT*. If a public body can refuse to recognize TWU degrees because of its religious beliefs, none of TWU's approved academic programs are safe.

455. This could significantly affect all religious primary, secondary, and post-secondary institutions in BC. Religious educational institutions are an important part of the fabric of Canadian society and enjoy constitutional protection.[571]

456. State accommodation or assistance for other religious organizations, such as churches, could likewise be affected based on the concept that public bodies necessarily must refuse "to sanction, condone, or otherwise endorse discriminatory practices and beliefs."[572] The seriousness of the effects is disproportionate to the benefit of denying TWU graduates entry into the bar (if there is any benefit of doing so, at all).

457. Religious communities with codes of conduct "are stronger because involvement in them is costly", since "they demand higher commitment and have greater restrictions."[573] In turn, "distinctive and demanding religious groups have greater strength and vitality because they are distinctive and demanding".[574] Those not committed to following those ideals can tend to "lower the overall commitment to the religious group".[575] To adopt the Supreme Court's holding in *Loyola*, the Decision does not "account for the socially embedded nature of

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[571] *TWU v. BCCT*, at para. 34.
[572] LSBC Response, para. 291.
[573] Affidavit #1 of S. Reimer, para. 45.
[574] Affidavit #1 of S. Reimer, para. 45.
[575] Affidavit #1 of S. Reimer, para. 45.

religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions".[576]

458. In *TWU v. BCCT*, the Court said that a "considerable personal cost"[577] to LGB students signing the predecessor to the Community Covenant was not sufficient to justify a decision "preventing [members of the TWU community] from expressing freely their religious beliefs and associating to put them into practice"[578] since "the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected."[579] The result in this case should be the same. The mere recognition of the rights of TWU and its graduates "cannot, in itself, constitute a violation of the rights of another. The promotion of *Charter* rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the *Charter* was meant to foster."[580]

459. To achieve the *LPA's* statutory objectives, there is no reason to limit the *Charter* rights of TWU and its religious community. Limits on *Charter* rights and freedoms could only be justified if (a) they are "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others"[581], and if (b) there were specific, concrete evidence that religious beliefs will have a detrimental effect on the quality of education or foster discrimination in the practice of law.[582]

460. None of these concerns apply here. As stated in *TWU v. BCCT*, "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". There is no similar evidence that accepting TWU law school graduates would have a detrimental effect on the legal system. The freedom to associate "permits the growth of a sphere of civil society largely free from state interference".[583]

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[576] *Loyola*, at para. 60.
[577] *TWU v. BCCT*, at para. 25.
[578] *TWU v. BCCT*, at para. 32.
[579] *TWU v. BCCT*, at para. 36.
[580] *Reference re Same-Sex Marriage*, 2004 SCC 79 at para. 46.
[581] *R. v. Big M Drug Mart*, para. 95.
[582] *TWU v. BCCT*, at para. 35.
[583] *Mounted Police Association*, at para. 56.

461. Third, the Law Society did not even attempt to accommodate TWU and Brayden's rights. As stated by Chief Justice McLachlin in *R. v. N.S.*, even if there is a potential conflict of rights, the Law Society is under a duty to accommodate:

> Third, the Canadian approach in the last 60 years to potential conflicts between freedom of religion and other values has been to respect the individual's religious belief and accommodate it if at all possible. Employers have been required to adapt workplace practices to accommodate employees' religious beliefs: [references omitted]. Schools, cities, legislatures and other institutions have followed the same path: [references omitted]. The need to accommodate and balance sincerely held religious beliefs against other interests is deeply entrenched in Canadian law. For over half a century this tradition has served us well. To depart from it would set the law down a new road, with unknown twists and turns.[584]

462. The practice of law is no different. In *R. v. N.S.*, the Supreme Court of Canada rejected the notion that courtrooms "are secular spaces where religious belief plays no role".[585] The Law Society's justification, that obtaining a law degree in a private institution is necessarily "a fundamentally secular activity", should be rejected.[586]

463. TWU should not have to change its religious foundations or how it achieves its religious mission in order for its graduates to be recognized. As stated by the Supreme Court in *Loyola*, "[t]he 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."[587]

464. The Court in *R. v. N.S.* stated that "[a] total ban on religious face coverings for all evidence given by all witnesses in the courtroom would mean that freedom of religion is being limited in situations where there is no good reason for the limit."[588] A complete ban on accepting TWU graduates is not a proportionate response. There is no good reason for the Law Society preventing TWU graduates from practicing law. TWU graduates' "freedom of religion is not accommodated if the consequence of its exercise is the denial of the right of full participation in society".[589]

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[584] *R. v. N.S.*, 2012 SCC 72 at para. 54.
[585] *R. v. N.S.*, at para. 52.
[586] LSBC Response, paras. 284, as well as 259.
[587] *Loyola*, at para. 43.
[588] *R. v. N.S.*, at para. 56.
[589] *TWU v. BCCT*, at para. 35.

(iv) Conclusion on Proportionality

465. The *Charter* values of freedom of religion, expression and association, and equality can only be protected "as fully as possible" in the context of the statutory objectives of the *LPA* by the Law Society remaining neutral and accommodating the religious beliefs espoused by TWU and the members of its community. Those beliefs, and their implementation through the Community Covenant, do not in any way impair the Law Society achieving the statutory objective of lawyer competence.

466. Fundamentally, this is about who is admitted to the bar. It should not matter to the Law Society which law school people choose, provided that they are prepared for the practice of law. Evangelical beliefs on marriage and sexuality are unrelated to lawyer competence or whether TWU graduates would discriminate in the administration of justice. TWU and its religious community should be respected.

E. REMEDY

467. The Petitioners seek declarations that the Decision is *ultra vires* and invalid and that it unjustifiably infringes on their *Charter* rights. They also seek orders in the nature of certiorari, mandamus and prohibition.

468. The Court may make orders in the nature of certiorari, mandamus and prohibition under the *Judicial Review Procedure Act*.[590] The Court may craft an appropriate remedy under s. 24(1) of the *Charter* stemming from an infringement of the *Charter*.[591]

469. The Petitioners say the only effective remedy is to order that TWU graduates be recognized and the School of Law be "approved" for the purposes of Rule 2-54(3) (formerly Rule 2-27(4.1)[592]) and prohibiting a further resolution such as the Decision. Such an order would restore what the Benchers properly did in April of 2014 when they decided the issue on proper administrative and constitutional grounds, rather than by a popular vote of the membership.

470. The Court has the authority to determine this issue where sending the matter back to the Law Society would be pointless, only one interpretation of the issue is possible or any other decision would be unreasonable.[593] All of these factors weigh in favour of the Court determining the issue of acceptance of graduates of the School of Law.

471. The reason for upholding an order of *mandamus* in *TWU v. BCCT* was "because the only reason for denial of certification was the consideration of discriminatory practices."[594] As it was then, so it is now. It is clear that the Community Covenant was the only concern upon which future graduates of the School of Law were rejected. This was the only concern raised by the Benchers when they considered the April Motion, is the only justification cited in the SGM Resolution and is the only justification now brought by the Law Society in this proceeding.

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[590] *Judicial Review Procedure Act*, RSBC 1996, c. 241, s. 2(2).
[591] *Loyola*, at paras. 163-164.
[592] Renumbered effective July 1, 2015.
[593] *Giguère c. Chambre des notaires du Québec*, 2004 SCC 1, per Deschamps, dissenting; *TWU v. BCCT*, at para. 43.
[594] *TWU v. BCCT*, at para. 43.

