Court File No. S-149837
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

PETITIONERS

AND

THE LAW SOCIETY OF BRITISH COLUMBIA

RESPONDENT

AND

Court File No. S-142908
Vancouver Registry

BETWEEN:

TREVOR JAMES LOKE

PETITIONER

AND:

MINISTER OF ADVANCED EDUCATION OF BRITISH COLUMBIA and TRINITY WESTERN UNIVERSITY

RESPONDENTS

REPLY TO APPLICATION RESPONSES

Filed by: The Law Society of British Columbia (the "**Law Society**")

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I. OVERVIEW

1. The issue before this Court is whether a law school can legally be allowed to discriminate against Lesbian, Gay and Bisexual (LGB) people in its admissions policy.

2. There are presently two separate proceedings dealing with this issue.

3. Mr. Loke contends in his petition (the "**Loke Petition**") that the Government cannot lawfully approve the law school proposed by Trinity Western University ("**TWU**") because of its discriminatory admissions policy.

4. TWU contends in its petition (the "**TWU Petition**") that the Law Society's decision to not approve TWU's proposed law school for admissions purposes because of its discriminatory admissions policy (the "**Resolution**"), is unlawful.

5. In the Loke Petition, TWU says the Government has no power to consider the admissions policy of its proposed law school, only the power to determine whether a law school can provide a satisfactory legal education.

6. In the TWU Petition, TWU says that the Law Society has no statutory power over the admissions policies of law schools, only the narrow power to determine whether the graduates of law schools are fit and competent to practice law.

7. Therefore, according to TWU, no public body has the statutory power to deny approval to TWU's law school on the ground that it discriminates against LGB people.

8. Acceptance of this argument would mean that neither the Government nor the Law Society could deny approval to TWU if it excluded other groups in our society, such as women or persons of colour.

9. In effect, according to TWU, no public body has the authority to protect the *Charter* rights of potential applicants to law schools seeking state approval to issue secular degrees.

10. TWU further submits that even if either or both the Law Society and the Government have the statutory authority to deny approval to a law school on the basis of a discriminatory

admissions policy, it cannot do so in TWU's case, because its discriminatory admission policy is sanctioned by the religious beliefs of TWU's community.

11. In other words, according to TWU, the *Charter* guarantee of freedom of religion allows TWU to discriminate against LGB people it its admissions policy, regardless of the important role of law schools in the justice system.

12. The Law Society submits that TWU's position regarding the statutory powers of the Law Society and the Government over the approval of law schools is legally incorrect. Both bodies, albeit in different statutory contexts, have the legal power and the duty to ensure that proposed law schools would not be acting contrary to fundamental legal principles, including equality before and under the law, in their admission policies.

13. Put simply, the Law Society submits that the beliefs of TWU's religious community do not trump the equality rights of LGB people in the context of the administration of justice, and that both the Government and the Law Society have the legal duty to deny the approval of a law school that discriminates against LGB people in the context of admissions.

14. This conclusion flows at least partly from the fact that law schools are different than other educational institutions. Law schools are an integral part of our justice system, and access to law school provides access the legal profession and the judiciary. As a result, law schools cannot be permitted to act inconsistently with the core principles of the justice system. To permit discrimination in the context of law school admissions would undermine the integrity of the administration of justice.

15. The statutory reality is that TWU needs the approval of both the Government and the Law Society to grant law degrees that enable its graduates to practice law in British Columbia. As recognized by all parties to these proceedings, the statutory context of each approval is different, which requires a distinct legal analysis in each case, even though the fundamental issue is the same in both cases.

16. The Law Society therefore agrees with the submissions of TWU and the Minister that the decisions challenged in each petition arise in different statutory contexts, and that the court

must be sensitive to those differences in arriving at conclusions with respect to the legality of the specific *decisions*.

See e.g. *Submissions of Trinity Western University and Brayden Volkenant on the Application of the Law Society of British Columbia*, at para 34-36 ("***TWU Combined Hearing Submission***").

The Minister of Advanced Education of British Columbia, Application Response in S-149837, at paras 11-15 ("***MEABC Application Response***").

17. However, it is equally important not to lose sight of the fact that both decisions must necessarily address the same fundamental *issue*: whether it is consistent with the *Charter* for public bodies to approve a law school that discriminates against LGB people.

18. The question of whether the Government and the Law Society, or both, have the legal authority or obligation to address TWU's discriminatory admissions policies must be decided before TWU can grant law degrees that will be recognized for bar admission purposes in B.C.

19. Logically, the issue of whether the Government legally can or must give its consent to TWU to grant law degrees should proceed first; if TWU does not have the consent to grant law degrees, it does not matter whether the Law Society would admit its graduates to the B.C. Bar, as there are no graduates who could apply for admission.

20. As matters stand, TWU does not have the Government's approval to grant law degrees.

21. The Law Society passed its Resolution at a time when TWU had the Government's approval.

22. That approval was then rescinded, which in effect rendered the Law Society's Resolution moot.

23. In the Law Society's submission, TWU should first obtain the Government's approval to issue law degrees before challenging the Law Society's Resolution not to approve TWU's proposed law school for bar admission purposes.

24. However, because the Government tied its rescission of consent to the Law Society's Resolution (and similar decisions made by other law societies), TWU chose to challenge the Law Society's Resolution, and not the Government's decision.

25. Respectfully, that is putting the "cart before the horse."

26. Moreover, if the Minister's strategy of passing the buck to the law societies is successful, it would merely encourage the law societies to do likewise. That is, the law societies would have an incentive to rescind their own resolutions until the Minister decides whether or not to approve the law school, in which case TWU's petitions against the law societies would become moot.

27. Were that to occur, the cycle of mootness and ripeness would never end, occasioning significant prejudice to all of the parties involved and harming the administration of justice. Given the way this has unfolded, the legal issues raised in both petitions need to be decided.

