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

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

INTERVENORS

WRITTEN ARGUMENT OF THE LAW SOCIETY OF BRITISH COLUMBIA

Gall Legge Grant & Munroe LLP
1000 – 1199 West Hastings Street
Vancouver, BC V6E 2T5

Peter A. Gall, Q.C.
Lawyer for the Respondent,
The Law Society of British Columbia

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I. OUTLINE OF ARGUMENT

1. Trinity Western University ("TWU") seeks in its petition to legally compel the Law Society to approve and facilitate its proposed law school, even though TWU will effectively deny participation in its legal education program on the basis of sexual orientation, marital status, gender, and religion.

2. The Law Society of British Columbia (the "Law Society") has the duty under the *Legal Profession Act* to "uphold and protect the public interest in the administration of justice", including by "protecting and preserving the rights and freedoms of all persons".

3. It also has a duty, under the *Canadian Charter of Rights and Freedoms*, to consider the rights and values enshrined in the Constitution in exercising its discretionary powers under the *Legal Profession Act.*

4. Pursuant to these duties, the Law Society adopted a resolution to not approve the proposed law school of TWU, following an exhaustive review process which involved seeking the views of the Law Society's membership.

5. The Law Society adopted this resolution because TWU intends to require, as a condition of access to its proposed law school, that students commit to abide by a covenant that:

    i. prohibits sexual intimacy between married same-sex couples but not married heterosexual couples, thereby discriminating against lesbian, gay, bisexual, transgender and queer ("**LGBTQ**") persons;
    ii. prohibits sexual intimacy outside of marriage, discriminating against those in long-term and committed common law relationships;
    iii. denies its students access to reproductive choice, discriminating against women; and
    iv. seeks to not only create an evangelical Christian learning environment, but also, through the Covenant, to impose evangelical Christian views and behavioural norms on all, discriminating on the basis of religion.

6. As a condition of attending TWU's proposed law school, the Covenant is clearly discriminatory and contrary to the equality rights of LGBTQ people. It also discriminates on other protected grounds of marital status, gender and sex, and religion.

7. By imposing this Covenant as a condition of participation in its proposed law school, TWU is not only limiting the access of LGBTQ and other persons to the legal profession, but also sending the message that the rights and freedoms of these persons are not deserving of protection and preservation in our legal system.

8. To do this in the context of providing a legal education is inconsistent with the fundamental values that the legal profession is obligated to uphold and protect, and inconsistent with the Law Society's statutory mandate.

9. TWU says that it can impose the Covenant on students of its proposed law school because homosexual relations, sexual intimacy generally outside of marriage, and abortion, are not permitted under the religion to which TWU ascribes. While this may allow TWU to exclude LGBTQ and other groups of people in other spheres in which TWU or its religious community engages or participates, the Law Society does not consider it to be acceptable as a condition of participation in a legal education program and hence participation in the legal profession.

10. Law schools are the training ground for future lawyers and judges. Such training is not confined to legal knowledge and skills, and the Law Society's mandate is not so confined.

11. As in Ontario, the Law Society has had a longstanding involvement in and influence over legal education in the Province, to ensure that the profession is meeting its obligations to uphold and protect the public interest in the administration of justice.

12. Because law schools act as gateways to the legal profession and judicial branch of government, the Law Society must ensure that a law school preserves the rights and freedoms of all persons, including the right to equal access to a legal education, which is a prerequisite to entry into the legal profession.

13. A law school that engages in discriminatory action against LGBTQ and other persons in their access to legal education seriously undermines the integrity and foundation of the administration of justice.

14. That was the view of the members of the Law Society whose guidance the Benchers relied on in deciding whether to approve TWU's proposed law school.

15. Contrary to what TWU claims, the resolution is not invalid because the Law Society adopted it after consideration of a vote of its members.

16. The Law Society is legally entitled to consider the wishes of its members in exercising its discretion under the *LPA*, as long as it is consistent with the Law Society's statutory and constitutional obligations.

17. The Resolution is consistent with the Law Society's statutory and constitutional obligations.

18. The Law Society has the power to determine admission to the bar, which reasonably includes ensuring that there is equal access to a legal education and hence to the legal profession.

19. And most importantly, TWU does not have a religious right to the approval of an institute of legal education that does not preserve and protect the rights and freedoms of LGBTQ and other persons to be able to become lawyers.

20. TWU's religious community is lawfully entitled to pursue and advocate for its religious beliefs. That is not being denied by the Law Society.

21. But the Law Society is not legally obliged to approve or facilitate TWU's proposed law school if it does not respect the rights and freedoms of all persons to have equal access to entry into the legal profession.

22. It is important to emphasize that this case is about approval of TWU's proposed law school.

23. There are no graduates of TWU's proposed law school.

24. TWU's proposed law school is in the planning stages.

25. It still needs accreditation from the Government, which was rescinded because of the Law Society's Resolution.

26. The Resolution has made it clear that the Law Society does not believe that a law school should be allowed to effectively deny entry to the legal profession through the imposition of a Covenant that discriminates against certain people in our society.

27. This is the statutory means by which the Law Society can, and indeed must, ensure that certain groups in society are not being denied an equal opportunity to enter the legal profession.

28. As will be elaborated upon below, the Law Society submits that it has the statutory power to not approve a law school that denies equal access to the legal profession through a discriminatory admissions policy, and that it exercised this power reasonably, and indeed correctly, in the circumstances of this case.

29. The fact that people might have different views on how freedom of religion and equality rights are to be balanced in the context of TWU's proposed law school does not mean that the balance reached by the Law Society was unreasonable.

30. The Law Society submits that reasonableness is the applicable standard of review to be applied to its decision not to approve TWU's proposed law school, both in terms of the scope of its powers under the *Legal Profession Act* and its balancing of *Charter* rights in the exercise of its statutory duty.

31. However, even if the standard of correctness is applied to these considerations, the Law Society submits that its Resolution must be upheld.

II. BACKGROUND FACTS

A. The Role of the Law Society

32. As the guardian of the public interest in the administration of justice, the Law Society is statutorily required to preserve and protect the rights and freedoms of all persons and to protect the integrity and honour of the legal profession.

33. The statutory obligations of the Law Society, as a self-regulating body, are outlined in section 3 of the *Legal Profession Act* as follows:

> 3. It is the object and duty of the society to uphold and protect the public interest in the administration of justice by
>
> (a) preserving and protecting the rights and freedoms of all persons,
>
> (b) ensuring the independence, integrity, honour and competence of lawyers,
>
> (c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,
>
> (d) regulating the practice of law, and
>
> (e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law. [1]

34. The Law Society is, by statutory design, a democratic organization. The Benchers are the governing council of the Law Society, and the *Legal Profession Act* provides for the election of Benchers by the Law Society's members.[2] There are currently twenty five elected Benchers, and five appointed Benchers.[3]

35. The *Legal Profession Act* provides broad statutory powers to the Benchers with which to govern and administer the affairs of the Law Society.

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[1] *Legal Profession Act*, SBC 1998, c 9 ("***Legal Profession Act***" or "***LPA***").
[2] *LPA*, ss. 4, 5, 7.
[3] Law Society of BC website, *Benchers*, <http://www.lawsociety.bc.ca/page.cfm?cid=50>. The *Legal Profession Act* provides that there can be a maximum of six appointed Benchers. See *LPA*, s. 5(1). The Law Society Rules (the "**Rules**") provide the number of elected benchers, based on the districts set out in the Rules. See Rule 1-20(1).

36. These powers include the taking of "any action they consider necessary for the promotion, protection, interest or welfare of the society" and "any action consistent with this Act by resolution".[4] For greater clarity, the *Legal Profession Act* provides that these powers are not limited by any other specific power or responsibility given to the benchers under the *Act*.[5]

37. The Benchers are also empowered generally to make rules for the governing of the society, lawyers, law firms, articled students and applicants, and for the carrying out of the *Legal Profession Act*. This power includes the ability to make rules for the purposes of discharging the Law Society's statutory mandate set out in section 3. The *Act* stipulates that this general power is not limited by any specific power or requirement under the *Act.*[6]

38. Consistent with the Law Society's broad statutory mandate and powers, the Benchers have the authority under the *Legal Profession Act* to set requirements, including but not limited to academic requirements, necessary to obtain admission to the Law Society, and to adopt rules establishing those requirements.[7]

39. Pursuant to this statutory authority under the *Legal Profession Act*, the Benchers have set out Rules relating to the approval of law schools.[8] It is through this mechanism that the Law Society is able to ensure that its statutory mandate is fulfilled in terms of access to a legal education which is a prerequisite to admission to the bar.