472. The Law Society admits that the Decision was "based solely"[595] on the Community Covenant, not whether TWU's proposed graduates would be fit or qualified for admission to the bar.[596] If it is not lawful for the Benchers to reject TWU graduates on the basis of the Community Covenant, then an order in the nature of *mandamus* is appropriate. The Law Society relies on no other rationale for its disapproval; any other decision would be unreasonable in the circumstances.

473. In any event, the Benchers have already exercised their discretion on this issue, twice, coming to contradictory results. First the Benchers approved graduates of the School of Law on proper grounds, only to later reverse themselves when the Law Society's membership disagreed. In this proceeding, the Law Society now implausibly argues that both approval and disapproval were seen by the Benchers as equally consistent with their statutory duties,[597] while simultaneously defending the Decision on the basis that the Benchers are statutorily compelled ***not*** to approve the School of Law.[598]

474. In light of this track record, it is hard to escape the conclusion that expediency, not legal principle, was the driving force behind the Decision. The Petitioners' rights should be adjudicated with regard to proper legal principles and not made subject to the preferences of the Law Society membership. If the Benchers cannot resist the membership to do this, then the Court must.

475. Alternatively, if the Court determines that the appropriate remedy is to quash the Decision and remit it back to the Benchers, the Petitioners say that an order in the nature of prohibition should be granted, prohibiting the Law Society from taking steps to declare, or to implement a resolution of Law Society members declaring that TWU's School of Law is not an approved faculty of law for any reason related to the Community Covenant.

476. In *Oil Sands Hotel*, the court made an order in the nature of prohibition to prevent an administrative decision-maker from taking future steps to implement the results of a non-binding plebiscite.[599] Here, the Petitioners say that delegation of the Benchers' statutory

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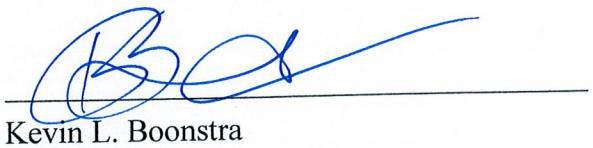
[595] LSBC Response, para. 312.
[596] LSBC Response, paras. 230-231.
[597] LSBC Response, paras. 151, 163.
[598] LSBC Response, paras. 7, 14.
[599] *Oil Sands Hotel*, at para. 62.

discretion to a popular vote of the membership, given the serious constitutional questions at issue and the legislative scheme set out in the *LPA,* was improper and should not be repeated. An order in the nature of prohibition is appropriate to prevent the Benchers from delegating the decision to the membership or again rejecting TWU graduates.

477. The Petitioners seek their costs of this Petition, to be assessed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 20th DAY OF JULY, 2015.



Kevin L. Boonstra
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Lawyers for Trinity Western University and Brayden Volkenant

APPENDIX A

EXCERPTS OF BENCHERS' REASONS

BENCHER	APRIL 11, 2014 MEETING *(references are to pages and lines in the transcript in Affidavit #1 of E. Phillips, Exhibit I at 545-594)*	SEPTEMBER 26, 2014 MEETING *(references are to pages and lines in the transcript in Affidavit #1 of T. Lesberg, Exhibit "B")*
Lynal Doerksen	"Here is my brief, legal analysis. … I believe we are here to apply the law as it is … To refuse Trinity Western's law school accreditation on the basis their exercise of their belief in a traditional marriage is not in the public interest is, in my view, a very shaky legal foundation which will not stand up in court." *(Page 14, lines 4, 5 & 25; page 15, lines 5-8)*	"I am 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…. I cannot change my vote as I am not persuaded I am 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 will be voted out at the next election is not persuasive. … In my view a referendum now is the best of all the availability options. If the referendum succeeds this matter will be moved out of this political realm and into the courts which are immune from such considerations. … If we have a referendum there may be an ironic result. The more successful it is the more it may show that Trinity Western is in need of protection from us." *(Page 71, lines 17-24; page 72, lines 10-16; page 73, lines 17-21; page 77, lines 17-20)*

Tony Wilson	"We, as Benchers, must uphold the rule of law with respect to this issue and I believe we are still bound by the Supreme Court of Canada's decision in the *Trinity Western University* v. *BC College of Teachers* decision." *(Page 17, lines 3-6)*	"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 the British Columbia lawyers have with their Law Society and with their Benchers. Now I believe it's become an issue that affects the governance of our Law Society.... Let's have a binding referendum and that's what Ms. Kresivo and I have put forward for your consideration today in motion 2. 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. ... 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't do in the public interest I don't know what is." (*Page 14, lines 13-19; page 16, lines 10-21; page 17, lines 12-19)*
Phil Riddell	"...[W]e have to follow the law. For the reasons stated by Mr. Wilson, I am of the view that the *Trinity Western University* v. *BC College of Teachers* case is the law in Canada and, until we are told otherwise, that is a law that we are bound to follow." *(Page 17, lines*	"Fundamentally what I believe 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 vote to disaccredit TWU by the membership as a vote saying we want to be an active part of the

	25-28)	litigation because quite clearly if TWU is disapproved by the Law Society we will be subject to a review and we will be part of the litigation." *(Page 58, lines 12-20)*
David Mossop, QC	"In my view, the Supreme Court of Canada decision in *Trinity Western University* v. *The BC College of Teachers* is binding on the Law Society." *(Page 20, lines 16-18)*	"Many of the Benchers are reluctant to reverse their decision and that is because they've studied the matter extensively and made their decision on April 16th, 2014. This decision was an honest decision in law. There's nothing about the general meeting that changes that. … I've read the opinions on this issue of the referendum and I have some severe doubts whether we have the authority, and I think we can't delegate our authority to the membership on this issue. … What we need in this is a little pause and allow the courts to proceed with their decision-making process." (*Page 24, lines 9-16; page 26, lines 4-8; page 28, lines 4-6)*
Miriam Kresivo, QC	"It troubles me, but if I applied my own personal views, I would vote for the motion. I am not here to apply my personal views, as others have said. I am here as a Bencher to apply the law and, as a Bencher, I have to remove my personal feelings and say what is the law. I adopt the comments of Mr. Doerksen and Mr. Wilson that we have very good, very impartial legal opinions which indicate that the Supreme Court of Canada TWU case still applies and is good law, and it is not our discretion to say that we would prefer it to be different." *(Page 22, lines 9-15)*	"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 a vote, understanding that it should be binding and I believe it is principled and I believe only motion 2 provides for all three." *(Page 18, lines 17-25; page 19, lines 1-2)*