28. Moreover, as both the Law Society's and the Government's denial of approval raise the same fundamental legal issue of whether TWU's proposed law school can legally be allowed to discriminate in its admissions policy against LGB people, the Law Society submits that the two cases, even though they arise in different statutory contexts and may lead to different outcomes, should be heard at the same time.

29. The Law Society does not say that the cases should be consolidated into a single proceeding, only that they be heard by the same judge in the same time frame, either together or consecutively as the judge considers just and convenient in the circumstances.

30. Proceeding in this way will permit all of the issues relating to the ability and duty of these public bodies to take into account *Charter* rights and values in the context of approving a law school to be fully understood and addressed, in an efficient, consistent, and coherent fashion.

31. Doing so would not only expedite the ultimate resolution of the legal issues pertaining to the approvals TWU needs to graduate law students who can be admitted to the B.C. Bar,

but it will also enable the presiding Judge to see and deal with the issue of whether a law school can be permitted to discriminate against LGB people holistically, and not in pieces.

32. As stated above, consideration of the Law Society's exercise of power is only necessary if TWU succeeds in convincing the Court that the Government legally may or must give its consent to TWU's proposed law school to grant law degrees.

33. That is why the Law Society says that the constitutional issues regarding the Government's exercise of its statutory powers should be decided first. Doing so would conserve judicial resources, as the resolution of this issue may render issues related to admission to the bar unnecessary to resolve, here and in proceedings across the country.

34. Finally, the Law Society submits it would be in the interests of justice for this Court to have available to it the evidence in each petition with respect to the other, in so far as that evidence may be considered relevant to the similar matters raised in the petitions.

35. This will promote judicial economy and efficiency, and ensure that any determinations relevant to both matters – particularly the impact of the decisions on the *Charter* interests at play – will be based on complete information, and will be fully consistent with each other.

36. The argument that the evidence in these petitions must be strictly limited to the 'record' before the decision-makers does not accord with the modern approach to judicial review of administrative decisions, particularly where those decisions impact *Charter* rights and values.

37. The fact that the full impact of those decisions on *Charter* interests may not have been adequately considered by the decision makers, and therefore may not be adequately reflected in the 'record', should not immunize those decisions from judicial scrutiny for compatibility with the Constitution.

38. In summary, despite the presence of two different decisions under review, the fundamental issue is whether it would be consistent with the *Charter* for a public body to allow a law school to discriminate against LGB people.

39. Although there are a number of discrete applications before the Court, the ultimate question in these preliminary matters is how best to address this fundamental issue, from the standpoint of judicial economy, efficiency and in the interests of justice.

II. THE ISSUES RAISED IN THE LOKE PETITION MUST AND WILL BE DECIDED

40. It is critical in assessing the various applications before this Court to recognize that the issues raised in the Loke petition – that is, whether the Minister can (or must) approve TWU, from a constitutional standpoint – ultimately must and will be decided by the courts, if TWU wants to be able to grant law degrees notwithstanding its discriminatory admissions policy.

41. As observed above, the ability to grant law degrees is a *necessary prerequisite* to graduating students who would be admitted to provincial law societies. In its petition against the Law Society, and in various court proceedings across the country, TWU seeks the latter approval, without seeking the logically prior approval of the Minister.

42. Currently, TWU is not permitted to issue law degrees. The Minister has revoked his consent under the *Degree Authorization Act*, SBC 2002, c 24, s. 4 ("***DAA***"), at least temporarily.

43. In order for the law societies' decisions to have any practical effect, the Minister must either decide to consent to TWU's application, in which case, the matters raised in the Loke Petition become live; or TWU must successfully petition the Government's refusal to grant consent, which also requires determining the constitutional issue raised by the Loke Petition.

44. Either way, the issue raised in the Loke Petition against the Minister must be heard in order for TWU to obtain the relief it seeks.

45. In addressing the issue raised in the Loke Petition, the Court could find that the Minister must grant approval to TWU's proposed law school, as to do otherwise would unjustifiably infringe on the *Charter* rights of TWU or its prospective students, like Mr. Volkenant.

46. Only if that occurs will the issue raised in the TWU Petition against the Law Society be ripe for consideration.

47. However, the Court could also find that the Minister cannot, in a manner consistent with his obligations under the *Charter*, grant approval to TWU's proposed law school, as submitted by Mr. Loke and the Law Society. In such a case, the TWU petition and proceedings against other law societies across the country become moot. Without a law school, there can be no law students, and no issues arise relating to admission to provincial bars.

48. Contrary to TWU's submission, then, there is no inconsistency in recognizing that resolving the scope of the Minister's discretion "as a matter of law" will not resolve the issue of the lawful scope of Law Society's discretion, while also recognizing that if the Minister cannot legally approve TWU's law school, the Law Society's decision is moot as a matter of fact, as there would be no possibility of applicants to the bar.

Submissions of Trinity Western University on the Application by the Law Society of British Columbia to be Added as a Party or Intervenor, at para 11("***TWU Add Party Submission***").

49. The former is in recognition of the fact that, as TWU submits, both issues must be decided in different statutory contexts. The latter is in recognition of the fact that without a law school, there cannot be law students.

50. By contrast, a ruling in the TWU Petition – even in TWU's favour – cannot and will not resolve the question of whether it would be consistent with the *Charter* for the Minister to approve TWU's proposed law school. As TWU and the Minister submit, the issues arise in different statutory context, and will each have to be considered on their merits.

TWU Combined Hearing Submission, at paras 35, 38, 43-45, 66, 68, 70.

MEACB Application Response, at paras 8-15.

51. While a ruling in the TWU Petition may lead the Minister to grant approval to TWU, as TWU appears to believe, that will merely lead to the issues in the Loke petition again becoming live.

52. Therefore, the issue of the constitutionality of the Minister's decision, and the lawful scope of the Minister's authority, will not disappear; it can only be delayed.

53. The Loke Petition, particularly with the Law Society's participation, is the ideal vehicle for having the issue fully considered.

54. In itself, the possibility that the Loke Petition may resolve all outstanding legal issues with respect to TWU's proposed law school, while a decision in the TWU Petition cannot, should be an important factor in considering the various applications before this Court.