40. Among the requisite qualifications for enrolment is proof that the applicant has completed the requirements for a degree "from an approved common law faculty of law in a Canadian university". The Benchers may adopt a resolution declaring that the law school is not or has ceased to be an approved faculty of law, under Rule 2-27 (4.1) ("**Subrule 4.1**").

41. In determining whether to exercise the discretion conferred by Subrule 4.1, as with any discretion under the *Legal Profession Act*, the Law Society must consider and seek to

[4] *LPA*, ss. 4(2), 4(3).
[5] *LPA*, s. 4(3).
[6] *LPA*, ss. 11(1), 11(2).
[7] *LPA*, ss. 20, 21.
[8] See Law Society Rules, Rule 2-27.

advance the objectives set out in its statutory mandate, and must additionally consider the Law Society's *Charter* obligations as a public body.

42. This involves a consideration not only of the impact of a law school's admission practices and policies on prospective applicants to the Bar. It also requires attention to the overriding obligation of the Law Society to act in furtherance of the public interest, and to promote public confidence in the administration of justice.

43. This objective is achieved in particular by ensuring the accessibility to, and diversity in the legal profession, the integrity and honour of the legal profession, and the obligation of all participants in the administration of justice to preserve and protect the equal rights and freedoms of all persons.

44. In exercising its statutory mandate, the Law Society is concerned about barriers to equal access to the legal profession in British Columbia.

45. The Benchers and the Law Society as a whole have taken a number of concrete steps to further the objectives of achieving inclusivity and diversity in the legal profession, including by establishing a dedicated Equity and Diversity Advisory Committee of the Law Society. The Equity and Diversity Advisory Committee was established under the power granted to Benchers in the *Legal Profession Act* to further the Law Society's statutory mandate.[9]

46. The Equity and Diversity Advisory Committee is designed to promote the principles of equity, diversity, accessibility and inclusiveness in the Law Society and the legal profession generally.[10] The Advisory Committee's 2012 report entitled "Towards a More Representative Legal Profession: Better practices, better workplaces, better results",

[9] *LPA*, s. 9.

[10] Concerns regarding the inclusivity of the legal profession have prompted the Canadian Bar Association's Sexual Orientation and Gender Identity Committee to launch a comprehensive research project, specifically focusing on the barriers faced by sexual minorities in the practice of law. See Affidavit #1 of Tracy Tso, sworn January 16, 2015 ("**Tso Affidavit #1**"), Exhibit 'D', at paras 49-59.

observes this commitment, and emphasizes that "the public is best served by a more inclusive and representative profession."[11]

47. The Report also makes the following observations with respect to the Law Society's responsibility to ensure equal access to and the diversity and inclusivity of the profession:

- "Law firms are encouraged to consider the competitive advantages of increasing diversity, in order to meet clients' demands for diversity in legal representation, to better serve an increasingly diverse society…"
- "The legal profession is grounded in the belief that individual effort, competence, talent and skill are the keys to success. Lawyers are assumed to be recruited, retained and advanced based on objective merit criteria, with the most deserving rising to the top."
- "Lawyers should also be supported in developing skills and competencies in addressing bias, and responsibility for dealing with discrimination should be shared by everyone, not left to visible minority lawyers and Aboriginal lawyers."
- "The Law Society believes that everyone in the legal community shares responsibility for promoting equality and diversity in the profession…"
- "Members of the legal community need to work together to create equal opportunities for all lawyers to succeed."
- "The Law Society of British Columbia values the principles of equity, diversity, accessibility and inclusiveness. In the face of shifting demographic trends and an aging profession, the public is best served by a more inclusive and representative profession. The Law Society supports the promotion of a profession that reflects the diversity of the province…"[12]

48. In January 2014, the Advisory Committee made the following recommendations to the Benchers, highlighting in particular the Law Society's interest in the advancement of equity seeking groups – such as LGBTQ persons – and ensuring diversity and inclusivity in the profession and on the bench:

> 1. Be pro-active in selecting a more diverse list of lawyers and the Law Society's candidates for appointment to the Federal Judicial Advisory Committee;
>
> 2. Investigate and endeavor to address the systemic barriers impacting the retention and advancement of lawyers from equity seeking groups, through the development

[11] See Affidavit #2 of Timothy McGee, QC, sworn January 26, 2015 ("**McGee Affidavit #2**"), at paras 23-25, Exhibit 'T', at 614.

[12].McGee Affidavit #2, Exhibit 'T', at 614-621.

> and implementation of effective programs and more informal ways of supporting lawyers from equity seeking groups.
>
> 3. On an annual basis, monitor and assess the effectiveness of Law Society of British Columbia initiatives relating to the retention and advancement of lawyers from equity-seeking groups, in light of the objective of improving diversity on the bench; and
>
> 4.Continue to collaborate with organizations representing lawyers from equity seeking groups in British Columbia to help disseminate information on the judicial appointments process, and to facilitate the career advancement of lawyers from equity seeking groups.[13]

49. This motion was carried unanimously by the Benchers.

50. These commitments and obligations are also expressly recognized in the Law Society *Code of Professional Conduct*, which prohibits lawyers from acting in a discriminatory fashion, and states that lawyers have "a special responsibility to comply with the requirements of human rights laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in human rights laws."[14]

51. Similarly, the Barristers Oath itself, to which all members must swear prior to admission to the bar, includes the obligation of lawyers to "uphold the rule of law and the rights and freedoms of all persons".[15]

52. More generally, it should be noted that the Law Society, like other law societies across the country, is a self-regulating body. This means that while the Legislature has provided a framework within which the Law Society should operate, the obligation is on the Law Society itself to adopt rules, formulate policies, and make decisions with respect to the governance of the legal profession that are consistent with its overall mandate to uphold and protect the public interest in the administration of justice, as well as its other statutory and constitutional obligations.

53. As the Supreme Court of Canada has recognized, actively promoting and safeguarding the public interest is the sole basis upon which the privilege of self-regulation can be justified: "The privilege of self-government is granted to professional organizations only in

[13] See McGee Affidavit #2, Exhibit 'G', at 359-360.
[14] *Code of Professional Conduct for British Columbia*, s. 6.3, Harassment and Discrimination (the "***Code***").
[15] Affidavit #3 of Tim McGee, QC, to be sworn ("**McGee Affidavit #3**").

exchange for, and to assist in, protecting the public interest with respect to the services concerned".[16]

54. Legislatures have conferred special privileges and responsibilities on self-governing professions on the understanding that those privileges and responsibilities will be exercised for the benefit of society as whole.[17] As explained in the McRuer Report on civil rights: "The granting of self-government is a delegation of legislative and judicial functions and can only be justified as a safeguard to the public interest."[18]

55. The *LPA* expressly states that the Law Society has the obligation to act in the public interest in the administration of justice, which includes ensuring the honour and integrity of the legal profession as a whole, preserving and protecting the rights and freedoms of all persons as well as promoting public confidence in the legal system.

B. The Role of Law Schools in Promoting the Values of the Legal System, and Fulfilling the Objects of the Law Society

a) The Law Society's Role in Legal Education in BC

56. The Law Society's obligation to make rules and set requirements for admission to the bar, in a manner that will fulfil its statutory mission to uphold and protect the public interest in the administration of justice, necessarily entails ensuring equal access to legal education. This is essential to fostering diversity and inclusivity in the profession and, ultimately, in the judicial branch of government.

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[16] *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para 36. See also Adam Dodek, "Case Comment: Forsaking the Public Interest: *Law Society of New Brunswick v. Ryan*" (2002) 25 Advocates' Quarterly 230 at 230 ("**Dodek**") (referring to "the protection of the public" as "the core value that justifies the self-regulation of the legal profession"). See also *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869 at 41 ("***Pearlman***") (provincial legislation "manifestly intends to leave the governance of the legal profession to lawyers", and the "self-governing status of the professions, and of the legal profession in particular, was created in the public interest" (emphasis added)).