Claude Richmond	"Whether we agree or not, it is the law of the land." *(Page 23, lines 14-15)*	"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 in mind? Were you not sure of the decision we made in April? I was. I think we made the right decision then 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." (*Page 62, lines 23-25; page 64, lines 1-6)*
Dean Lawton	"...I am very alive to the 2001 decision of *Trinity Western University v. The British Columbia College of Teachers*. In that case, the Supreme Court of Canada provided pragmatic and clear direction that there is a difference between belief and conduct. In my opinion, there needs to be evidence of harm having occurred or likely to occur as a result of the Trinity Western community covenant agreement being embraced by law students. In this approach, a fellow Bencher has asked for data with respect to any past discipline histories relating to discrimination by Trinity Western University teacher graduates or undergraduates who have gone on to BC law schools. None were reported. While I do not agree with the soundness of Trinity Western University's perspectives on sexual expression or marriage, these are nevertheless a legitimate faith-based catechism." *(Page 24, lines 28-29; page 25, lines 1-9)*	"Similarly, I cannot support motion 3 because although I agree it is 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 and so for these reasons I am in support of Mr. Wilson's motion for a referendum." (*Page 68, lines 3-10)*
Ben Meisner	"In voting, we have to have an eye on the future, but we must represent the law of the land as it exists today." *(Page 27, lines 16-18)*	"We talk about a binding referendum. There is no such thing has 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." *(Page 61, lines 19-24)*
Martin Finch, QC	"We're being asked whether the training of students at a lawfully created university law school should be recognized as fit for the purpose of satisfying the requirements of the Law Society in its responsibility to ensure only properly trained students should be granted the privilege of practising law. ... As the Supreme Court of Canada has observed, it may not be for everyone and it may not be to everyone's taste. ... Mind you, it is a mistake, in the absence of compelling evidence, of which I've seen none, to suppose that religious sectarianism will by itself result in a form of legal training that is not objective and broad-ranging in its consideration. In order to understand contemporary Canadian law, students will necessarily need to study significant constitutional cases. Ironically, one of those cases will be the *TWU* v. *BC College of Teachers* case. Trust is an important component in human activity. In the absence of evidence to the contrary, there is no reason, in my view, to suppose the worst for TWU based on stereotypes of intellectual propensities. ... I believe the law, as stated by the Supreme Court of Canada in the *TWU* v. *BC College of Teachers* TWU case, effected the complex task of balancing apparently competing rights. There was great wisdom in the judgment of Mr. Justice Iacobucci, and I believe that opposition to the motion is consonant with that wisdom." *(Page 28, lines 11-18; page 29, lines 2-9 & 20-24)*	"This is an historic process upon which we've engaged. 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 a careful consideration of expert opinion and our own efforts as lawyers to discern the law. ... 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 into it and as you may recall I was the first person to actually voice that motion. 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 reflex and patience. I don't believe -- 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 promptly." *(Page 78, lines 17-23; page 81, lines 1-16)*

Maria Morellato, QC	"Well, the Supreme Court of Canada in 2001 addressed this very question. ... That is what the Court found and that is the law that we must follow. ... The Law Society of British Columbia must not make the same mistake [as the College of Teachers]" *(Page 35, lines 7-8 & 28-29; page 36, lines 2-3)*	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 it 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 to -- protects competing minority rights. ... The challenge we now face is how we faithfully apply the law in ways that honours 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. ... 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's a legal one. *(Page 88, lines 4-12; page 90, lines 18-22; page 91, lines 2-5)*
David Crossin, QC	"In my view, the jurisprudence, and you've all had an opportunity to read that, makes it clear the conduct is lawful, and I've heard nothing that persuades me that the analysis of logic of the *Teachers* case many years ago would now be seen as flawed. ... For me, the overarching issue that engages the public interest on these facts in the context of the jurisprudence as it now stands is the recognition of the right to assemble and the right to freely and openly practise religious belief. It is a fundamental right in this country that is to be jealously guarded, not on behalf of TWU, but for and on behalf of the public and the citizens of this province. ... [T]hat does not justify a response that sidesteps that fundamental	"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 the public will be properly and fully served in these circumstances is to proceed with the suggested referendum. For me the public will have its interests well served and vigorously protected by the collective goodwill and cautious reflection of our membership and I believe my duty is fulfilled by endorsing this suggested process.... I think we must respect the fact that the members and the public want to decide this issue, whatever the future court processes may bring in the years

	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." *(Page 37, lines 7-10, 16-20 & 23-26)*	to come." *(Page 33, lines 23-25; page 34, lines 1-9; page 37, lines 19-22)*
Herman Van Ommen, QC	"I should know better than to follow my good friend Mr. Crossin and so, having listened to him, I really have nothing to add. I simply adopt his comments." *(Page 38, lines10-11)*	"I support sending this to a binding referendum. In April I voted in support of TWU. Since then it's -- 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. ... 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 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." *(Page 94, lines 8-15; page95, lines 11-19)*
Craig Ferris, QC	"...I also, like Mr. Van Ommen, would like to adopt the comments of Mr. Crossin, which I thought were quite eloquent. ... I think until that law is changed, we are bound to follow the *TWU* case." *(Page 40, lines 1-3 & 7-8)*	"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." *(Page 54, lines 12-16)*
Ken Walker, QC	"I will be voting no to this motion. I therefore will be supporting TWU as a university teaching lawyers. ... My vote can be considered a vote in favour of balancing the two *Charter* rights in	"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 implement?

	conflict here. My vote can be taken as a vote supporting diversity and diversity in our profession. We need diversity. The Law Society of British Columbia is not a belief regulator. We are a conduct regulator and we will be regulating conduct and conduct that is discriminatory." *(Page 41,lines 5-6 & 10-14)*	What's new? ... So, I'm in favour 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 circumstances -- if those original reasons say that my analysis of the law was wrong, our legal opinion was wrong, I will vote for motion 1 because that's the law of the land." (*Page 29, lines 16-19; page 31, lines 24-25; page 32, lines 1-7)*
Pinder Cheema, QC	"...[I]t is our obligation above all else to uphold the rule of law. The opinions we have received to date, which support the applicability of *TWU BCCT* today, govern." *(Page 42, lines 5-7)*	"I believe that the call for a referendum as framed in the Wilson resolution balances competing interests and objectives." (*Page 69, lines 11-13)*
Jeevyn Dhaliwal	"I adopt and I support the comments of my colleague Mr. Crossin and others. ... I am bound as a decision-maker and a critically thinking lawyer to apply the current law. I cannot distinguish the decision of the Supreme Court of Canada in *TWU* one and therefore I will vote against the motion as tabled." *(Page 42, lines 24-25; page 43, lines 1-4)*	"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 the Wilson motion." (*Page 101, lines 15-18)*
David Corey	"I don't believe that I have anything else to add other than what has already been said. The ground has been covered very sufficiently in my estimation." *(Page 43, lines 8-10)*	"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." (*Page 102, lines 7-10)*

APPENDIX B

INADMISSIBLE MATERIAL

AFFIDAVIT OF TREVOR LOKE - Exhibit J of the Tso Affidavit		
Paragraph	**Objection**	**Explanation**
7	▪ Lay Opinion ▪ Irrelevant	*"I think people generally realize that it is not socially acceptable to be homophobic or hateful, so if they have those reactions, they keep their opinions to themselves or censor themselves."* This is a personal opinion. Mr. Loke is not qualified to opine on the personal motivations of other people.
25	▪ Lay Opinion ▪ Irrelevant	*"I think that in our society we still have a long way to go. While culturally we have a lot of "tolerance" and tolerance is enough to move us towards social change, it is not enough to mean true equality."* This paragraph is a personal opinion that is not relevant and for which Mr. Loke has no qualification.
46	▪ Argument ▪ Lay Opinion ▪ Without Foundation ▪ Irrelevant	*"...all of my colleagues would have signed an agreement saying that who I am is not acceptable. An environment where I would be the subject of shame would exclude me from attending there. This is reminiscent of a time when homosexuality was considered a mental illness ..."* Mr. Loke is speculating about the TWU environment and providing an opinion on it, without personal knowledge and without foundation. Also he is interpreting a document, which usurps the fact finding function of the Court.
47	▪ Argument ▪ Lay Opinion ▪ Without Foundation	"*It is not true that anyone is welcome to attend TWU. Given the requirement to sign the Covenant, I am not welcome.*" This is argument and inferences drawn from documents and information not attached as exhibits ("*TWU says on its website...*"). Mr. Loke has no personal experience at TWU.
49	▪ Argument ▪ Lay Opinion	*"It is no answer to say that there are other law schools to choose from. There were other water fountains and lunch counters to choose from, but that did not justify segregating public spaces based on race. The suggestion that I just go elsewhere is offensive."* This is clearly argument.
56	▪ Argument ▪ Lay Opinion	*"Being excluded from a law school for being unable to honestly pledge my acceptance of the Covenant seems blatantly unfair. I am excluded because of something I feel I have no choice about. Even if were a choice for me, it is not one that TWU should be able to force me to make"* This is a personal opinion, contains adjectival descriptors ("blatantly") and is

		clearly argument.
57	▪ Argument ▪ Without Foundation ▪ Lay Opinion ▪ Irrelevance	*"I find the Province's endorsement of TWU's law school humiliating ... it is embarrassing that we still have to fight to get government to protect the rights of the LGBT community. This is not just embarrassing for me but for our province and for the Canadian public."* Presupposes the "Province" "endorsed" the law school. This is argument, suggesting that the Minister approved the Community Covenant. Whether these proceedings are "embarrassing" is an irrelevant personal opinion.
Exhibits B, C, D, E, F, G, U, V, W	▪ Hearsay	These exhibits were accessed from public sources. Mr. Loke is unable to and does not attest to any of their contents. This makes these exhibits inadmissible for the truth of the contents. They are admissible as evidence of the fact that they were published.