III. APPLICATION IN PETITION S-142908

a. The Law Society Should be Added as a Party to the Loke Petition

55. The B.C. Court of Appeal has remarked on the "elusive character of a firm rule" with respect to adding parties, and has emphasized that the overarching consideration is whether it is in the interests of justice that a party be joined.

Kitimat (District) v. Alcan Inc., 2006 BCCA 562 at paras 24-25;
Yestal v. New Westminster (City), 2012 BCSC 925 at para 22 ("***Yestal***").

56. In this case, it is clearly in the interests of justice that the Law Society be added as a party to the Loke Petition, because it has a direct interest in the proceedings, and because the Law Society's participation is necessary for the effective adjudication of the issues raised.

The Law Society has a direct interest in furthering its statutory mandate

57. TWU submits that adding the Law Society as a party would not be in the interests of justice, because the Law Society has no "direct interest" in the Loke Petition. It implies that the outcome of the Loke Petition would merely have "an impact on its responsibilities and duties", which is not a sufficiently direct interest to justify adding the Law Society as a party.

58. TWU also submits that the Law Society's statutory mandate to, *inter alia*, protect the public interest in the administration of justice, cannot ground a direct interest in the Loke Petition, because the "Law Society has already exercised its statutory duties. Twice."

TWU Add Party Submission, at paras 7-8.

59. In support, TWU cites a decision regarding whether the owners of a Strata Corporation had a 'direct interest' in an individual petitioner's application for a building permit.

Yestal, supra.

60. Unlike a strata owner, however, the Law Society has a *statutory obligation* to regulate the legal profession, to protect the public interest in the administration of justice, to uphold the rights and freedoms of all persons, and to ensure the independence, integrity, honour and competence of lawyers.

Legal Profession Act, SBC 1998, c 9, s. 3.

61. The Law Society, and its membership, have a direct interest in preserving equal access to and the diversity of the legal profession in British Columbia.

62. As reflected in the Law Society's Resolution, the Law Society does not believe that it is in the public interest in the administration of justice for TWU to be allowed to graduate prospective lawyers as long as it maintains its discriminatory admissions policy.

63. The public interest in the administration of justice is an implied factor that the Government must consider in determining whether to give its consent to TWU to grant law degrees under the *DAA*. In the Law Society's submission, the Government cannot grant its approval to a law school if doing so is contrary to the public interest in the administration of justice.

64. As this is also the statutory mandate of the Law Society, the Law Society has a direct interest in the Government's decision.

65. Thus, contrary to TWU's submission that the Law Society's interest is merely indirect or precedent based, the decision in the Loke Petition goes to the core of the Law Society's ability to fulfil its statutory mandate. It is on this basis that the Law Society has a direct interest in the Loke Petition.

TWU Add Party Submission, at para 9.

66. This is particularly so if, as TWU submits, the Law Society has no explicit power to ensure and protect the diversity and inclusivity of the legal profession. If TWU is successful in

this submission, the Law Society must seek other avenues to fulfill its overall mandate to protect and promote the public interest in the administration of justice.

67. In other words, if TWU is correct that the Law Society cannot act directly, in its specific statutory context, to preserve and protect "the rights and freedoms of all persons", or to "protect the public interest in the administration of justice", it is nevertheless integral to the Law Society's statutory mandate to see that these interests are protected and preserved by the Minister.

68. Moreover, to the extent that it is the Minister's position that whether or not the Law Society will admit graduates is a critical, if not determinative, factor in the exercise of the Minister's own discretion, the Law Society submits that the matters raised in the Loke Petition cannot be effectively considered without the perspective of the body upon whose decision the Minister appears to be relying, perhaps exclusively.

69. Considering whether it would be reasonable or constitutional for the Minister to authorize TWU to provide a legal education in BC, in the absence of the arguments of the body charged with regulating the legal profession, would be to leave out a critical aspect of the overall analysis.

70. In light of the uncertainty over which statutory decision makers in this context have the authority to determine the fundamental issue raised in the petitions, it is "difficult to appreciate how this matter could be completely understood" without the Law Society's perspective and participation.

TWU Add Party Submission, at paras 23-24;
Delta Sunshine Taxi (1972) Ltd. v. Vancouver (City), 2014 BCSC 2100 at para 18.

71. As such, contrary to TWU's submission, the Law Society's participation is necessary to a full consideration of all of the relevant issues raised in the Loke Petition.

TWU Add Party Submission, at para 16.

72. Finally, in determining whether it would be in the interests of justice to add the Law Society as a party, it should be kept in mind that Mr. Loke has brought this Petition in the public

interest. It is likely that he is doing so at considerable personal cost and that his counsel are acting *pro bono*, at considerable personal expense.

73. Given the Law Society's statutory mandate, it is important that it be added as a Petitioner in order to ensure the case can be fully argued and, if necessary, appealed, in the event that Mr. Loke or his counsel may in the future be unable to continue.

74. The Law Society is therefore seeking public interest standing so that adequate resources and institutional capacity are available to ensure that the public interest in the administration of justice is protected.

75. It intends to do so on the basis of Mr. Loke's petition, and so no further pleadings will be required.

76. For these reasons, adding the Law Society as a party in the Loke Petition is the most practical and effective way for the issues requiring resolution to be resolved. It is therefore in the interests of justice, just and convenient that the Law Society be added as a party in the Loke Petition pursuant to Rule 6-2(7).

Intervenor Status

77. Alternatively, and for the same reasons, the Law Society has a direct interest in this case, and should be added as an intervenor.

78. TWU says that the Law Society should not be permitted to intervene both because its arguments, perspective and objectives would be "the same" as the petitioner Mr. Loke, and because the Law Society's participation "will expand the scope of the proceeding by raising new or immaterial issues". With respect, these positions are inconsistent, and neither are accurate.

TWU Add Party Submission, at paras 43-48.

