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

APPLICATION RESPONSE

Application response of: The Minister of Advanced Education of British Columbia, (the "Minister")

THIS IS A RESPONSE TO the notice of application of the Respondent, the Law Society of British Columbia, filed 16/JAN/2014, seeking that the TWU Petition (Vancouver Registry No. S-149837) be heard at the same time as the Loke Petition (Vancouver Registry No. S-142908)

Part 1: ORDERS CONSENTED TO

The Minister consents to the granting of **None** of the orders set out in Part 1 of the notice of application.

Part 2: ORDERS OPPOSED

The Minister opposes the granting of the orders set out in paragraphs **1.b. and 1.c.** of Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Minister takes no position on the granting of the orders set out in paragraphs **1.a.** of Part 1 of the notice of application.

Part 4: FACTUAL BASIS

1. On April 14, 2014, Trevor James Loke filed a petition, (the "Loke Petition"), challenging the Minister's decision under the *Degree Authorization Act* to consent to Trinity Western University's ("TWU") law degree proposal.

2. On December 18, 2014, TWU filed a petition (the "TWU Petition"), challenging the resolution adopted by the Law Society of British Columbia (the "LSBC") stating that the proposed law school at TWU is not an approved faculty of law for the purpose of the LSBC's admissions program.

3. On January 16, 2015, the LSBC filed an application in the TWU Petition seeking an Order that:
    a. The TWU Petition be heard at the same time as the Loke Petition
    b. The Constitutional Issues in the Loke Petition be determined prior to or at the same time as the Constitutional Issues in the TWU Petition; and
    c. The evidence relating to the *Charter* issues in each Petition be evidence in the other Petition.

4. Further factual background is set out in the Minister's January 16, 2015 Notice of Application seeking dismissal of the Loke Petition on the ground of mootness.

Part 5: LEGAL BASIS

Hearing the Petitions Together

5. In the event the Court exercises its discretion to adjudicate the moot issues raised in the Loke Petition, the Minister takes no position on whether the Loke Petition and the TWU Petition are heard at the same time by the same judge.

6. The hearing of related proceedings at the same time is not the same as consolidating proceedings.

Peel Financial Holdings Ltd. v. Western Delta Partnership, 2003 BCSC 784 (*"Peel"*), paras. 27-30
Supreme Court Civil Rules, B.C. Reg. 168/2009, Rule 22-5(8)

7. The LSBC seeks an order that the Petitions be heard together at the same time, but also refers to "consolidation" (Notice of Application ("NoA"), paras. 2-3) and "joining the petitions" (NoA, para. 24). If the LSBC seeks for the Petitions to be consolidated or joined, rather than heard together, the Minister opposes such an order. As indicated above, the Minister takes no position on whether the petitions should be heard at the same time in the event that the Loke Petition continues.

8. Judicial review is a narrow exercise by which courts supervise those who exercise statutory powers to ensure they do not overstep their legal authority. The function of judicial review is to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes. Unlike a trial, a judicial review is on the "record of proceedings" that was before the administrative decision maker.

New Brunswick (Board of Management) v. Dunsmuir, 2008 SCC 9 ("*Dunsmuir*"), at para. 28

9. The nature of a petition for judicial review precludes consolidation with another petition with a separate record of proceeding.

10. Further, it would not be appropriate to consolidate the two Petitions into one because the parties are different (TWU is the only Party participating in both proceedings), some parties have more limited roles than others (i.e. the Minister), and because the Petitions raise different issues in different statutory contexts.

Peel, supra, paras. 28-29

Deciding Constitutional Issues before Administrative Law Issues

11. The LSBC seeks for the "Constitutional issues" in the Loke and TWU Petitions to be determined in advance of "administrative law issues" in the TWU Petition. The Minister opposes the proposed order on the basis that it is irreconcilable with the Supreme Court of Canada's decision in *Doré v. Barreau du Québec*, 2012 SCC 12 ("*Doré*").

12. In *Doré*, the Supreme Court adopted a flexible administrative law approach to reviewing statutory decisions for *Charter* compliance based on *Dunsmuir*. Administrative decisions that engage the *Charter* are reviewed on a deferential standard of reasonableness.

Doré, supra, at paras. 37, 56

13. A constitutional dimension to a decision does not transform a reasonableness review into a correctness review or permit bifurcation of administrative and constitutional issues. The only question on judicial review is whether "in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play." The decision is reasonable if it satisfies the proportionality test.