AFFIDAVIT OF PRESTON PARSONS - Exhibit I of the Tso Affidavit		
Paragraph	**Objection**	**Explanation**
49	▪ Hearsay ▪ Lay Opinion	*"...gay and lesbian lawyers do not, for the most part, reveal their sexual orientation for fear of discrimination. They are consequently un-derrepresented in the studies."* Mr. Parsons expresses an opinion based on the contents of Exhibits L and M. There is no attestation as to the truth of the contents of these exhibits, which makes them unreliable.
53	▪ Lay Opinion ▪ Irrelevant	*"However, I am concerned about any law school that requires students, as part of a mandatory covenant, to abstain from same-sex intimacy, whether the student is married or not."* This is personal opinion and not relevant.
54	▪ Argument ▪ Lay Opinion	*"Requiring such a restriction is an affront to my personal dignity. Same-sex intimacy is fundamentally intertwined with my identity. It also institutionalizes shame about my identity and does not reflect my views on the Christian faith. I could only attend the school if I accepted I was flawed according to their particular viewpoint on the issue."* This is argument and lay opinion built without a factual foundation.
55	▪ Argument ▪ Law Opinion ▪ Without Foundation	*"I am concerned about the creation of a law school that would create a condition for entry that would bar students like me from being able to attend without fraudulently swearing an official law school document at the risk of expulsion and betraying my own core identity to myself and others".* This is a personal opinion and is clearly argument. The reference to the

		likelihood of "expulsion" is without factual foundation.
Exhibits B, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, T, U, V, W, X	▪ Hearsay	These exhibits were accessed from public sources. Mr. Parsons is unable to and does not attest to any of their contents. This makes these exhibits inadmissible for the truth of the contents. They are only admissible as evidence of the fact that they were published.

AFFIDAVIT OF JILL BISHOP - Exhibit G of the Tso Affidavit		
Paragraph	**Objection**	**Explanation**
6	▪ Argument ▪ Without Foundation ▪ Lay Opinion	*"I do not agree with TWU's theology that requires gay and lesbian people to disclaim their identity and renounce their sexuality."* This statement is argumentative, based on personal opinion and factually inaccurate (without foundation).
13	▪ Argument ▪ Without Foundation ▪ Lay Opinion	*"Going to TWU... made me realize that an approach to sexuality that denies the dignity of gay and lesbian people... is not a positive or a preferable approach to faith. This made me confront that there is a lot of hate perpetuated by certain interpretations of religion, including Christianity..."* This is argument and personal opinion. Further, the suggestion that there is "hate perpetrated" is without factual foundation.
14	▪ Lay Opinion ▪ Without Foundation	*"I believe that other students shared my fear of expulsion or other consequences, and were careful to conform."* This statement is outside Ms. Bishop's knowledge and there is no factual foundation. It is opinion, at best.
16	▪ Lay Opinion ▪ Without Foundation	*"The effect of this was that people did not give opinions in class discussions that did not align with those values."* Ms. Bishop not qualified or able to opine on the potential motivations of other people. There are no facts to support that others withheld opinions.
17	▪ Argument ▪ Without Foundation ▪ Lay Opinion	*"Another effect was that professors **carefully** avoided expressing opinion that did not align with the Covenant and TWU's values."* This is a subjective adjectival description. Ms. Bishop cannot opine on the motivations of the professors. She also cannot say whether Professors "avoided" topics as this goes to motivation of others.
18	▪ Argument ▪ Lay Opinion	*"...my very identity was not accepted under TWU's values"* This is argument and opinion about "values" at TWU.

19	▪ Without Foundation ▪ Lay Opinion ▪ Argument	*"Because homosexuality is condemned by TWU's value system, it was not a subject of open or inclusive discussion at TWU."* Ms. Bishop is arguing and gives a factually unsupported opinion that TWU's "value system" "condemns" homosexuality. She uses this to support an opinion about what is and is not included in third party discussions.
20	▪ Argument ▪ Lay Opinion	*"...I have agreed to abide by their values even though they were wrong."* This is a personal opinion about TWU's values, intended to support an argument.
21	▪ Argument	*"Conformity is not surprising when TWU has a mandatory Covenant that prohibits divergence from its values. But this means that the values of the Covenant are at the expense of diversity."* This is argument.
23	▪ Argument ▪ Lay Opinion	*"...opinions were stifled by the threat of expulsion or other consequences"* This is also argument. It also lacks foundation and attempts to give evidence of the motivations of other persons.
28	▪ Argument ▪ Lay Opinion	*"Those values condemn a whole sector of the population"* This is argument and personal opinion about "values".
30	▪ Argument	*"If the Community Covenant is required of people applying to law school who are in same-sex marriages or in relationships outside of marriage, they will be required to lie as the first step they take in entering law school."* There is no foundation for this statement. It is presumptuous of others' motivations in the future and is clearly argument.
31	▪ Argument ▪ Lay Opinion ▪ Without Foundation	*"The TWU law school's promotion of that exclusion does not fit with my understanding of the values of our code of professional conduct, the Law Society's guiding principles, the Canadian Bar Association's principles, all of which embrace anti-discrimination objectives."* This paragraph contains argument and Ms. Bishop's personal opinion. The principles of third parties are referenced without factual foundation.
32	▪ Argument ▪ Lay Opinion	*"It is contrary to my vision of our profession to have a law school in BC that some cannot attend because of their sexual identity."* This is argument and Ms. Bishop's personal opinion. Her vision of the profession is irrelevant.

AFFIDAVIT OF WILLIAM BRENT COTTER #1 - Exhibit L of the Tso Affidavit		
Paragraph	**Objection**	**Explanation**
7	▪ Without Foundation	*"A good proxy for the true number of individual applicants to Canada's Common Law Schools is the number of LSAT test takers in Canada in any one application year. .. This is consistent with anecdotal data suggesting that applicants submit approximately three applications per person in any one year."* Paragraph does not state from where this data comes or how it was arrived at. The statements including anecdotal data and the estimate are made without foundation.
8	▪ Without Foundation	*"The overall increase in first year places at common law schools since 2000 closely tracks with the increase in the Canadian population (excluding Quebec)"* No source or reference provided for data cited.
10-14	▪ Without Foundation	Much data referenced without citations or references to support inferences drawn.
14	▪ Absence of foundation	No facts to suggest what percentage of British Columbians study law elsewhere – where is author getting data from?
14	▪ Without Foundation	*"Probably because of this..."* Expresses an opinion about individuals' motivations, which is outside of his knowledge.