79. While Mr. Loke's arguments will be primarily directed to the impact of the Minister's approval on prospective students such as Mr. Loke, the Law Society will demonstrate how

this impact undermines values at the core of the Law Society's mandate: that is, upholding the public interest in the administration of justice and the integrity of the legal profession.

80. Bringing the Law Society's critical perspective to bear in the Loke Petition will not raise 'new' legal issues, as alleged by TWU. Rather, it will permit the Court to fully understand the overlapping schemes of regulating legal education in British Columbia, and the impact of the Minister's decision on the broader administration of justice in the province.

81. In opposing this application, TWU is seeking to ensure that each decision is considered in a vacuum, without taking into account the *Charter* interests of potential LGB applicants or the impact of the Minister's decision on the broader public interest in the administration of justice.

82. In the submission of the Law Society, both considerations are integral to assessing the reasonableness and legality of the Minister's decision.

83. TWU's argument on this point as to why the Law Society has no interest and its perspective is not material is, again, begging the question to be decided on the merits.

TWU Add Party Submission, para 48.

84. Only if the preservation of the public interest in the administration of justice is irrelevant to the Minister's exercise of discretion will the Law Society's perspective be "immaterial". With respect, the Law Society submits that the Court should not artificially blind itself to relevant factors, considerations and perspectives from the outset.

The Law Society's Impartiality

85. Finally, in response to TWU's submission that the Law Society should not be permitted to participate in the Loke petition because it would undermine the Law Society's "impartiality", it should be observed that the Law Society has already expressed its view on whether TWU should be permitted to operate with a discriminatory admissions policy. It passed a resolution indicating the Law Society's view that TWU should not be permitted to do so. Having passed the Resolution, the Law Society need not be 'neutral' in making

submissions as to the reasonableness of approving a law school that discriminates against LGB students, as TWU alleges.

TWU Add Party Submission, at paras 32-34.

86. The Court of Appeal found in *18320 Holdings* that the decision whether to permit a 'tribunal' to take a position on the merits of a case under review is one in the discretion of the court. In exercising this discretion, "(t)he court must strike an appropriate balance between the two fundamental values, the need to maintain tribunal impartiality and the need to facilitate fully informed adjudication on review".

18320 Holdings Inc. v. Thibeau, 2014 BCCA 494 at paras 51-53 ("***18320 Holdings***").

87. That decision set out the following factors to guide the court's discretion:

> [52] The need to maintain tribunal impartiality will generally be more important, and it will be less likely to be appropriate for a tribunal to argue the merits, if:
>
> a) the tribunal is strictly adjudicative in function, rather than also inquisitorial or investigative (*Leon's Furniture* at paras. 20-21);
>
> b) the matter will be referred back to the tribunal for reconsideration if the petitioner is successful; or,
>
> c) the tribunal seeks to make arguments on review which are not grounded in, or which are inconsistent with, the published reasons for its decision (Children's Lawyer at para. 42);
>
> [53] On the other hand, the need to facilitate fully informed adjudication will generally be more important, and it will be more likely to be appropriate for a tribunal to argue the merits, if:
>
> a) there is no other respondent able and willing to defend the merits (*Pacific International Securities* at para. 41);
>
> b) there is a challenge to the legality of procedural policies or guidelines that have been formally adopted by the tribunal;
>
> c) a detailed analysis of matters within the specialized expertise of the tribunal is necessary and the court is unlikely to be able to comprehend or analyze those matters without the assistance of counsel for the tribunal.

18320 Holdings, *supra*, at paras 52-53.

88. TWU has not sought to limit the Law Society's submissions in the TWU Petition to issues relating to the standard of review. Nor would it be sensible to do so.

89. The Law Society's Resolution, as elaborated upon in the Petition response, was not adjudicative in nature, but quasi-legislative. There were no "reasons" published, and therefore no risk of inconsistency with those reasons. The Law Society's decision involved passing a resolution that it considered to be in the public interest in the administration of justice, not deciding upon an application or rendering an adjudicative decision.

90. However, to the extent that the framework outlined in *18320 Holdings* applies in the TWU Petition, there is no other respondent able and willing to defend the merits; there is a challenge to the legality of procedural policies or guidelines that have been formally adopted; and a detailed analysis of the mandate of the Law Society is required.

91. Clearly, then, the Law Society may defend its decision on the merits in the TWU Petition.

92. In the Loke petition, it is the *Minister* who is the statutory decision maker, not the Law Society. There is no concern that the Law Society's participation will somehow jeopardize the impartiality of the *Minister's* decision under the *DAA*, such that the Law Society should not be permitted to participate.

93. The standards outlined in *18320 Holdings* simply do not apply in the context of the Law Society's application to be added as a party or an intervenor to the Loke Petition, because the Law Society is not the statutory decision maker in the Loke Petition, and in any event must have the ability to defend its position on the merits, for the reasons outlined above.

Conclusion

94. It is the Law Society's position that it would not be consistent with the constitutional and statutory authority of the Minister to approve of TWU's proposed law school, and it should be given the opportunity to make these arguments and lend its critical perspective in this statutory context, either as a party or as an intervenor.

IV. APPLICATION IN PETITION S-149837

a. The Petitions Should be Heard Together

95. Some confusion has arisen, both in the case law generally and in the applications now before the Court, as to the distinction between having proceedings consolidated, on the one hand, and having cases heard together or consecutively by the same judge, on the other.

96. To clarify: the Law Society does not seek consolidation of the two petitions, in the sense of creating "a single proceeding with a consolidated statement of claim and statement of defence." The Law Society agrees with the Minister and TWU that both decisions are, for the purposes of each petition, legally distinct. Rather, the Law Society seeks an "order that proceedings be tried together… or at the same time".

Discovery Enterprises Inc. v. Ebco Industries Ltd., 2001 BCSC 235 at para 23.

97. The Minister takes no position on having the petitions heard together. Mr. Loke consents to the order. Although TWU appears to oppose having the matters consolidated or "*de facto*" consolidated, it does not oppose an order having these matters heard by the same judge and consecutively.