[17] WH Hurlbert, *The Self-Regulation of the Legal Profession in Canada and in England and Wales* (Calgary and Alberta: Law Society of Alberta and Alberta Law Reform Institute, 2000) at 145, cited in Dodek, *supra* at 238.

[18] See *Royal Commission Inquiry on Civil Rights,* Report Number One (Toronto: Queen's Printer, 1968), vol 3, 1162, cited in Dodek, *supra* at 237.

57. As described above, lawyers are expected and required to uphold the rule of law and fundamental values that underpin our democratic society. The honour and integrity of the profession, and the public faith and confidence in the justice system, depends on the legal profession complying with this duty.

58. Law schools play an integral role in this mission. An education in the law is not simply a vehicle to obtain the great privileges, benefits and responsibilities associated with a law degree; it is "fundamental training in citizenship or membership in a community".[19] As Mark MacGuigan has explained:

> [T]he public has a vital stake in legal education oriented to justice as well as to law, because a legal profession with that orientation is crucial to democracy.
>
> Law is the principal means to the attainment of justice, and society cannot accept a system of legal education, any more than it can tolerate a legal profession, which does not recognize its essential orientation to the achievement of justice. Such a perspective defines the public dimension of legal education.[20]

59. The "achievement of justice" begins with access to a legal education. Law schools are the initial gateways to the profession. Therefore, their admission policies are of critical importance in the administration of our justice system. They must provide equal access to all groups in our society, consistent with the rights and freedoms of everyone under the law.

60. The Law Society has always played an integral role in the provision of legal education in British Columbia.

61. The early iterations of the *Legal Professions Act* provided that the Benchers shall have wide powers to ensure the education of lawyers, including the specific powers to:

> make rules for the improvement of legal education, and may appoint readers and lecturers with salaries, and may prescribe the subjects and mode of study of

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[19] W. Wesley Pue, *Law School: History of Legal Education in British Columbia Legal Education* (Vancouver: Continuing Legal Education, 1995) at xxiii ("**Pue**").

[20] RJ Matas & DJ McCawley, eds, *Legal Education in Canada : reports and background papers of a National Conference on Legal Education held in Winnipeg, Manitoba, October 23-26, 1985* (Montreal: Federation of Law Societies of Canada, 1987) at 177 ("***Legal Education in Canada***").

> students-at-law and articled clerks, and rules for the attendance of students and articled clerks at readings or lectures
>
> [and to] make rules for final examinations of students-at-law and articled clerks as conditional to call to the Bar or admission as Solicitor[21]

62. In pursuance of this plenary statutory mandate over the provision of legal education in the province, the first law schools in the province were funded, organized, governed and taught by the Law Society. These schools were established in Vancouver and Victoria in the early 1900s by the Benchers at the urging of the students themselves, who argued that the system of legal training – primarily through a five-year articling process – was inadequate in light of the grave responsibility of members of the legal profession.[22]

63. One student, who later became a Justice of the Supreme Court of British Columbia, observed in 1911 that the importance of law schools stemmed from the fact that it is "from the Bar that ultimately must be selected the judges upon whom devolves the discharge of the most solemn and grave duties", and that the Bar also produces a "large number of our legislators, who participate to a marked degree in the making of our laws".[23]

64. Until 1945, the obligation to ensure that incoming members of the Bar were adequately educated was borne solely by the Law Society itself. There were no University-based law schools in the province until the post-war era; lawyers were either trained on the job, or in the schools and education programs set up by the Law Society.

65. The critical importance of the enterprise of legal education in our society was recognized by the early Law Society educators. The first Dean of the Law Society's Vancouver Law School, R. M. MacDonald, observed in 1920 that the objective of legal education was to "saturate the minds of the students in those elementary principles that lie at the base of all law, and upon which our ideas of freedom and justice exist".[24]

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[21] See *Legal Professions Act*, 1884, 47 Vict, c-18, ss. 32(2), 32(3); *Legal Professions Act*, 1888, 51 Vict, c-72, s. 31(2); *Legal Professions* Act, RS 1897, c. 24, s. 37; *Legal Professions Act*, RSBC, 1911, c-136, ss. 36(2).
[22] See generally Pue, *supra* at 36-44; Alfred Watts, QC, *History of the Legal Profession in BC, 1869-1984* (Vancouver: Evergreen Press, 1984) at 55-57 ("***History of the Legal Profession***").
[23] "Correspondence", *Vancouver Law Students Annual* Vol. 1 (1911) at 17 (PABC, Victoria: UBC Law Library Special Collections), quoted in Pue, *supra* at 37.
[24] Pue, *supra* at 48.

66. While the Law Society resisted efforts to "cede all of its authority over admission to the legal profession to the university",[25] it nevertheless played an integral role in promoting the first University-based law school in the province, at the University of British Columbia, in 1946.[26]

67. After the UBC Law School was established, with the support and urging of the Law Society, the UBC faculty was provided with the input of the Law Society committee on legal education. Indeed, it has been recognized that the early UBC law school could not have functioned without the active support of the legal profession and the Law Society.[27]

68. This historical role of the Law Society in the provision and maintenance of standards for the provision of legal education in the province has been maintained by the Legislature in the current iteration of the *Legal Profession Act*.

69. The Law Society has the duty to establish standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission;[28] may make rules respecting requirements, including but not limited to academic requirements, for the enrolment of articling students and for admission to the bar, and to establish and maintain an educational program for articled students;[29] and may take any steps it considers advisable for "establishing and maintaining or otherwise supporting a system of legal education".[30]

70. As the history of legal education in this province demonstrates, there has never been a complete separation between admission to the bar and the provision of legal education. To the contrary, in the first half of the 20th century, both functions were performed *solely* by the Law Society, through its statutory mandate over admissions and legal education.

71. The Law Society's legal education role has continued to this day, through the Law Society's statutory obligation to establish standards and programs for the education,

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[25] Pue, *supra* at 127.
[26] See generally Pue, *supra* at 130-144.
[27] Pue, *supra* at 172-173, 185-187, 193-195.
[28] *LPA*, s. 3(c).
[29] *LPA*, s. 20(1)(a), 20(2).
[30] *LPA*, s. 28(a).

professional responsibility and competence of lawyers and of applicants for call and admission, and ultimately, through the statutory power and obligation to control admissions to the bar.

b) The Mission of Law Schools as Gateways to the Legal Profession

72. With the advent of the new co-venture between the Law Society and UBC in 1946, the critical importance of the enterprise of legal education was widely acknowledged. The speakers at the opening ceremony of the UBC law school spoke about how a legal education consisted of more than learning a trade.

73. UBC President Norman MacKenzie, for instance, stated that the training of practicing lawyers was important, but that a legal education provided much more than that: "it contributes much to all the profession and to the community and the nation".[31] On the same occasion, a senior barrister remarked that "the progress of public and semi-public activities depends to a very large extent upon the quality and integrity and the purposive effort of members of the Bar", and that "the tone of the community, good, bad, or mixed, is set to a very considerable extent by our profession".[32]

74. As these speakers understood, law schools are not, and have never been, simply professional trade schools set up solely for the benefit of a select few, nor are they merely designed to ensure the technical competence of lawyers. They must also reflect the values of our society by providing equal access to the legal profession and hence the judicial branch of government.

75. As Professor Carrington put it:

> If there can be but one law, and it must be interpreted and administered as evenly as possible, the judges and lawyers must inform their understanding with values that are shared within the profession and consonant with the moral conventions of the people to be served and governed. Thus, if there is to be but one law, there can be but one legal profession, and that profession cannot be a preserve for any group or class. If the society to be served is inclusive, the legal profession needs to be so as well...

[31] Quoted in Pue, *supra* at 156.
[32] Quoted in Pue, *supra* at 157.

> To have one law for all requires one legal profession to interpret and administer it. And for the legal profession to be one, there needs to be an acknowledged common core of shared public values informing the professional work of its members.[33]

76. In the book *Legal Education in Canada,* Professor Alvin A. J. Esau states that the central institutions of the legal system – of which law schools are among the most important – must themselves reflect the fundamental values of the legal order:

> Any focus on the many particular ethical dilemmas involving the lawyer-client relationship must be placed first within the context of the much broader examination of the changing social context and the social role of the profession within it. The focus cannot only be on particular *situations* that raise ethical concerns but also on the *systems* of law. Personal integrity alone is not enough if the institutions and processes of the law systematically lack integrity in the first place. The focus cannot be only on the duty of the lawyer, but also must include the duty of the profession collectively.[34]

77. It is therefore essential to the proper functioning of our system of justice that law schools comply with the fundamental values and tenets of the legal system of which they are an integral part, including, most importantly, the legal principles regarding the equality and human dignity of all persons.