AFFIDAVIT OF WILLIAM BRENT COTTER #2 - Exhibit P of the Tso Affidavit		
Paragraph	**Objection**	**Explanation**
2	▪ Argument	*"To my knowledge, there is no evidence of law school seats actually being increased in the manner suggested by Mr. Falk"* Noting the absence of evidence is argumentative and/or improper opinion evidence that is not within personal knowledge and experience of Mr. Cotter.
3-6, 8	▪ Argument ▪ Without Foundation and Speculative	These paragraphs postulate theories on why existing universities may or may not increase the size of their existing law schools. Mr. Cotter provides no factual foundation for these theories. He is engaging in argument about all universities with law schools and the motivations of their administration. In paragraph 4, he opinions on what "*universities have an interest in ...*"

		In paragraph 5, he opinions on what law schools are "*disinclined*" to do and that they "*tend to have a preference.*". In paragraph 6, he opines on what the "*public view tends to be ...* " In paragraph 8, he opines about the motivations of the entire legal profession. Mr. Cotter is engaging in argument, not providing opinion evidence.

AFFIDAVIT OF CATHERINE TAYLOR - Exhibit E of the Tso Affidavit		
Paragraph	**Objection**	**Explanation**
Entire Affidavit	▪ Does not comply with Rule 11-6(1) ▪ Without Foundation ▪ Lack of Expertise ▪ Argument	The report does not adequately set out the instructions to the expert (Rule 11-6(1)(c)) or the nature of the opinion sought (Rule 11-6(1)(d)). The report does not set out a description of factual assumptions on which the opinion is based and every document relied upon by the expert ((Rule 11-6(1)(e)). These rules state each provision must be included (*Haughian v. Jiwa*, 2011 BCSC 1632 at paras. 33-36). The entire opinion is speculative because the foundation for the opinions does not support her opinion about the effects of sexual minorities at TWU, since there is an absence of facts (either assumed or set out) in the affidavit that relates to the specific environment at TWU. She may be qualified to give an opinion about effects of discrimination on sexual minorities generally, but applying it to TWU's environment is speculative, which is reinforced by the various qualifiers used ("I assume..." – para. 9, "highly likely" – para. 10, "likelihood of harm"- para. 12) Dr. Taylor is a "Professor of Rhetoric and Communications". While this may explain the argumentative nature of her affidavit, it does not provide the requisite expertise for many of the statements she makes.
4	▪ Legal Conclusions ▪ Without Foundation	"*I address my opinion to both the effects of excluding sexual minority students from entry.*" This assumes that TWU bars sexual minority students from admission, which is a finding of fact that contradicts the evidence and, in any event, is too close to the facts that the Court must decide. This is also inconsistent with para. 9, where she "assumes some sexual minorities" sign the Covenant. Are sexual minorities excluded or not?
6	▪ Without Foundation ▪ Argument ▪ Legal Conclusions	There is no authority cited for the statements in this paragraph. Dr. Taylor argues that "*TWU's insistence on the Covenant both enacts and* ***authorizes others to enact discrimination*** *against sexual minority students by defining marriage as between a man and a woman as the only acceptable form of sexual intimacy.*"

		This is legal argument without an adequate foundation and should be inadmissible. It also contradicts the Community Covenant and other evidence. The paragraph goes on to further state that sexual minority students are being required to renounce their own natures as unhealthy as a condition of enrolment. There is an absence of foundation for this statement and in any case is not within her expertise and knowledge. Dr. Taylor further asserts that the Covenant is tantamount to a statement of inferiority and that students are subject to discrimination as people with unhealthy sexualities. This, again, is legal argument and there is no evidentiary foundation for this.
7	▪ Without Foundation ▪ Argument	*"Being excluded from enrolment..." "even though sexual minority identity is highly stigmatized there..."* Dr. Taylor's assertion that students are excluded from enrolment based on a "discriminatory requirement" is both factually inaccurate, inconsistent with her statement in para. 9 that sexual minorities attend TWU, and constitute argument. There is specific evidence that LGBT students that identify with the religious community served by TWU attend there ***specifically*** to integrate their spiritual and personal lives. The assertion that being of a sexual minority group is highly stigmatized at TWU is outside Dr. Taylor's knowledge and has no basis in the evidence.
8	▪ Argument ▪ Without Foundation ▪ Legal Conclusions	*"The TWU Covenant is not only an example of a discriminatory action, but an egregious example. Apart from the residential school system, it is hard to think of another example where school officials require minority students to renounce their identities as unworthy..."* Dr. Taylor's assertion is based on her belief that LGBT students at TWU are asked to renounce their identities. This is not supported by any evidence and is outside her realm of knowledge and expertise. By comparing the TWU Covenant to the residential school system, she fails to be objective and makes an argument. "*Attraction to same-sex relationships is essential to minority identity; remove same-sex attraction and there is no such identity.*" TWU does not try to remove same-sex attraction and there is no evidence for this. TWU's *"requirement that students sign a statement...is therefore discrimination"* is a legal conclusion that goes to a finding of fact the Court is being asked to make. The paragraph goes on to state that the Covenant is discrimination on the grounds of sexual identity, not just behaviour and is "analogous to requiring Poles to sign a statement agreeing that the desire to be Polish is unhealthy..", etc.. This whole portion is clearly argument.
9	▪ Without	Dr. Taylor states that she assumes some sexual minority students sign the

	Foundation ▪ Argument	Covenant because of their own parents' strong attachment to their faith. This is entirely outside her realm of knowledge and is simply her own personal assumption, offered without any evidence. She also cannot opine that these students cannot freely choose this. Nothing is cited for this paragraph apart from a residential school reference.
10	▪ Argument ▪ Without Foundation	*"It is highly likely that some sexual minority students at Trinity Western University are closeted because they are struggling to reconcile their same-sex attractions with the belief system of the faith community, and also because being open about their sexual minority identity would expose them to discrimination."* This is speculation based on no evidence. The article cited at the end of this statement does not make this observation (article is included in the brief of authorities). "*And also because being open about their sexual minority identity would expose them to discrimination."* The last part of this sentence is legal argument. No foundation for this. The rest of the paragraph is not fully supported by any fact ("*highly likely that some sexual minority students" are closeted*")
11	▪ Without Foundation ▪ Irrelevant	"*Experiencing discrimination at school is known to weaken school attachment, and to increase social isolation, shame, anxiety, depression and increased risk of suicidality.*" For this proposition, Dr. Taylor cites CA King & CR Merchant (2008), Social and interpersonal factors relating to adolescent suicidality: A review of the literature, *Archives of Suicide Research,* 12(3), 181-96. This is an article about **adolescents** and the opinion extrapolates it for everyone attending any type of school. This is unrelated to TWU and irrelevant.
12	▪ Without Foundation ▪ Argument ▪ Irrelevant	"*... and the school's explicit condemnation of same-sex relationships."* This is argument and contrary to the evidence (including the express terms of the Community Covenant). "*A sign of the extreme importance of attachment to their faith communities is the phenomenon of Evangelical Christians undertaking so-called 'reparative therapy' in a desperate effort to become heterosexuals."* The rest of the paragraph uses adjectival descriptions and qualifiers. This is irrelevant and outside the scope of the opinion sought. There is no allegation that TWU engages in reparative therapy with students or that it encourages students to change their identity. While it might be relevant to explain the experience of some sexual minority evangelicals, particularly in the US, it is not relevant to these proceedings. The article cited for this proposition does not state that anything about "*Evangelical Christians undertaking so-called 'reparative therapy' in a desperate effort to become heterosexuals*".