MEABC Application Response, at para 5.
Application Response of Trevor James Loke in S-149837.
TWU Combined Hearing Submission, at paras 28-29.

98. The Law Society does not purport to dictate exactly how the matters should be heard at this early stage. Upon review, a judge may find it most expedient to hear the two petitions "at the same time" or to have them heard "consecutively", or to have some matters considered at the same time and other consecutively, as the Judge considers just and efficient in the circumstances.

99. From the Law Society's perspective, the critical point is that the issues raised in both petitions should be heard contemporaneously in a manner that is most convenient and efficient, in front of the same judge.

100. The overarching concern or the "real issue" to be determined in an application to have proceedings heard together is whether "*the order make[s] sense in the circumstances.*"

Murray v. Morgan, [1999] B.C.J. No. 2871 (QL) at para 2;
Sohal Estate v. Argitos, 2010 BCSC 916 at para 22.

101. As discussed in the Law Society's application, it makes sense in the circumstances to hear the two proceedings contemporaneously. Separate hearings before different judges at different times would be "undesirable and fraught with problems and economic expense".

Merritt v. Imasco Enterprises Inc. (1992), 2 C.P.C. (3d) 275 (BCSC) at paras 17-19.

102. Simply put, as the two cases raise the same fundamental legal issue and the facts in each context overlap, hearing the petitions together would promote judicial economy and efficiency, and would permit a more complete understanding of the important constitutional issues in play.

103. By contrast, if the two proceedings are heard separately, it will produce an unnecessary and wasteful duplication of evidence and argument, and would run the risk of producing opposing and contrary findings on the evidence.

104. As the Supreme Court of Canada has recognized, a judge at first instance – particularly in a *Charter* case – has the important responsibility of not only considering 'adjudicative' facts, but also making findings as to social science evidence and legislative facts, a number of which will be considered in both petitions now before this Court.

Canada (Attorney General) v. Bedford, 2013 SCC 72 at para 48-56.

105. Both petitions will involve the consideration of similar evidence, for instance, with respect to the impact of TWU's Community Covenant on the LGB community and the administration of justice, the impact of the decisions under review on the religious freedom of TWU's religious community, and the importance of the Covenant to the religious convictions of TWU or its students.

106. TWU notes in its response submission that "both petitions may ultimately require a balancing of similar *Charter* values, the statutory objects against which such balancing is to be done are different."

TWU Combined Hearing Submission, at para 38.

107. The Law Society agrees.

108. However, the strength of the *Charter* claims – both of TWU's membership and of members of the LGB community– is critical to the reasonableness of both decisions. That is, the degree to which *refusal to approve* TWU's proposed law school will impact the religious freedom of TWU's membership, and the degree to which *approving* the proposed law school will impact the equality interests of Mr. Loke and others who would be effectively denied admission to scarce law school spots, are central to both proceedings.

109. Contrary to TWU's submissions, and as discussed below, the record before and specific processes followed by the Minister and the Law Society, respectively, are not the only facts and material relevant to determining whether the decisions are consistent with the *Charter*.

TWU Combined Hearing Submission, at paras 43-49.

110. Indeed, TWU has tendered considerable affidavit evidence in the TWU Petition – for instance that of Mr. Iain Cook, Mr. William Taylor, and Dr. Jeffrey Greenman – relating to attendance at TWU for members of the LGB community, as well as information regarding the Evangelical Free Church of Canada, the beliefs of evangelical Christians, Christian theology and ethics, and so on.

111. Just as this material may be relevant to determining the impact of the decisions on the *Charter* interests of TWU's membership, so is the evidence tendered in the Loke petition relevant in establishing the impact of TWU's discriminatory admissions policy on members of the LGB community.

112. As the Court's determinations with respect to social and legislative evidence will be deferred to on appeal, it is important that the findings in these two petitions be consistent in this regard.

Carter v. Canada (Attorney General), 2015 SCC 5 at para 109.

113. Having the petitions heard at the same time will therefore promote consistency in the evidentiary findings common between the two petitions, in particular regarding the application of *Charter* interests to the specific decisions under review.

114. Moreover, there are numerous common legal issues before the Court raised in the two petitions, many of which are subject to considerable uncertainty and dispute. For instance, both cases require determinations relating to:

- a proper delineation of the scope of the same *Charter* rights and freedoms;
- untested issues of constitutional causation, particularly the extent to which the government's constitutional obligations are implicated by the admissions requirements of a University;
- the proper application of the *Doré* framework, with respect, for instance, to standards of review and burdens of proof;
- whether an *Oakes* analysis is relevant in these contexts; and
- whether certain administrative law issues – relating to procedural fairness, for instance – can be isolated from the 'reasonableness' analysis under *Doré*.

Doré v. Barreau du Québec, 2012 SCC 12 ("***Doré***").

115. Thus, the fact that – for instance – the standard of review with respect to a specific decision might ultimately be found to be different, as TWU argues, does not mean that the same legal approach should not be followed in determining how and to what extent the *Doré* framework applies to questions of this sort.

TWU Combined Hearing Submission, at para 41.

116. The (unsettled) framework for considering the issues raised in each petition should be applied consistently with respect to both petitions, in light of the overlapping scheme for the regulation of legal education in BC and the unique similarity in the questions before the Court.

117. Nor does the Law Society assume that "a proper balancing of *Charter* values will favour the same balancing in each case", or that "there can be a resolution to these *Charter* issues that uniformly settles both petitions".

TWU Combined Hearing Submission, at paras 66-67.

118. To the contrary, the Law Society has argued that it is exactly because the resolution of the constitutional issues in one case will not resolve the other that both need to be adjudicated, unless the resolution of the Loke Petition renders the Law Society's decision moot as a matter of fact.

119. The point is that consistent findings on the evidence and determinations of law should be arrived at in both cases, which may lead to different – but legally and factually consistent – outcomes.

120. In the Law Society's submission, hearing the cases together in these unique circumstances is therefore important to maintaining the integrity of the judicial function and to promote fairness between the parties.