Doré, at paras. 56- 57

14. Reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors. It is essentially a contextual inquiry.

Catalyst Paper Corp. v. North Cowichan (District), 2012 SCC 2, para. 18;
Doré, supra, para. 54

15. *Doré* mandates that *Charter* values be considered in their factual and legal context in light of the administrative law standard of reasonableness. *Doré* does not allow for constitutional issues (whether moot or live) to be isolated and determined in advance of administrative law issues. The constitutional issues cannot be divorced from their administrative context; they are inextricably interwoven.

Evidence from one Petition becomes Evidence in the Other

16. The Minister opposes an order that evidence relating to the *Charter* issues in each Petition be evidence in the other Petition.

17. As stated above, judicial review is based on the "record of proceedings" before the statutory decision-maker.

Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 *("JRPA")*, s. 1;
Actton Transport Ltd. v. British Columbia (Employment Standards), 2010 BCCA 272 *("Actton")* at paras. 19, 23;
Kinexus Bioinformatics Corporations v. Asad, 2010 BCSC 33, at para. 17

18. The British Columbia Court of Appeal has held that to permit a review other than on the record would be to embark on a *de novo* hearing that usurps the role delegated to the statutory decision-maker by the legislature and confounds appellate review.

Actton, supra, at paras. 19, 23;

19. In the Loke Petition, the petitioner and TWU have filed a large volume of affidavit material concerning the *Charter* issues that 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 proceeding. The Minister has raised an objection as to this extra-record evidence. The question of whether evidence extrinsic to the record should be admitted on the Loke petition has not yet been determined.

20. This extrinsic evidence is presumptively inadmissible on judicial review, subject to narrow exceptions.

Kinexus, supra, at para. 17;
Smith v. Canada, 2001 FCA 86, at para. 7

21. This Court should not order that presumptively inadmissible evidence from one Petition be automatically tendered in the other Petition. The admissibility of the *Charter* evidence should be addressed before the judge at the hearing proper. There should be no advance order on the admissibility and interchangeability of this extrinsic evidence.

22. To the extent that the *Charter* evidence in each Petition is found to form part of the record of proceedings, the Minister objects to this order on the basis that it would contaminate the records of proceeding and confound the judicial review process.

23. Blending the evidentiary records would abandon any semblance of a judicial review proceeding. It would be to embark on a novel *de novo* hearing in the nature of a private reference that usurps the legislated role of the decision makers.

24. The LSBC cites no authority supporting blending evidentiary records in two separate judicial reviews. Both cases cited in favor of the proposed evidence order involved substantially

overlapping commercial actions (NoA, para. 9). The Court ordered that *viva voce* and discovery evidence in one action would be interchangeable with evidence in the other action.

Peel, supra;
Tylon Steepe Homes Ltd. v. Landon, 2010 BCSC 192

25. Sharing *viva voce* and discovery evidence in substantially overlapping trials is not the same as blending the record in separate judicial review proceedings. Two separate decisions made by two separate decision makers should not be reviewed on the same evidentiary record.

Part 6: MATERIAL TO BE RELIED ON

26. Affidavit #2 of Dorothy Rogers, made June 27, 2014

27. Affidavit #3 of Dorothy Rogers, made November 18, 2014.

28. Affidavit #4 of Dorothy Rogers, made January 9, 2015.

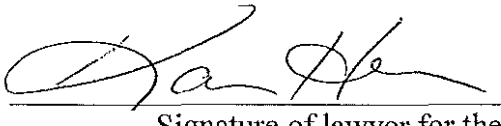
The Minister estimates that the application will take one hour.

[ ] The Minister has filed in this proceeding a document that contains the application respondent's address for service.

[x] The Minister has not filed in this proceeding a document that contains an address for service. The application respondent's ADDRESS FOR SERVICE is:

Ministry of Justice, Legal Services Branch
1301 – 865 Hornby Street
Vancouver, BC V6Z 2G3
Fax: (604) 660-6797

Date: February 2, 2015



Signature of lawyer for the Minister
Karen Horsman, Q.C. and Karrie Wolfe

This **APPLICATION RESPONSE** is prepared by Karen Horsman, Q.C., Barrister & Solicitor, of the Ministry of Justice, whose place of business and address for service is 1301 - 865 Hornby Street, Vancouver, British Columbia, V6Z 2G3; Telephone: (604) 660-3093; Facsimile: (604) 660-6797.