13	▪ Without Foundation ▪ Argument ▪ Legal Conclusion	*"This does not happen in schools where discrimination is official policy. In any case, sexual minority identity cannot be affirmed in any ordinary sense of the term by school officials who denounce same-sex relationships as unhealthy and sinful."* The reference to "discrimination" is a legal conclusion. This is argument.
14	▪ Without Foundation ▪ Argument	No foundation for statement that *"Sexual minority students in evangelical Christian colleges are much less likely to have family or peer support for their stigmatized identity than other students..., etc."* *"discriminatory faith community"* - This is argument with a built-in legal conclusion
15	▪ Without Foundation	*"There is a virtual consensus in the research..."* but yet nothing is cited for this statement. *"... like Trinity Western University, they are taught that they are disordered and that same-sex relationships are damnable and condemned by the Holy Bible."* This is argument. There is no evidence that students at TWU are taught these things, and, in any event, this is outside the realm of Dr. Taylor's knowledge.

AFFIDAVIT OF BARRY ADAM - Exhibit C of the Tso Affidavit		
Paragraph	**Objection**	**Explanation**
Entire Affidavit	▪ Irrelevant	The requested opinion was *"to provide my opinion on whether the [TWU] Community Covenant has the effect of excluding gay and lesbian people from attending [TWU] and if so whether this exclusion would cause harm to gays and lesbians"* (para. 4). The entire affidavit is inadmissible because it does not answer the question posed. The one oblique reference to TWU in para. 19 does not relate to this question. The affidavit therefore does not set out "the expert's opinion respecting those issues" for which the opinion was sought, as required under Rule 11-6(1)(e)
19	▪ Without Foundation ▪ Argument	*"The question at hand is the kinds of limitation that may be acceptable to participation in civil society..."* This is completely outside the question posed. This first sentence appears to tie TWU to the rest of the paragraph, which speaks to the 'separate but equal' doctrine applied in apartheid South Africa. The implication that TWU's Covenant is analogous to apartheid policies is tenuous and not supported by the evidence and is legal argument. The discussion of apartheid policies generally clearly irrelevant. *"...and the virtual expulsion of large categories of people from participation in democratic institutions."*

		This is argument and irrelevant. The case deals with TWU, a private religious institution. It is not about "democratic institutions".

AFFIDAVIT OF ELLEN FAULKNER - Exhibit D of the Tso Affidavit		
Paragraph	**Objection**	**Explanation**
Entire Affidavit	▪ Argument ▪ Without Foundation	The entire affidavit is argumentative. It reads as advocacy, rather than a measured and independent opinion. It repeatedly makes legal conclusions disguised as opinion. It is replete with improper adjectival descriptors which are prejudicial and are used to make argument. The report is unmeasured and does not take into account any other portions of the Community Covenant that, for example, extol students to love one another and prohibit harassment. The entire opinion is speculative, and therefore lacks a proper foundation. No facts supporting the harms alleged are actually caused at or attributed to the TWU environment. There are no factual assumptions or evidence before the expert about TWU's disciplinary policies and she assumes many things about its discipline procedures without factual foundation (and contrary to the evidence filed). Therefore, the report is unreliable and Dr. Faulkner cannot be considered an impartial witness.
8	▪ Argument ▪ Legal Conclusion	*"Discrimination is the prejudicial treatment of an individual.... By this definition, the requirement of adherence to the Community Covenant is discriminatory"* This is a question to be determined by the court and is outside Dr. Faulkner's expertise. It should be inadmissible.
9	▪ Argument ▪ Without Foundation ▪ Legal Conclusion	*"the university is perpetuating this discrimination and causing the kinds of harms we see in studies of gay and lesbian discrimination"* This is a legal argument with a legal conclusion. There is also no foundation to say that TWU is "*causing the kinds of harms*", as if the "causing" were a fact. There are no facts to support this factual statement.
11	▪ Argument ▪ Without Foundation	*"Signing the Covenant would push gays and lesbians back into the closet... verbal threats and harassment may be imposed upon those who are seen to cross the line..."* This paragraph is highly problematic. There are no citations for that paragraph and therefore lacks foundation. Given that the Community Covenant forbids all forms of verbal and physical harassment and no evidence of verbal threats or harassment at TWU, there is no basis for asserting that these things may be imposed on LGBT students by others. It is speculative. There is also no factual or scholarly basis for the assertion that signing the Covenant would push LGBT

		students back into the closet because they are allegedly being forbidden from being "out" on campus (which is an assumption that is not clearly set out or stated anywhere). This conflicts with TWU's evidence. This statement is both baseless and factually incorrect.
12	▪ Argument ▪ Without Foundation	This entire paragraph is problematic and speculative. I.e., *"students may sign"*. There are no citations for that paragraph and therefore lacks foundation. *"The resulting harm is that LGBTQ applicants would need to hide their identity, viewpoints, religious values, political values, family values and their understanding of definitions of equality from the TWU community... If one does not pass – essentially assimilate – into the TWU community, a LGBT student could be 'outed', with potential dire consequences..."* This is pure speculation and not based on any evidence provided by Dr. Faulkner. It is also outside her realm of expertise.
13	▪ Without Foundation ▪ Irrelevant ▪ Argument	This paragraph is replete with speculation and assumptions outside her knowledge. For example: *"In signing the Covenant, LGBTQs at TWU would be required to be heavily closeted so as not to risk discipline and punishment."* This is factually incorrect, outside of Dr. Faulkner's knowledge, and speculative. The paragraph then discusses closetry, which may be relevant. However, the further discussion about physical and psychological effects of physical assault on victims is unrelated and irrelevant. It also carries highly prejudicial implication that LGBTQ students at TWU may be physically assaulted as a result of being outed. This is speculative and without foundation and does not even consider that the Community Covenant expressly forbids any form of physical or verbal harassment.
14	▪ Argument ▪ Without Foundation ▪ Legal Conclusion	This paragraph is problematic. It makes an argument that TWU is homophobic, which is never defined. *"The Covenant makes it plain that gays and lesbians and their lifestyle is not acceptable."* This is a legal interpretation of a key document, which usurps the court's fact finding function and is therefore unnecessary. *"Within this context, anyone who seems to violate TWU's moral code could be subject to attack."* This is based on pure speculation, without factual foundation and is outside Dr. Faulkner's realm of knowledge. The rest of the paragraph gives factual evidence for how people react to being physically attacked, with the implication that students at TWU would be attacked and therefore feel this way. There is no basis for this implication in the evidence. While her observations about victims' reactions to physical assault may be accurate, they are irrelevant, given that there is no evidence that TWU students have or will experience physical assault.
15	▪ Argument	*"These patterns of victimization in the research suggest that gays and lesbians*

	▪ Without Foundation ▪ Legal Conclusion	*experience discrimination across educational systems* ***and this discrimination is no less likely to exist in the TWU university environment.***" The research upon which Dr. Faulkner bases this assertion is primarily focused on high school and elementary school environments in environments different than TWU. The assertion that students at TWU would experience the same type of discrimination is both legal argument and speculation, not supported well by the evidence she has provided. Dr. Faulkner's attempts to relate "anti-gay /lesbian attacks or harassment" to the TWU environment is without foundation and another indicator that she is an advocate and not an impartial expert.
16-25	▪ Irrelevant	Much of the research in these paragraphs deal with the experience of LGBT students in public schools, particularly at the high school and elementary levels. There is little connection between it and this case. Given that TWU is a private, Christian university in Canada, made up primarily of young adults, and holds distinct values and beliefs from other public institutions. There are also statements for which there is no factual foundation related to TWU. Dr. Faulkner suggests that there are "homophobic comments", a poisoned school environment, "assault(s) on human dignity", "homophobic harassment", etc. and relates those things by implication to TWU. Similarly, she suggests that TWU "condones discrimination" and "hateful language" (para. 26). These would all be contrary to the express terms of the Community Covenant and the evidence is that such things are unacceptable in the TWU community. Again, this shows Dr. Faulkner to be an advocate.
26	▪ Without Foundation ▪ Argument	"*By signing the Covenant and agreeing to abide by its code of conduct, gays and lesbians* ***may*** *find themselves living in a social environment that condones discrimination against sexual minorities.* ***There is potential to be subjected to hateful language that could inspire fear into the gay and lesbian population.***" This is speculation and is outside the realm of Dr. Faulkner's expertise. The paragraph goes on to explain the consequences of hate speech experience by LGBT people. These observations may be accurate. However, there is no basis on which to suggest that LGBT students have experienced or will experience hate speech at TWU, particularly given that this is expressly forbidden within the Covenant.
27	▪ Without Foundation ▪ Argument	This paragraph asserts that students who are "outed" at TWU and become known as "violators of the Covenant" will be shamed, ostracized, and prevented from getting their degrees. This is entirely speculative and factually incorrect. There is no evidence to suggest that openly gay students at TWU would suffer these consequences and Dr. Faulkner offers no evidence to support her claims. There are no citations for this paragraph.
28	▪ Without Foundation ▪ Argument	"*Signing the Covenant would force gay and lesbian students to support a limited world view with regard to what kinds of intimate relationships are acceptable and unacceptable... This exclusion supports the assumption that the relationships of married heterosexual couples are superior to any other intimate relationship.*"