121. There will be no delay from an order to have the Petitions heard contemporaneously. To the contrary, hearing the issues together will ensure a timely resolution of questions that are of importance to not only the parties, but also the public. The judge will have the ability to organize the hearing in such a way as to avoid waste and duplication.

122. As noted in the application, the focus and perspectives of the petitioners in each case are directly opposed, which will provide the ideal legal and factual matrix in which the two sets of *Charter* interests can be best understood and reconciled.

R. v. N.S., 2012 SCC 72, at paras 30-33.

123. Therefore, in terms of judicial economy and consistency, and a complete understanding of the constitutional issues at play, the Law Society submits that it makes sense to deal with the legal issues involving the proposed law school in an integrated manner, and then to apply such findings to the respective decisions challenged in each petition.

124. How to integrate the proceedings to maximize judicial economy and efficiency should, in the Law Society's respectful submission, be left to the Judge hearing the two petitions. The Law Society seeks no specific order at this time, beyond that the two petitions should be heard contemporaneously by the same judge, so that the judge can deal with the matters

raised in these cases holistically. The Petition Judge can determine how best procedurally to accomplish this objective.

125. Finally, to the extent that TWU's opposition to any 'overlap' in the proceedings is based on its submission the *Charter* interests of prospective LGB applicants are irrelevant to both decisions under review, TWU is begging the question to be decided.

126. In the Law Society's submission, as described in more detail below, such evidence is relevant to the reasonableness of *both* decisions, and therefore must be considered in the course of resolving *both* petitions. The question is therefore how those matters relevant to both petitions can be considered as efficiently as possible.

127. In summary, it is in the interests of efficiency, consistency, and a full understanding of the constitutional issues, for the Law Society's and Government's decisions to be dealt with together contemporaneously. This will allow all of the legal issues relating to TWU's proposed law school to be thoroughly considered by the Court in deciding whether TWU's proposed law school should be allowed to grant law degrees, notwithstanding its discriminatory Covenant.

b. The Loke Petition Should be Considered First

128. The Law Society seeks an order to have the constitutional issues relating to the authority of the Minister to be considered first.

129. The Law Society agrees with TWU that the administrative law and *Charter* issues raised in the TWU Petition are "inseparable", "intertwined" and "necessarily interrelated", and that they should be "determined together under *Doré*." It also agrees with the Minister that the "constitutional issues cannot be divorced from their administrative context; they are inextricably interwoven".

TWU Combined Hearing Submission, at paras 75-79;
MEABC Application Response, at para 15.

130. Moreover, as TWU and the Minister grant, resolving the *Charter* issues in one petition will not resolve the *Charter* issues in the other petition, because they arise in different statutory contexts.

131. However, this merely reinforces why this court should not decline to decide the Loke Petition, and indeed, why the matters raised in that petition should be heard and considered first (to the extent that the proceedings are to be considered consecutively).

132. As detailed above, the resolution of the *Charter* issues in Mr. Loke's favour would render the petitions against the Law Society and other similar proceedings elsewhere unnecessary, as those decisions could have no practical effect on the rights and interests of any party.

133. The Law Society seeks an order to have the issues raised in the Loke Petition considered first simply because they are a prerequisite to the Resolution, challenged in the TWU Petition, having any practical effect.

134. That is, if the Minister is without the constitutional competence to approve TWU, as Mr. Loke and the Law Society assert, no other matters need to be decided by the Court. No TWU law students will exist to seek admission to the bar.

135. By contrast, whether or not the Law Society has the authority to disapprove of TWU's proposed law school because of its discriminatory admissions policy, that will not resolve whether or not TWU could be permitted to operate by the Minister, and to issue law degrees recognized by other jurisdictions and other provincial law societies.

136. Moreover, if the TWU Petition is heard first and separately – that is, if the Loke Petition is found to be moot, and therefore not heard until a new decision is inevitably rendered by the Minister – it is possible that the TWU Petition may be resolved on administrative law issues relating to jurisdiction, fettering of discretion, sub-delegation of authority, or procedural fairness grounds.

137. Despite TWU's recent concession that these administrative law matters all go to the 'reasonableness' of the Law Society's decision under a *Doré* analysis, they are raised by TWU in its petition as discrete grounds for overturning the Law Society's decision, and

not as matters "inextricable" from assessing the *Charter* interests in the context of a *Doré* substantive reasonableness analysis.

138. Indeed, TWU could not be arguing for a 'correctness' standard of review if it considered all relevant matters to be resolved on a *Doré* reasonableness analysis.

139. If any of TWU's administrative law arguments in the TWU Petition find favour with a court, it would render consideration of the constitutional issues and overall 'reasonableness' of the decision under a *Doré* analysis unnecessary, and a judge would be justified in refusing to consider them.

See e.g. *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86.

140. Thus, even if the resolution of the *Charter* issues in the TWU Petition might impact the resolution of the *Charter* issues raised in the Loke Petition – as TWU appears to imply, but which is denied – those issues may not be considered at all if the Court does not exercise its discretion to hear the Loke Petition.

TWU Combined Hearing Submission, at para 69.

141. However, to the extent that the administrative law issues necessarily overlap with the 'reasonableness' of the overall decision under *Doré* , as TWU now submits, the Law Society does not seek an order that they be artificially separated. The question should be left to the wisdom of the judge.

142. The objective of the order sought is to put first things first, and only decide as much as is necessary to resolve the controversy between the parties. Hearing and considering the Loke Petition first may render the TWU Petition (and other similar cases across the country) unnecessary to resolve, while the reverse is not true. As such, and in the interests of conserving judicial resources, the Loke Petition should be considered first.

c. The Evidence Should be Common in Both Petitions

143. The Law Society does not intend to file further evidence in either proceeding, except as necessary and with leave of the Court.

144. In the TWU Petition, the Law Society is relying on the same affidavits as those filed in the Loke petition.

145. This is simply a natural extension of the arguments put forth above, with respect to judicial efficiency and the importance of hearing the matters contemporaneously.