78. Chief Justice Dickson made this point in a speech entitled "Legal Education". In his speech, the Chief Justice discussed the primary goal of legal education, which was not only to ensure competence of lawyers, but also to ensure a commitment to the fundamental values of our society. To the Chief Justice, a legal education is no more or less than "the foundation of the entire legal system and profession".[35]

79. As the Chief Justice pointed out, like others before him, law schools must provide an education in the "broad sense, not just professional training". Law schools should not be limited to mere "training grounds where students learn the skills and rules that they will apply on a daily basis once they are in practice".[36] The Chief Justice continued:

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[33] PD Carrington, "One Law: The Role of Legal Education in the Opening of the Legal Profession Since 1776" (1992) 44 Fla L Rev 501 at 505 (emphasis added).
[34] *Legal Education in Canada*, *supra* at 314 (emphasis by underlining added).
[35] Chief Justice Brian Dickson, "Legal Education" (1986) 64:2 Can Bar Rev 374 ("**Dickson**") at 375.
[36] Dickson, *supra* at 376.

> "If the legal profession as a whole is to help solve some of the seemingly intractable difficulties faced by the poor, our native people, other minorities, new immigrants and others then, it seems to me, the process must start in Canadian law schools"[37]

80. The Chief Justice emphasized that law schools have a special obligation as "gatekeepers to the legal profession", because "the ethos of the profession is determined by the selection process at the law schools".[38]

81. The Chief Justice recognized that it is of paramount importance, in particular, to "ensure equality of admissions". As he put it, if the ideal of equality of opportunity were to "be realized in our profession then law schools, and ultimately the legal profession, must be alert to the need to encourage people from minority groups and people from difficult economic circumstances to join our profession".[39]

82. This goal is obviously not met if a law school discriminates against certain groups in its admissions policies.

c) The Scarcity of Law School Seats and Access to Legal Education

83. Access to law schools in Canada, and therefore to the legal profession and judicial branch of government, is limited.

84. Thus, not all persons who are otherwise qualified to be lawyers are able to attend law school in Canada.[40] As TWU submitted in its application for its proposed law school, "(c)ompetition to get into existing law schools is now fierce, with many arguably qualified candidates unable to access a legal education."[41]

85. In Canadian common law schools, the ratio between applications received by law schools, and those accepted, range from one out of every five applicants to one out of every sixteen

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[37] Dickson, *supra* at 378.
[38] Dickson, *supra* at 378.
[39] Dickson, *supra* at 377.
[40] See *Trinity Western University v The Law Society of Upper Canada*, 2015 ONSC 4250 at para 67 ("***TWU v. LSUC***") ("it is clear that, in this case, being eliminated from TWU as a place to attend law school means, for many persons, that their likelihood of gaining acceptance to any law school is decreased. Absent access to a law school, of course, persons cannot pursue a legal education or their dream of becoming a lawyer").
[41] McGee Affidavit #2, Exhibit 'D', at 121.

applicants,[42] with an average of one law school seat for every eleven applications over the 2011-2014 period.[43]

86. In this Province, the University of British Columbia typically receives around 1,700 applications for approximately 180 seats, while the University of Victoria, received 1,309 applicants for 110 seats.[44] This amounts to only one out of every twelve applications being accepted for placements at these law schools, which is slightly lower than the national average at common law schools.[45]

87. Because many applicants will apply to more than one school, it can be difficult to identify exactly how many otherwise qualified persons were unable to attend law school due to a lack of available spots. However, the nationwide statistics suggest that there are more than three law school applicants for every available law school seat.[46]

88. As a result of this fierce competition, the presence of a law school that caters to an insular group of people defined by common personal characteristics, *to the exclusion of others who do not share those personal characteristics*, will have the necessary effect of giving the excluded persons a lesser chance of attending law school than those who also have access to the exclusionary law school, and ultimately, a lesser chance of gaining access to the legal profession and judicial branch of government.

89. Denying access to a legal education to certain groups in society also undermines the integrity of our legal system and hence public confidence in the administration of justice.

C. TWU and the Community Covenant as a Condition of Access

a) Overview of TWU and its Mission

90. TWU is an educational institution committed to the promotion of evangelical Christian values, and provides evangelical Christians with an opportunity to come together and learn

[42] Tso Affidavit #1, Exhibit 'J', at paras 32-33, and sub-exhibits 'F' and 'G' to be included.
[43] Tso Affidavit #1, Exhibit 'L', at para 6.
[44] Tso Affidavit #1, Exhibit 'J', at paras 32-33, sub-exhibits 'F' and 'G', to be included.
[45] Tso Affidavit #1, Exhibit 'L', at paras 6-7.
[46] Tso Affidavit #1, Exhibit 'L', at para 7.

with other members of their religious community. TWU is affiliated with the Evangelical Free Church of Canada ("**EFCC**"), which is an association of churches that adhere to a common statement of faith.[47]

91. TWU describes its mission as:

> 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.[48]

92. Notwithstanding this mission, TWU is not an insular religious organization, a seminary school or a church. It does not only or even primarily confer theological or religious degrees.[49] It is an institution of higher education that grants secular degrees, and TWU seeks the accreditation and approval of public bodies for that purpose.

93. TWU's proposed law program is non-religious and is not based on scripture – unlike its undergraduate programs, religious studies courses are not required as part of the proposed law school curriculum.[50] TWU's law school proposal states that the objective of the proposed law school will be "training students for the profession and ethical demands of the practice of law" and that the overarching curricular goal is the "development of core competencies that are the bedrock of the profession".[51]

94. TWU was initially authorized under the *Trinity Junior College Act*,[52] which was amended by *An Act to Amend The Trinity Western College Act* ("***TWU Act***").[53] Among the statutory objects of TWU is the obligation to provide an education for "young people of any race, colour, or creed… with an underlying philosophy and viewpoint that is Christian".[54] The

[47] Affidavit #1 of Robert Wood, sworn December 12, 2015 ("**Wood Affidavit #1**"), at paras 53-54.
[48] Wood Affidavit #1, Exhibit 'U', 154.
[49] Wood Affidavit #1, at paras 21-25.
[50] Wood Affidavit #1, at para 56.
[51] McGee Affidavit #2, Exhibit 'D', at 118-119.
[52] *Trinity Junior College Act*, S.B.C. 1969, c. 44, as amended.
[53] *An Act to Amend The Trinity Western College Act*, S.B.C. 1895, c. 63 ("***TWU Act***").
[54] *TWU Act*, s. 3(2).

Petitioners take the position that TWU is open to all, "regardless of their personal beliefs".[55]

95. The *TWU Act* does not expressly, or implicitly, condone or promote discrimination, on the basis of sexual orientation or otherwise. The license to operate "with an underlying philosophy and viewpoint that is Christian", is qualified by the requirement that TWU must be open to all young people.

96. There is also no evidence that evangelical Christianity requires isolation from those who have different beliefs or different moral commitments in the provision of legal education; to the contrary, TWU's evidence is that evangelical Christianity requires engagement with others, in order to further the Church's mission.[56]

b) The Mandatory Covenant

97. As a condition of membership in the TWU community, TWU requires students and faculty to affirm and adhere to a Community Covenant, described in more detail below. Signing and adhering to the Covenant is not optional for persons seeking attendance at TWU.

98. TWU describes its Covenant as a "solemn pledge in which members place themselves under obligations" to "accept reciprocal benefits and mutual responsibilities" as outlined in the Covenant. It is a "contractual arrangement" into which all members must enter in order to be admitted to TWU. According to the Covenant, it "is vital that each person who accepts the invitation to become a member of the TWU community carefully considers *and sincerely embraces this community covenant*."[57]

99. In signing the Covenant, all students and faculty affirm as follows:

- I have accepted the invitation to be a member of the TWU community *with all the mutual benefits and responsibilities that are involved*;

[55] Petition of Trinity Western University and Braydon Volkenant, filed December 18, 2014 (the "**Petition**"), at para 9.
[56] Affidavit #1 of Samuel Reimer, sworn December 10, 2014 ("**Reimer Affidavit #1**"), at paras 24, 43-44; Affidavit #1 of Jeffrey Greenman, sworn December 10, 2014 ("**Greenman Affidavit #1**"), at paras 33-34.
[57] Wood Affidavit #1, para 7, Exhibit 'C', at 008.