		There is no evidence that supports these assertions, some of which are unnecessary because they are interpretations of documents the Court is tasked with interpreting. Most of this paragraph is problematic and lacks the adequate foundation given that the Community Covenant does not "force" any students to support any particular worldview and no evidence is offered to the contrary. The idea that asking unmarried students to remain celibate supports the idea that heterosexual marriage is superior to any other kind of intimate relationship is not supported by any evidence. There are no citations for this paragraph.
29	▪ Without Foundation ▪ Argument	The assertion that signing the Covenant will "force gays and lesbians to deny the existence of their same sex relationships" is outside the realm of Dr. Faulkner's knowledge and expertise without any factual foundation. Also, deny the existence to whom? Family? Students? TWU? Assertions about the belief that marriage is an institution between one man and one woman diminishes the value of gay and lesbian relationships is argument. *"[D]ouble standard"* is argument too.
30	▪ Without Foundation ▪ Argument	*"In signing the Covenant, gays and lesbians will be required to isolate themselves within the TWU culture."* This is outside Dr. Faulkner's realm of knowledge, is pure speculation and contrary to the evidence.
31	▪ Without Foundation	This paragraph asserts that signing the Covenant may lead LGBT students to perceive that they are under constant surveillance, which might contribute to a climate of fear. There is no factual basis before the expert about TWU's disciplinary policies. This is entirely speculative and there is no cited basis on which she makes this claim. She also asserts that students could be subject to questioning, investigation, and moral contempt. Again, this is speculation, which is not supported by any evidence. It is outside Dr. Faulkner's realm of expertise and is contrary to the evidence.
32	▪ Without Foundation	This paragraph asserts that signing the Covenant *"requires"* censure of gay and lesbian existence that could lead to a climate of fear at TWU. This is a bald assertion that is not supported by any evidence. Alternatively, it is argument. Dr. Faulkner goes onto explain what a climate of fear looks like and the consequences it has for LGBT people. While these observations may or may not be factually accurate in other environments, they heavily imply that LGBT people experience or will experience these things at TWU, which is without foundation.
33	▪ Irrelevant	The studies relied on by Dr. Faulkner in this paragraph are about 15 years old. No current research is referenced. The reliability of this research should be questioned to the issue at hand.
36	▪ Argument ▪ Legal Conclusion ▪ Irrelevant	*"Unfair discrimination in the form of protecting the rights of straight students versus the rights of gay students..."* is legal argument. This paragraph deals with the obligations that Canada and other states have to

		protect the rights of children with respect to education, etc. Given that this petition deals with a university, where the vast majority of students are adults, this paragraph is not relevant.
37	▪ Without Foundation ▪ Argument	*"Signing the Covenant is potentially harmful because it forces gays and lesbians to abide by strict gender roles which perpetuate sexism. There is no recognition of diverse gender identities; one may be only a 'man' or a 'woman'."* There is no evidence that the Covenant in any way forces anyone to conform to specific gender roles and the studies cited do not support this opinion. In any event, she refers to "potential" and not actual harm, which is without any factual foundation. The rest of the paragraph explains how rigid gender roles create a culture of deviance and further an ideology of heterosexism, with the implication that the policies at TWU create this type of atmosphere. Dr. Faulkner relies on an article that argues that the harms of homophobia must be viewed in the context of "heterosexual domination". Given that there is no evidence adduced that indicates that TWU perpetuates rigid gender roles or heterosexual domination, these observations are otherwise irrelevant. The implication that TWU is homophobic is speculation and is argument. It is also contrary to the express terms of the Community Covenant and the other evidence filed.
38	▪ Argument ▪ Without Foundation ▪ Irrelevant	This whole paragraph is argument. Ms. Faulkner states in this paragraph that the Covenant potentially re-pathologizes homosexual identity. This is factually incorrect, as there is nothing in the Covenant that suggests homosexuality is a mental disorder. The paragraph goes on to explain the historical context of homosexuality being de-classified as a mental disorder. These observations may be accurate but are not relevant. She then states that "*TWU's exclusion of gays and lesbians works to suggest the deviant nature*" of LGBT students. This statement is unsupported by any evidence and is argument.
39	▪ Without Foundation ▪ Argument ▪ Irrelevant	*"History has shown how the "language of dehumanization paves the way for atrocities against stigmatized groups in society"."* This paragraph is advocacy and argument, irrelevant and highly prejudicial. Dr. Faulkner uses this paragraph to assert that TWU dehumanizes LGBT students. This is factually baseless, outside her realm of knowledge, and argumentative. She uses a single quote from an Amnesty International study on hate crimes and torture of LGBT people from 2001 to support her claim. The relevance and reliability of this evidence is questionable at best.
40	▪ Argument ▪ Without Foundation	This paragraph is argument, comparing the situation to gay priests or the US military under the Clinton administration. Dr. Faulkner asserts that in signing the Covenant, gay and lesbian students at TWU would be forced to live a double-life, wherein they would need to censor themselves and their partners. This is speculation, argument and is outside of her expertise.

41	▪ Without Foundation ▪ Argument	Dr. Faulkner gives no evidence to support her claims in this paragraph, in which she argues that expelled students from TWU may feel compelled to explain their reasons for leaving the school, which could have negative impacts on their entry into another faculty of law or into the legal profession. The entire paragraph is purely speculative, not supported by any evidence, and is outside her realm of knowledge.
42-43	▪ Without Foundation	In these paragraphs, Dr. Faulkner opines on the process that JD graduates go through to be admitted to the profession and nothing is cited for this paragraph. This is outside her realm of expertise and the consequences she claims may result are entirely speculative.
44	▪ Argument ▪ Without Foundation	Dr. Faulkner asserts that the Covenant requires all members of TWU to remain alert to potential violations of the Covenant and that failure to do so, or delay in report violations, could cause the same consequences as described in the proceeding paragraphs. This is speculative and outside her realm of knowledge.
45	▪ Without Foundation ▪ Argument	"*Signing the Covenant may lead gay and lesbian students to perceive that debate about moral and ethical issues is unwelcome... gay and lesbian students may be denied a well-rounded education that could prepare them for work in the legal profession.*" This is a bald assertion with no evidence provided to support it. The idea that students may be denied a proper legal education by attending TWU is a legal finding, or one that would be considered by the Minister, and should not be opined on by Dr. Faulkner. It is also outside of her realm of expertise.
47-48	▪ Argument ▪ Without Foundation ▪ Legal Conclusion	Both paragraphs deal with the legal consequences of a student not signing the Covenant. This is outside Dr. Faulkner's expertise and should not be opined on. They also contain argument and legal conclusions (i.e., TWU precluding gays "on the basis of prejudice".).
49- 50	▪ Argument ▪ Without Foundation	Dr. Faulkner states that "lawyers face the same barriers they did at the beginning of the process" of advancing "legal rights of sexual minorities." She follows this by saying that "*there is no comprehensive Canadian study of gay, lesbian, bi-sexual, transgendered and two-spirited people within the legal profession that clearly captures where these individuals are and how their sexual orientation impacts upon their career options perceptions of themselves as professionals and their status within the profession.*" Despite the lack of any evidence, she concludes in para. 50 that strides in the Canadian profession have not "necessarily been made." She cites the lack of evidence as support for her conclusion. There is no foundation and no evidence. It is argument and, again, shows that she is an advocate and not an impartial expert.
52	▪ Argument ▪ Without Foundation	"*This data will have significant contributions in two key areas.... These policies will make the legal profession more equitable in hiring as well as more cognizant of the need for consistent equity training and awareness in the workplace.*"