146. In the Law Society's submission, neither of the petitions can be treated in isolation, as each revolve around the same fundamental question. The evidence regarding the impact of TWU's Covenant, as originally filed in the Loke Petition, is relevant to the impact of the Law Society's decision, and the evidence in the TWU Petition may be relevant to the Minister's exercise of discretion.

147. TWU submits that "the scope of evidence admissible in a judicial review is much narrower than in a trial… judicial reviews are generally conducted on the basis of the record before the administrative decision-maker." As such, it submits that each matter should be dealt with exclusively on the basis of the "record" before the decision makers.

TWU Combined Hearing Submission, at para 86.

148. The Minister makes a similar argument, suggesting that the "affidavit material concerning the *Charter* issues… is not properly admissible on judicial review as it was not before the Minister when he exercised his discretion and is therefore extrinsic to the record of the proceeding." Such presumptively inadmissible evidence in the Loke Petition, according to the Minister, should not be tendered in the TWU Petition.

MEABC Application Response, at paras 8, 16-25.

149. With respect, these positions fail to account for the important factual affinities between the two petitions, and the full implications of the Supreme Court of Canada's recent decisions in *Dunsmuir* and *Doré*, and the cases that have followed.

Dunsmuir v. New Brunswick, 2008 SCC 9 ("***Dunsmuir***");
Doré, *supra*.

150. The historical rationale for limiting the record on judicial review is grounded in the fact that the courts' intervention "must be based upon jurisdictional error, denial of natural justice or error of law in the face of the record".

Waverly (Village) v. Nova Scotia (Minister of Municipal Affairs) (1993), 126 N.S.R. (2d) 147 (S.C.) at 149.

151. The courts' role on judicial review is no longer so limited. In *Dunsmuir*, the Court confirmed that in reviewing the decision of an administrative decision maker, the courts must look to the merits of the decision rendered:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Dunsmuir, *supra* at para 47.

152. This is all the more so with respect to administrative decisions which touch upon *Charter* rights and values. As the Court observed in *Doré* :

> How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. (...)
>
> Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the Oakes context. As this Court recognized in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199, at para. 160, "courts must accord some leeway to the legislator" in the Charter balancing exercise, and the proportionality test will be satisfied if the measure "falls within a range of reasonable alternatives". The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of *Dunsmuir*, "falls within a range of possible, acceptable outcomes" (para. 47).

Doré, *supra*, at paras 55-56.

153. The question before the courts in such cases is therefore no longer limited to identifying an error on the face of the record, or determining whether an administrative decision-maker acted so as to exceed their 'jurisdiction'.

154. Rather, a court on judicial review seeks to determine whether the decision-maker made a reasonable decision, defensible "in respect of the facts and the law". Where *Charter* values are implicated, as in both petitions before this Court, a court must determine whether the decisions fell within "a range of possible, acceptable outcomes" which appropriately balanced any relevant *Charter* values. To do so, a court must consider the "severity of the interference of the *Charter* protection".

155. The Law Society submits that a court cannot adequately undertake this task without considering factors and evidence relating to *Charter* rights and values, even if the administrative decision maker failed to do so explicitly, and even if that evidence does not make up part of the self-determined 'record' before the decision-maker.

156. The importance of considering evidence 'extrinsic' to the record is all the more critical in cases involving *Charter* values, and potentially conflicting *Charter* rights and interests. The point was put well by Campbell J. in *TWU v. NSBS*:

> Litigation under the *Charter* has resulted in the more robust development of another kind of evidence. Legislative facts or social science evidence is important in providing a context within which to consider issues that relate to public policy. Courts do not consider those kinds of things in a vacuum. It is important to have access to information but the process can become bogged down by dealing with it in the more formal traditional way. Because of that parties are able to file materials and provide reports from experts that set out some of that information. The court has to consider how much weight to be given to it.

Trinity Western University v. Nova Scotia Barristers' Society, 2015 NSSC 25 at para 26.

157. The fact that an administrative decision-maker may not have considered evidence relevant to *Charter* values in the course of rendering a decision does not mean such matters are not legally relevant on judicial review, or that a reviewing court should not have regard to them in determining whether the ultimate conclusion was defensible in light of the facts and the law.

158. Moreover, these petitions do not involve decisions made before a tribunal, where the parties are provided with an opportunity to submit evidence before an adjudicator at first instance, in accordance with doctrines of natural justice. It is therefore unlike a decision rendered by the Employment Standards Tribunal in *Actton*, cited by the Minister. In effect, the administrative decision-makers in non-adjudicative settings exercise discretionary authority to determine their own record.

Actton Transport Ltd. v. British Columbia (Employment Standards), 2010 BCCA 272; *MEABC Application Response*, at paras 17-18.

159. Thus, the rationale for limiting the record on a judicial review of an adjudicative decision of an administrative tribunal is inapplicable in the context of non-adjudicatory decision making, where there is no true 'record of proceedings', no evidence tendered, no natural justice afforded, no explicit findings of fact or interpretations of law, and importantly, no reasons given.

160. If the information available to a court on review were as limited as TWU and the Minister claim, a public body in a non-adjudicative setting could effectively immunize its decisions from any scrutiny under the *Charter*, through its own lack of due diligence or by artificially limiting the range of considerations it takes into account.

161. This would permit a statutory decision maker to impose significant harm upon the *Charter* interests of individuals, but so long as it did not actually *consider* that harm before acting, evidence about the harm could not be considered by a reviewing court in determining whether the decision was consistent with the *Charter*.

162. For these and other reasons, strictly limiting the record does not accord with the modern approach to evidence on judicial review, wherein the Courts have recently applied a more flexible approach, even to review of decisions of adjudicative tribunals.