- I understand that by becoming a member of the TWU community *I have also become an ambassador of this community and the ideals it represents;*
- I have *carefully read and considered TWU's Community Covenant and will join in fulfilling its responsibilities while I am a member of the TWU community*.

100. The Covenant embraces a commitment to the institution of marriage, defined exclusively as the union between one man and one woman. Under the section titled "healthy sexuality", the Covenant states that "according to the Bible, sexual intimacy is reserved for marriage between one man and one woman."[58]

101. A footnote in the Covenant refers to a biblical passage denouncing same-sex intimacy as "vile", "against nature", "shameful" and "unseemly".[59] According to the Petitioners' evidence, it is consistent with evangelical Christianity to view same-sex intimacy with "unqualified disapproval", as "sexually immoral", "impure", "sinful", "contrary to nature", and "an abomination".[60]

102. As a result of this mandatory commitment in the Covenant, LGBTQ people can be admitted to TWU's proposed law school only if they agree to abstain from what the Covenant treats as their sinful and deviant sexual behavior. They must effectively renounce their sexual identity and treat their right to marry as a nullity for the duration of their education at TWU's proposed law school. Persons in marriages that are considered legitimate – which is all opposite-sex marriages – are under no such burden.

103. Given the obligation of same-sex married persons to renounce their sexual identity as a condition of admission to TWU, the Covenant effectively bars LGBTQ Canadians from attending TWU.

104. Although it is primarily this discriminatory impact that has led to the Resolution before this Court, it is important to highlight that the Covenant requires further commitments from students that impose discriminatory impacts upon other vulnerable and historically disadvantaged individuals or groups.

[58] Wood Affidavit #1, Exhibit 'C', at 011.
[59] Wood Affidavit #1, Exhibit 'C', at 010, citing Romans 1: 26-27.
[60] Reimer Affidavit #1, at para 31; Greenman Affidavit #1, at paras 43-49.

105. The requirement in the Covenant to abstain from sexual intimacy outside of (heterosexual) marriage imposes a discriminatory impact on the basis of the marital status, as common law couples are treated unequally. Persons in long term, committed common law marriages are effectively prohibited from attending TWU, because they have not had their marriage solemnized in the manner TWU requires for admission. The Covenant seeks to deny persons the choice whether or not to marry, as a condition of admission to scarce law school places at TWU.

106. The Covenant also includes an obligation to uphold the "God-given worth" of all persons "*from conception to death*".[61] The Covenant refers to specific passages from the Bible which leave no doubt that the effect of this commitment is to prohibit women from accessing safe and legal abortion services, which have been held to be constitutionally protected.

107. This aspect of the Covenant imposes a discriminatory impact on women, who are required to renounce their right to access safe and legal abortion services as a condition of admission to TWU.

108. Moreover, women must forgo *in advance* the freedom to access safe and legal medical services to terminate their pregnancy, or what the circumstances surrounding that decision may be, with no certainty as to when or if such a profoundly personal decision will need to be made. TWU's proposed law school would force women to choose: access to law school, with all the benefits and privileges that come with it, or preserving the freedom and autonomy over their own fundamentally personal decisions respecting their bodies and wellbeing. Men at TWU will face no such dilemma.

109. Finally, the Covenant states that:

> The University's acceptance of the Bible as the divinely inspired, authoritative guide for personal and community life is foundational to its affirmation that people flourish and most fully reach their potential when they delight in seeking God's purposes, and when they renounce and resist the things that stand in the way of those purposes being fulfilled. This ongoing God-enabled pursuit of a holy life is an inner transformation that actualizes a life of purpose and eternal significance.

[61] Wood Affidavit #1, Exhibit 'C', at 009.

> Such a distinctly Christian way of living finds its fullest expression in Christian love, which was exemplified fully by Jesus Christ, and is characterized by humility, self-sacrifice, mercy and justice, and mutual submission for the good of others.[62]

110. By including the obligation to commit to the Bible as "the divinely inspired, authoritative guide for personal and community life" and to give a "commitment to the person and work of Jesus Christ as declared in the Bible", and confirming TWU's commitment "to be a distinctly Christian university",[63] TWU, through the imposition of the Covenant, implicitly if not explicitly excludes those who adhere to another faith or to no faith at all.

111. Overall, the Covenant does not merely recite values or principles that reflect the evangelical Christian worldview; it requires *conduct* and *behaviour* consistent with those values and commitments. It is not simply an inspirational document, or a solemn urging to follow TWU's moral commitments, it is a command to do so.

c) Enforcement of the Covenant

112. The Covenant states that TWU "provides formal accountability procedures to address actions by community members that represent a disregard for this covenant", the procedures of which are outlined in the TWU Student Handbook.[64]

113. The Student Handbook referred to in the Covenant includes a "Student Accountability Policy", which provides:

> Each student who accepts an invitation of admission to Trinity Western University has agreed to accept the Community Covenant and/or policies and guidelines of the University for living in accordance with the community standards of this private, creedal Christian academic community. These are specified in the Community Covenant contract that each student signs. It is the responsibility of each student to clarify any misunderstanding that may arise in their mind before committing their signature to this contract. The University does not view a student's agreement to comply with these standards and guidelines as a mere formality. Therefore, students who find themselves unable to maintain the integrity of their commitment should seek a living-learning situation more acceptable to them.[65]

[62] Wood Affidavit #1, Exhibit 'C', at 008-009.
[63] Wood Affidavit #1, Exhibit 'C', at 008-009.
[64] Wood Affidavit #1, Exhibit 'C', at 012.
[65] Wood Affidavit #1, Exhibit 'Y', at 198.

114. The Handbook states that it is the responsibility of the Assistant Directors of Community Life to "receive complaints and investigate possible violations of Community Covenant and/or policies and guidelines of the University" and that "(i)f a student, in the opinion of the University, is unable, refuses or fails to live up to their commitment, the University reserves the right to discipline, dismiss, or refuse a student's re-admission to the University".[66]

115. The range of punishments available for a breach of the Covenant or other TWU guidelines includes an official warning, probation, suspension and ultimately, expulsion.[67]

116. Moreover, the Covenant tasks all members of the TWU community with ensuring that each other adhere to and abide by the principles in the Covenant. The Covenant states that "(e)nsuring that the integrity of the TWU community is upheld may at times involve taking steps to hold one another accountable to the mutual commitments outlined in this covenant. As a covenant community, all members share this responsibility."

117. Similarly, the Student Handbook states that it is "it is expected and encouraged that students, staff and faculty will hold each another accountable to the commitments each has made to the University and community". With respect to what it calls "informal accountability procedures", the Handbook states:

> Students are encouraged to informally challenge one another and hold each other accountable to the Community Covenant and/or policies and guidelines of the University out of genuine concern for others within the University community. Community members, directly working with students in leadership or representative roles, may be notified of violations or incidents involving a student working within their care.[68]

118. Therefore, students and faculty are expected to be involved in the policing and enforcement of the behavioral norms and prohibitions contained in the Covenant.

[66] Wood Affidavit #1, Exhibit 'Y', at 199.
[67] Wood Affidavit #1, Exhibit 'Y', at 201.
[68] Wood Affidavit #1, Exhibit 'Y', at 199.

d) Conclusion on the Effect of the Covenant on Applicants and Students

119. The Covenant requires adherence to the behavioral code of conduct, as a condition of admission and continued acceptance at the TWU's proposed law school. This constitutes a direct barrier to admission for those whose personal characteristics or identity preclude them from acting in a way consistent with that Covenant.

120. The necessary result of these obligations and prohibitions, therefore, is to effectively exclude various persons from participation in TWU's proposed educational program.

121. As developed further below, the effective exclusion of persons from scarce law school spaces on the basis of their immutable personal characteristics, and impeding equal access to the legal profession and the judiciary, is directly contrary to and inconsistent with the Law Society's statutory mandate to advance the public interest in the administration of justice, to maintain public confidence in the legal profession and legal system, to ensure equal access to the bench and bar, and to protect and uphold the rights and freedoms of all persons.