		The contributions and policies that Dr. Faulkner is referring to are purely hypothetical outcomes that may possibly be implemented from ongoing research that has not been concluded yet. The research has yet to produce any data, so any suggestions for potential uses of the data are entirely speculative.
54-59	▪ Irrelevant	These paragraphs interpret research in the United States and England on the experience of LGBT people in the legal profession. These observations are irrelevant as they have no obvious bearing on the facts in issue.

AFFIDAVIT OF MARY BRYSON - Exhibit H of the Tso Affidavit		
Paragraph	**Objection**	**Explanation**
8	▪ Legal Conclusion ▪ Argument	*"Signatories pledge that sexual intimacy cannot be expressed or enacted..."* This is an interpretation of a document before the Court. *"[S]ignatories pledge that sexual intimacy cannot be expressed or enacted outside the bonds of an* ***arbitrarily restricted state of marriage...*** *Thus, the TWU Admissions Policy, by means of the Covenant requirement,* ***excluded currently or prospectively married lesbian, gay, and bisexual people."*** The characterization of the Christian view of marriage as arbitrary is a legal submission characterized by adjectival language. The conclusion that the Covenant excludes married sexual minority people is a fact the Court should make, not her, and is outside Dr. Bryson's expertise.
9	▪ Argument ▪ Without Foundation	*"... Covenant obligates currently or prospectively married LGBT people... to practice dishonesty and concealment in relation to their marital status";", "the requirement to...practice dishonesty. ...the requirement to lie"* This is argument. It is pure speculation and is outside the realm of Dr. Bryson's knowledge. There is no evidence that married LGBT students or prospective students currently do this. There is no requirement to lie about their status in the Covenant and are in no way obligated to lie.
11	▪ Argument ▪ Legal Conclusion	*"... a specific abrogation of a healthy sexuality.... The requirement to sign the covenant unfairly curtails those LGBT TWU community members the right to recognition."* "Unfair" is outside her expertise and is a submission. This a legal argument, coupled with a legal conclusion.
12	▪ Argument ▪ Legal Conclusion	This paragraph is a legal argument with a legal conclusion. Whether TWU practices discrimination (and whether it is contrary to law) is a matter for the court to decide.

14	▪ Argument	The third sentence "*Discriminatory educational practice*" is argument and a legal submission. Also a legal conclusion: *"The TWU Community Covenant and the insistence that sexual minority students agree to it and sign it as a condition of enrolment at the university is discriminatory..."*
15	▪ Argument	*"... Discriminatory educational practices* ***such as this one.****"* This is a legal conclusion and the phrase "such as this one" is legal argument.
18	▪ Without Foundation	There is a reference to "research to date" that is not cited. There is no indication that this is applicable to religious schools or related to Christian beliefs related to marriage. There is also no factual foundation related to TWU students who largely contradict this evidence.
19	▪ Argument ▪ Legal Conclusion ▪ Without Foundation	*"Therefore, it is reasonable to conclude that the effects of the 'freedom to discriminate' that has been provided to TWU..." and "these rights are unduly foreclosed by the TWU Covenant. The fact that the State, as an institutional body, has provided accreditation to TWU, knowing full-well of the existence of a discriminatory Covenant..."* This paragraph is a legal submission and is a legal conclusion. There is an absence of foundation to make these statements. The last portion of this paragraph is rife with legal argument and erroneous conclusions.

AFFIDAVIT OF ELISE CHENIER - Exhibit F of the Tso Affidavit		
Paragraph	**Objection**	**Explanation**
Question 3, Page 8, last paragraph on page	▪ Without Foundation	*"These studies show that to be in a community that denies full humanity to lesbians and gays diminishes one's self-perception and endangers mental and physical health."* Dr. Chenier makes this assertion in the same paragraph as she discusses studies of baseball and basketball teams as historically providing relatively safe havens for LGBT people. She cites recent studies showing positive effects of belonging to such groups. However, the converse assertion that being in a community that "denies full humanity" to LGBT people diminishes self-perception is not proven with that evidence. It simply demonstrates that healthy engagement in community produces positive results.
Question 6, p. 11, last paragraph	▪ Legal Conclusion	*"...one can say that the admission policy does in fact discriminate against lesbians and gays as a group."* This is a legal conclusion based on her assessment of the Community Covenant.
Question 6,	▪ Without	*"[People who masturbate, consume porn, and have sex with an opposite sex*

page 12, first paragraph	Foundation ▪ Argument	*partner] are not, therefore, a socially, economically, or politically vulnerable population or group."* This is a stretched inference and erroneous assertion. While generally these groups may not be historically disadvantaged, there are certainly people within those groups who have been (i.e. women, people of colour, etc.) Using these people to juxtapose the experience of LGBT people is not factually supported.
Question 6, page 12, second paragraph ("Because lesbians…"	▪ Without Foundation ▪ Argument	This paragraph contains argument, and has no foundation or basis (i.e., suffering financial losses, shame, "being forced to be in the closet…", etc.). No academic articles cited for support. "*Because lesbians and gays are the only minority group who must look beyond their family to find the support of people who have experienced the same kind of marginalization…. Because homosexuality violates the admissions policy, to be discovered as gay could result in expulsion."* There is no evidence to opine that the **only** minority group that must look beyond family for support are LGBT people. The legal conclusion (not in accordance with the evidence) that the admissions policy is violated by homosexuality is inadmissible. It is also factually incorrect, given that there are openly gay students at TWU as produced by TWU's affiants and is therefore a disputed fact that usurps the courts fact finding role. She speculates outside her expertise that being discovered as gay could lead to expulsion.
Question 6, page 12, third paragraph ("Choosing not…")	▪ Legal Conclusion ▪ Argument ▪ Without Foundation	This paragraph is advocacy and contains many statements that are not adequately founded and are legal submissions and conclusions as well as unnecessary adjectival descriptions, such as how TWU is "entirely out of step" with current government policies and that this policy is "regressive", etc. There are no citations for any of the statements in this paragraph. *"However, that TWU bars non-celibate lesbians and gays from accessing its allocation of seats in law school can be compared to Queen's university's pre-1950's cap on the number of Jewish students annually admitted…. TWU is instituting and extending policies that once existed but have long been ruled a violation of the rights of Canadian citizens."* Dr. Chenier erroneously compares TWU's covenant with a policy at Queen's university that barred Jewish people from attending. This is a legal argument as well as a stretched analogy, given that TWU does not bar gay people from TWU. Asserting that TWU's institution policies that have been ruled violations of rights is a legal submission and should not be opined on. "*Presently, the majority of Canadians support gay and lesbian equality."* There is no evidence offered to support this claim and it is argument in any event.