163. In *SELI Canada Inc. v. Construction and Specialized Workers' Union, Local 1611*, the B.C. Court of Appeal endorsed the approach articulated by the Saskatchewan Court of Appeal in *Hartwig*, to the effect that the parties to a judicial review application should be

able to put before a reviewing court all of the material which bears on the arguments they are entitled to make:

> Richards J.A., for the court, reviewed the historical conception of the record, and found that it did not include the material that was tendered. Nonetheless, he found that they could properly be placed before the court on a judicial review application. At paras. 31-33, he said:
>
> > [31] [I]t is necessary to revisit and revise traditional notions about the scope of the material properly before a court on a judicial review application.
> >
> > [32] [T]he parties to a judicial review application should be able to put before a reviewing court all of the material which bears on the arguments they are entitled to make. If a tribunal decision can be challenged because it involves a patently unreasonable finding of fact, then the evidence underpinning that finding should be available for the Court to consider. This is ultimately a sounder and more transparent approach to this issue than one couched in terms of the sometimes elusive notion of "jurisdiction" or framed around the complex and rather uncertain and unsatisfactory body of case law relating to the concept of decisions based on "no evidence".
> >
> > [33] Thus, in all of the circumstances, the best course in this area for now is to simply recognize the right of participants in judicial review proceedings to bring forward the evidence which was before the administrative decision-maker. This may be done by way of an affidavit which identifies how the evidence relates to the issues before the court and which otherwise lays the groundwork for its admission....
>
> I respectfully agree with the reasoning of the Saskatchewan Court of Appeal in Hartwig. The chambers judge did not err in finding the impugned affidavits to be admissible. I would dismiss the appeal.

SELI Canada Inc. v. Construction and Specialized Workers' Union, Local 1611, 2011 BCCA 353, paras 84-5 (emphasis added);

Hartwig v. Commission of Inquiry into matters relating to the death of Neil Stonechild, 2007 SKCA 74.

164. It should be noted that in both *SELI* and *Hartwig*, the administrative tribunal provided 'reasons', and the only question was whether the evidence upon which those reasons were based could be put before the Court on appeal.

165. In the context of non-adjudicative settings, such as the decisions currently under review, a decision-maker effectively gathers its own evidence, does not provide reasons, and only limited, if any, procedural rights are afforded to those effected.

166. In such cases, it is critically important that a court on judicial review be able to understand what evidence and considerations ought to or could have been taken into account by the decision-maker, including those relevant to *Charter* values and interests, if it is to determine whether the decision was defensible on the facts and the law.

167. As such, TWU's argument that "(i)t would be improper to allow the Law Society to rely on evidence in the Loke Petition because this evidence does not relate to the grounds upon which the Law Society made the Decision", misconstrues the modern role of the courts on judicial review, especially where *Charter* values and interests are implicated.

TWU Combined Hearing Submission, at para 90.

168. It is presumably for this reason that TWU has tendered considerable 'extrinsic' affidavit evidence in the petitions before the court, as noted above. This evidence is relevant to whether the decision makers adequately appreciated and accounted for the implications of their decisions on the *Charter* interests of TWU's religious community.

169. For the same reason, Mr. Loke's evidence is relevant to whether the decisions made by the Minister and the Law Society reflect an adequate balance between the statutory objectives and the *Charter* values implicated.

170. Finally, as the Supreme Court of Canada has repeatedly observed, courts on judicial review must pay "respectful attention" to the reasons that "*could* be offered in support of a decision". As such, "(w)hen there is no duty to give reasons ... or when only limited reasons are required, it is entirely appropriate for courts to consider the reasons that could be offered for the decision when conducting a reasonableness review."

Dunsmuir, *supra* at para 48;

Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association, 2011 SCC 61 at paras 52-54;

Agraira v. Canada (Public Safety and Emergency Preparedness), 2013 SCC 36 at para 58.

171. As there were no written reasons for the Resolution or the Minister's decision, the court's task is to determine whether the ultimate conclusions were reasonable and defensible in light of the facts and the law, and whether each decision struck an appropriate balance between the statutory objectives and *Charter* rights and values.

172. This exercise must include a consideration of factors that could be offered in support of the decision, even if that material does not expressly make up part of the 'record'.

173. For these reasons, permitting the evidence in the Loke petition to be considered in the TWU petition – to the extent that it is relevant – will not have the effect of 'confounding' the process of judicial review, nor will it 'contaminate' a pristine record of proceedings, as alleged by the Minister.

MEABC Application Response, at paras 17-21.

174. Rather, it will permit a comprehensive record to be before the court – one that fully addresses the *Charter* interests of members of TWU's religious community, as well as the *Charter* interests of Mr. Loke and others who would be effectively denied admission – in order to determine whether the outcome is "defensible in respect of the facts and the law", and whether the ultimate decision adequately accounted for the severity of any impact on the respective *Charter* interests at issue.

175. Doing so would not create a '*de novo*' hearing or a 'private reference', as the Minister alleges. It would simply provide the judge with the evidence necessary, tendered and argued in a coherent and efficient fashion, to determine whether the outcome is reasonable. In the words endorsed by the BC Court of Appeal, it would ensure that the parties to a judicial review application are "able to put before a reviewing court all of the material which bears on the arguments they are entitled to make".

MEABC Application Response, at paras 23.

176. Again, the contrary position only makes sense to the extent that the *Charter* interests of Mr. Loke, and the related affidavit material, is not relevant to whether the Minister and the

Law Society properly exercised their discretion in a manner consistent with the *Charter* rights and values. With respect, this cannot be so, for the reasons given above.

177. As a result, the Law Society seeks an order to permit the evidence in each hearing to be considered by the judge in the other, in so far as the court considers that evidence to be relevant. It is difficult to predict from the outset what matters will be considered relevant to each petition. However, the order sought would permit the presiding judge to take all relevant evidence into account in adjudicating reaching a conclusion with respect to both.

PART 6: MATERIAL TO BE RELIED UPON

1. All materials filed in these petitions, and as indicated in the Law Society's applications; and
2. Such further and other material as counsel may advise and this Court may allow.

Two days have been scheduled for February 24 and 25, 2015 to deal with these and related applications.

Peter A. Gall, QC
Counsel for the Petitioner Respondent,
the Law Society of British Columbia