D. Procedural Background

122. In 2010, Canada's law societies agreed on a uniform national requirement that sets out the competencies and skills that law schools must impart to graduates in order to be approved for the purposes of graduating students eligible for admission to provincial bars. The national requirement is administered by the Federation of Law Societies of Canada ("**FLSC**"), a national coordinating body for Canada's provincial and territorial law societies.

123. On June 15, 2012, TWU submitted its proposal for a new law school program to the Canadian Common Law Program Approval Committee of the FLSC (the "**Approval Committee**"), as well as to the Minister for approval under the *Degree Authorization Act*.[69]

124. In light of the controversy surrounding the Covenant at TWU's proposed law school, the FLSC established a Special Advisory Committee (the "**Advisory Committee**") in April of

[69] *Degree Authorization Act*, SBC 2002, c 24.

2013 to determine if any additional considerations should be taken into account in deciding whether TWU should be authorized to provide law degrees.[70]

125. In particular, the Advisory Committee considered whether imposing the Covenant as a condition of admission to TWU posed any barriers to the provision of legal education in the public interest.

126. At the time of TWU's initial application to the Minister and to the FLSC, Law Society Rule 2-27(4) defined academic requirements for admission as "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."

127. The Law Society determined that a rule change was required in order to accommodate the role of the Approval Committee of the FLSC, without abdicating the Law Society's statutory responsibility to regulate admission to the legal profession in the public interest.

128. At a September 27, 2013 meeting, the Benchers unanimously approved an amendment to the Law Society Rules, including the new Subrule 4.1, which states that a common law program would be approved for the purposes of establishing adequate academic qualifications if approval was granted by the FLSC under the national requirement, "unless the Benchers adopt a resolution declaring that it is not or has ceased to be an approved faculty of law." [71]

129. On December 16, 2013, the Advisory Committee issued its report, finding that there was no clear 'public interest' bar to accrediting TWU as an approved institution for the purposes of issuing law degrees.[72] The Approval Committee granted "preliminary" approval to TWU's proposed law school.[73]

130. As a result of the FLSC's preliminary approval, the proposed law school at TWU automatically became an approved faculty of law for the purposes of enrolment in the Law

[70] McGee Affidavit #2, at paras 4-5, and Exhibit 'A'.
[71] See McGee Affidavit #2, Exhibit 'B', at 8.
[72] McGee Affidavit #2, Exhibit 'C', at 43-44 (para 65).
[73] McGee Affidavit #2, Exhibit 'D', at 83 (para 56).

Society's admissions program under Subrule 4.1, subject to any future resolution adopted by the Benchers.

131. On December 17, 2013, Minister of Advanced Education Amrik Virk granted consent to TWU to issue law degrees under the *Degree Authorization Act*.[74]

132. Between January and April of 2014, the Benchers of the Law Society considered whether to adopt a resolution declaring that the proposed faculty of law at TWU would not be an approved faculty of law. The Benchers convened numerous meetings and solicited submissions from the membership of the Law Society and the public regarding the proposed TWU law school.

133. These submissions were voluminous, and provided the Benchers with a wide range of views from the public and the legal community in particular with respect to the impact of approving, or refusing to approve, TWU's proposed school of law. Many wrote in favour of TWU, and TWU itself provided extensive submissions to the Benchers as part of this consultation and consideration process.[75]

134. Many other submissions were highly critical of TWU's requirement that its law students commit to a covenant as a condition on admission, and strongly urged the Benchers to refuse to grant approval to TWU's proposed school of law. These submissions reflected a range of considerations and arguments against approving TWU, including that:

- TWU's Covenant is inconsistent with or contrary to Canadian values;[76]
- if TWU's covenant discriminated on the basis of other prohibited grounds of discrimination, such as race, there would be no question of whether the Law Society should approve TWU's proposed law school, and that the same considerations should apply to its impact on LGBTQ persons;[77]

[74] McGee Affidavit #2, Exhibit 'F', at 354.
[75] Of the submissions received by the Law Society prior to March 4, 2014, a roughly even number of submissions were received in favour of and opposed to approving TWU. Cumulatively, 364 pages of submissions were in favour of TWU, while 420 pages of submissions were opposed. See McGee Affidavit #3.
[76] McGee Affidavit #3, Letter of Graeme Boyd at p. 1; Letter of Michael Doherty, Susan Dawson, & Judi Hoffman at p. 1; Letter of Art Grant at p. 1; Letter of UVic Faculty of Law at p. 3; Letter of UVic Law Students' Society at p. 2.
[77] McGee Affidavit #3, Letter of Kevin Hisko & Mia Bacic at p. 2; Letter of Michael Doherty, Susan Dawson, & Judi Hoffman at p. 1; Letter of Richard Hamilton at p. 2; Letter of Tara Hastings at p. 1; Letter of Mike Preston at p. 1; Letter of Sean Hern at p. 2 and 3.

- TWU's views are not reflective of all Christians, not followed by all Christian denominations, or are irrelevant to freedom of religion;[78]
- TWU's proposed law school would be operating in violation of the BC *Human Rights Code*;[79]
- the Law Society accrediting TWU would impact the public's confidence in the legal profession, would damage integrity of the profession, or would otherwise embarrass the profession;[80]
- discrimination against LGBTQ persons is already very real problems in the legal profession and Canadian society generally, to which the Covenant at TWU's law school would negatively contribute;[81]
- there is a unique value in legal education compared to other educational programs;[82]
- while the focus of discussion has been on the Covenant's discriminatory treatment of LGBTQ applicants, the Covenant also limits reproductive rights of women;[83]
- approving TWU would be incompatible or would otherwise negatively impact the Law Society's mandate and responsibilities;[84]
- there is intense competition for law school spots, and that there are insufficient numbers of law school spots to accommodate the amount of students who want them already;[85]

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[78] McGee Affidavit #3, Letter of Graeme Boyd at p. 1; Letter of Adriaan de Vries at p. 1; Letter of Vincent Orchard at p. 1; Letter of Janine Benedet at p. 2; Letter of UBC Law Faculty, Staff & Students (sent by Mary Anne Bobinski) at pp. 12 & 26; Letter of Mark Meredith at p. 1.

[79] McGee Affidavit #3, Letter of Alexandre Blondin at p. 1-2; Letter of Rebecca Bromwich at p. 3.

[80] McGee Affidavit #3, Letter of Kristen Anderson at p. 1; Letter of Christopher Bettencourt at p. 1; Letter of Mat Brechtel at p. 1; Letter of Jacqueline Fehr at p. 1; Letter of Art Grant at p. 1; Letter of Gabrielle Grant at p. 1; Letter of Sameer Ismail at p. 1; Letter of Eric Kristensen at p. 1; Letter of Dia Montgomery at p. 1; Letter of Glenn Orris at p. 1 and 5; Letter of Ronald MacDonald and Amy Sakalauskas at p. 15; Letter of Jenny Rutherford at p. 1; Letter of Jeffrey Yuen at p. 2.

[81] McGee Affidavit #3, Letter of Cole Caljouw at p. 2; Letter of Tiffany Glover & Margot Liechti at p. 2; Letter of Gabrielle Grant at p. 1; Letter of John McLean at p. 1; Letter of Rebecca Bromwich at p. 3; Letter of UVic Faculty of Law at p. 3; Letter of UVic Law Students' Society at p. 2; Letter of Merel Veldhuis at p. 1; Letter of Mat Brechtel at p. 1; Letter of Holly Vear at p. 1).

[82] McGee Affidavit #3, Letter of Sameer Ismail at p. 1; Letter of Paul Schachter at p. 3; Letter of Richard Berrow at p. 1; Letter of Preston Parsons et al at 3-5; Letter of Denise Reinhardt at p. 2).

[83] McGee Affidavit #3, Letter of UBC Law Faculty, Staff & Students (sent by Mary Anne Bobinski) at p. 30.

[84] McGee Affidavit #3, Letter of Jennifer Ball at p. 1; Letter of Sean Hern at p. 2 and 3; Letter of Ed Levy at p. 4; Letter of Julie Shugarman at p. 2; Letter of Elizabeth Pan at p. 1; Letter of Ronald MacDonald and Amy Sakalauskas at p. 5; Letter of Janine Benedet at p. 2; Letter of West Coast LEAF (Laura Track) at p. 3; Letter of Elizabeth Yip (quoting James Carpick) at p. 2.

[85] McGee Affidavit #3, Letter of Michael Doherty, Susan Dawson, & Judi Hoffman at p. 1; Letter of John Douglas at p. 1; Letter of John McLean at p. 1; Letter of Jenny Rutherford at p. 1; Letter of UVic Faculty of Law at p. 3; Letter of Merel Veldhuis at p. 1.

- accrediting TWU's law school would be contradictory to or inconsistent with the goals, ideals, and responsibilities of the profession;[86]
- a law school enforcing a covenant like TWU's would foster a hostile environment for LGBTQ students and others within it;[87]
- law schools have special obligations to the public, given that they are the only route to the judicial branch of government; [88]
- an institution that welcomes diversity, as TWU claims to do, would not require students to sign away their right to be diverse; [89]
- any benefit derived from TWU's proposed law school to the diversity of legal thought would be negated by the exclusion of others;[90] and
- potential applicants who are otherwise qualified but will not or cannot sign the covenant could be refused entry into the law school in favor of those less qualified but willing to sign it.[91]

135. All of these, and various other perspectives, were before the Benchers at the April 11, 2014 meeting, when the Benchers debated whether to adopt a resolution under Subrule 4.1 declaring TWU to not be an approved faculty of law for the purposes of the Law Society admissions process.

136. The discussions during the April meeting fully canvassed a wide variety of legal and policy-based arguments for and against giving the Law Society's approval to TWU's proposed school of law. The views of individual Benchers ranged considerably, reflecting the significant controversy and division that TWU's proposed law school has generated.

137. Some of the Benchers were, at least initially, of the opinion that the Supreme Court of Canada's decision in *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 ("***BCCT***") legally obliged the Benchers to approve of TWU's proposed law school, despite its discriminatory admissions policy.

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[86] McGee Affidavit #3, Letter of Kevin Hisko & Mia Bacic at p. 1; Letter of Jill Bishop at p. 1-3; Letter of Allison Crane at p. 1; Letter of Lisa Hamilton at p. 2; Letter of Scott Morishita at p. 1; Letter of Julie Shugarman at p. 2; Letter of Gisela Ruckert at p. 1; Letter of Merel Veldhuis at p. 1; Letter of Christina Vinters at p. 1.
[87] McGee Affidavit #3, Letter of James Ball at p. 1; Letter of Jill Bishop at p. 1-3; Letter of Jeffrey Yuen at p. 2.
[88] McGee Affidavit #3, Letter of University of Saskatchewan College of Law OUTLaws at p. 1.
[89] McGee Affidavit #3, Letter of Jill Bishop at p. 1-3.
[90] McGee Affidavit #3, Letter of University of Saskatchewan College of Law OUTLaws at p. 1.
[91] McGee Affidavit #3, Letter of Merel Veldhuis at p. 1.

138. Other Benchers disagreed, focusing on the detrimental impact such a Covenant would have on prospective law students and the corrosive effect that approving a law school with a discriminatory admissions policy would have on the statutory mandate of and public confidence in the Law Society. Others emphasized on the impact of the *Charter* and the Benchers' statutory duties, including whether the public interest would be harmed as a result of TWU receiving the Law Society's imprimatur.

139. A sampling of the views expressed by the Benchers who spoke in favour of the motion to not approve TWU include a broad range of considerations, including the fact that to approve of TWU would not be in the public interest, would violate the Law Society's obligations under the *Charter* and the *Human Rights Code*, and would have a detrimental impact on the public confidence in the Law Society and the inclusivity of legal education, the legal profession, and the legal system in general, and that the Supreme Court's prior decision regarding TWU did not bind the Benchers in law.

140. For instance, Joe Arvay, QC, argued that "it is not in the public interest for the Law Society to approve this law school and I say that this is the ultimate issue that is before us, and not simply whether its students will be academically qualified to be lawyers". Bencher Arvay argued as follows:

> My main objection to this law school is what I see as discriminatory conduct by the Administration of the law school. I object to what I say is the metaphorical sign at the gate at the law school which says no LGBT students, faculty, or staff are welcome. It is this act or conduct of the Administration of TWU that is discriminatory and per se harmful and it is the reason that the Law Society, which is charged with respecting the rights and freedoms of all persons in British Columbia, must refuse to approve this law school. (…)
>
> That admission and hiring policy perpetuate prejudice against LGBT students and faculty and it is irrelevant that this may not be the motive or purpose of the community covenant; all that matters is that it has this effect or impact. (…)
>
> What I fail to understand is how approving this law school in any way balances the rights of religious freedom and the rights of equality. I take no issue with there being a religious law school. I would take no issue with that law school having as one of its core beliefs that same-sex marriage and sexual intimacy that this entails being a sin. What I take issue with is that belief being imposed on those who do not share that belief. No one is asking any of their religious students or faculty to abandon their beliefs. How is it even possible to say that if we refuse to give our

> imprimatur, the state's imprimatur to this law school that we interfere with any of those religious beliefs or for that matter religious practices? But TWU in requiring LGBT students and faculty as an effective condition of entry to the law school to hide their sexual orientation and to reenter the closet that they have been told by the Supreme Court of Canada they no longer need to hide in. [92]

141. A number of the Benchers emphasized that if TWU's Covenant had the effect of excluding racial minorities, there would simply be no debate to be had, and rejected the notion that individuals discriminated against on the basis of sexual orientation should be treated any differently. For instance, Bencher Peter Lloyd addressed some of the arguments in favour of approving TWU, such as the notion that the Law Society should leave it to someone else to decide the issue, and that persons excluded from admission to TWU can simply go elsewhere:

> First, it's not our fight. What makes law students so special? Let somebody else take this case. But we're not commenting on the general right of TWU to operate their institution as they see fit. We are specifically examining an application to accredit a law school in BC. That is our fight. It may be annoying but it distracts us from other more strategic issues. But look around. The decision today will define the Law Society of BC for years to come, argument dismissed. Next, why not just go to UBC? If a law student doesn't like the conditions for entry to TWU, they can always apply elsewhere. Sounds a bit like we don't allow black people in our golf club but they can play somewhere else. But we're asked to approve this law school as being a civil place to train future lawyers. TWU asserts that the training provided will occur in an environmental of respect for Canadian equality law so why will they not even consider amending the offensive clause? Argument dismissed. Alberta may become the back door. This argument asserts that our refusal to approve this law school will cause a problem with national mobility agreements, well yeah, life is messy but [inaudible] of convenience should not outweigh principle. This proposed law school is in BC, it's for others to follow our lead, not vice versa. (…) How can it be in the public interest to accept discrimination in a law school? This time it's about gay students. Another prospective law school might tell us well they accept women but only if they agree to sit separately at the back of the class. Where will we draw the line? (…) This is 2014, this is Canada, and we at the Law Society of BC do not tolerate discrimination. Please join me in voting for the motion. Thank you.[93]

142. Similarly, Bencher Cameron Ward stated:

[92] McGee Affidavit #2, Exhibit 'J', at 394-398.
[93] McGee Affidavit #2, Exhibit 'J', at 405-406.

> I remember that in the 1960s some people in the deep south of the United States were made to feel unwelcome at lunch counters, at the fronts of buses, and indeed in some universities simply because of a characteristic they were born with and could not change, namely the colour of their skin. In my view, making people feel unwelcome anywhere because of their personal characteristics is a particularly repugnant form of discrimination. As a bencher, as a lawyer, and as a Canadian citizen, I feel I have the duty to oppose such discrimination, not to promote or to condone it.[94]

143. Other Benchers highlighted the fact that admission to Law Society is a scarce public good, and that facilitating or approving of unequal access to that good was unacceptable in light of the Law Society's mandate. According to Bencher Jamie Maclaren:

> Now we know that a Canadian legal education is [inaudible]. Admission to Canadian law schools is increasingly competitive and successful admission grants access to a degree that in turn grants access and privilege, affluence, interesting careers and status, indeed, a law degree is a condition for entry to the judicial branch of government. It is within this competitive market that TWU proposes to mete out disadvantage to the LGBTQ community, an equity-seeking group that has historically faced stereotyping, ridicule, assault, imprisonment, and execution because of their identity. It isn't far enough to consider whether we would have the same debate over discrimination against other equity-seeking groups like women, people with disabilities, or racial minorities. Is sexual orientation a somehow more acceptable basis for discrimination? This table has a duty to uphold and protect the public interest in the administration of justice by preserving and protecting the rights and freedoms of all persons, and we as benchers may take any action considered necessary for the promotion, protection, interest, or welfare of the Law Society. In seeking to retain the public's trust and to remain an important and respected institution within our civil society, the Law Society must take every opportunity to condemn discrimination against marginalized people.(…)
>
> Our refusal to approve TWU would not unduly infringe upon the freedom of religion of its students or staff. It would not circumscribe their beliefs nor prohibit their religious rights or practices. It would not stop them from living by the terms of the covenant or from holding views about homosexuality. It would not prevent TWU from operating a law school and issuing law degrees. It would only deny our profession's approval and endorsement of discrimination involved in the covenant.[95]

144. Other Benchers questioned the link between the specific prohibition contained in the Covenant and the freedom to follow one's own religious precepts. Bencher Sharon

[94] McGee Affidavit #2, Exhibit 'J', at 418.
[95] McGee Affidavit #2, Exhibit 'J', at 398-399.

Matthews, QC, recognized the importance of religious freedom and belief, but questioned whether it extended to imposing standards of behavior on others:

> And of course there are versions of Christianity that don't agree with that content but my firm view is that the believer defines their beliefs, that we are not here to say that TWU shouldn't hold those beliefs or those students and faculty of TWU shouldn't hold those beliefs or shouldn't put them at the center of their community. The other part of freedom of religion of course is what is freedom and the question that is, I've been asking myself from the beginning is is it, and it's a very amazing question, is it necessary for one to enjoy freedom of religion to be concerned about what the person sitting next to them in Torts class is doing within the confines of their intimate relationship.(…)
>
> As long as you stay on the belief side of the line, your freedom of religion must be respected. But if it becomes conduct, and the conduct is harmful, then the balance switches to protecting against discrimination. (…)
>
> So while I don't dispute what TWU 2001 says about belief and conduct, I do dispute that if it was properly applied to this covenant, the result would be the same because of the cases that have decided freedom of religion balanced against other rights under Section 1 analyses, and in particular the parts of the covenant which, as Mr. Arvay said, just got passing reference by the majority in TWU number one, starting with discrimination on admissions. That in my view is conduct, not belief. The community covenant implies that there can be sanctions up to dismissal for breaches of the covenant. I understand that to be very important to TWU, that it is a covenant, not simply an articulation of beliefs. I think if it was simply an articulation of beliefs we may not be having this debate or at least the same debate. So I say that is coercive conduct, it is conduct not belief. And the covenant also calls other members of the community into action in policing the covenant. Again, I say that is conduct and not belief and I would say that of those three, my greatest concerns would be the admissions conduct and I - as have been echoed in several of the submissions made to us. I also paid close attention to the fact, in several of the submissions, that the covenant contains some very not just mutual but positive things including respecting the dignity and the worth of all human beings.[96]

145. In a similar vein, Bencher Jamie Maclaren added the following with respect to the coercive nature of the Covenant:

> First is my view of the harm of TWU discriminatory covenant resides in the denial of the full participation of the LGBTQ community in legal academic life and future professional life and not in what future TWU law graduates may do while serving as members of our profession. It is TWU's institutional and apparently non-negotiable act, in other words conduct of discrimination, that is an affront to the

[96] McGee Affidavit #2, Exhibit 'J', at 419-420.

> human dignity of LGBTQ people and it diminishes their public standing that demands our disapproval in the name of equity and fairness. Second, I am not aware of any religious conditions that require attendance at a law school at which there are no gays and lesbians who are able to express their full identity in the defense of law. I am unaware of any faith that requires the specific kind of social isolation or educational enclave that [cuts??] against our society's general goals of great diversity, inclusion, and social integration. In light of that I ask myself and I ask this table where exactly is the untenable [limitation??] of religious freedom in the resolution before us?[97]

146. Finally, Benchers opposing the approval of TWU discussed their obligation to protect minorities and their equal access to legal education and the legal profession, and the harm caused to the LGBTQ population by the Covenant. According to Bencher Lee Ongman:

> I think that the Law Society of British Columbia has to stand up because who else will? Certainly the government has had their opportunity, the Supreme Court, and I think we rank up there where we have to speak up for our, for the rights of those that need to be protected. When we talk about protecting, the *Charter* talks about protecting the rights of minorities and religious freedoms and freedom of speech *et cetera*, I've always looked as that as, and some of the others have mentioned it, I've looked at that as a shield when we are protecting. But in this particular case I think that with the banner, I mean what seems like an attack on a certain small segment of the population, the gay section of our population, I find that is more of a sword. Nobody is saying, is denying TWU the right to have the right to religious beliefs, but there is an attack I think on a minority and I think that I am persuaded by the oath that I've taken for the Law Society to protect all persons. I'm persuaded that the *Charter* can work in our [inaudible] that the Law Society rules to consider the public interest. And I think it is, for me it is in the public interest to shield that part of the population. I think there is harm, there's harm in just that the bar, the door is closed to a segment of the population that are gay and that are married and it's closed to them. And so therefore I'm, and of all the legal opinions and submissions that we've heard, I'm drawn to the Canadian Bar Association's comments, and I keep coming back to that, and so in summary, I want to say that I think that it's the Law Society of BC, if nobody else is going to stand up for them, that we have to remember that that is our role as well in protecting all of the people of British Columbia and I would say that's where we can take a stand.[98]

147. Following the comprehensive discussion, the Benchers voted on a motion to declare the proposed TWU law school to not be an approved faculty of law under Rule 4.1. That motion was defeated by a vote of 20-7.[99] As such, as a result of the FLSC's preliminary

[97] McGee Affidavit #2, Exhibit 'J', at 430-431.
[98] McGee Affidavit #2, Exhibit 'J', at 426-427.
[99] McGee Affidavit #2, Exhibit 'I', at 385.

approval, TWU remained an approved institution for the purposes of Law Society admissions, subject to a future resolution adopted by the Benchers.

148. The Benchers' April 2014 decision provoked palpable dissatisfaction among many members of the Law Society. A Special General Meeting of the Law Society ("**SGM**") was convened on June 10, 2014, and was held in 18 locations across the province. This meeting was initiated by the Law Society membership.[100]

149. At the SGM, the membership considered and debated a resolution directing the Benchers to declare that the proposed law school at TWU is not an approved faculty of law for the purposes of the Law Society's admission program (the "**SGM Resolution**"). The resolution was passed by a vote of 3,210 to 968.[101]

150. The vote on the SGM Resolution was not, at that time, binding on the Benchers.[102]

151. At the July 11, 2014 Benchers meeting, the SGM Resolution was raised, and the Benchers determined to consider the issue further at the September 26th Benchers meeting.[103]

152. On September 26, 2014, the Benchers held that meeting, during which they fully canvassed the issues arising from the SGM. Three motions were put before the Benchers at that time.[104]

153. The first motion was to adopt the membership's SGM Resolution and declare that TWU was not an approved faculty of law for the purposes of Law Society admission.

154. The second motion was to direct a referendum on whether the Benchers should adopt the membership's SGM Resolution. The motion stated, in essential parts:

> BE IT RESOLVED THAT:
>
> 1. A referendum (the "Referendum") be conducted of all members of the Law Society of British Columbia (the "Law Society") to vote on the following resolution:

[100] McGee Affidavit #2, at paras 14, 15, Exhibits 'K', 'L'.
[101] McGee Affidavit #2, at para 15, Exhibit 'L'.
[102] The procedure for making a resolution binding on the Benchers is set out in section 13 of the *Legal Profession Act*, and discussed below.
[103] McGee Affidavit #2, Exhibit 'M', at 495.
[104] McGee Affidavit #2, Exhibit 'N', at 511-513.

> "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."
>
> Yes _____ No _____ (the "Resolution")
>
> 2. The Resolution will be binding and will be implemented by the Benchers if at least: (a) 1/3 of all members in good standing of the Law Society vote in the Referendum; and(b) 2/3 of those voting vote in favour of the Resolution.
>
> 3. The Benchers hereby determine that implementation of the Resolution does not constitute a breach of their statutory duties, regardless of the results of the Referendum.

155. The third motion was to delay voting on the first two motions until a decision had been rendered in litigation arising from TWU accreditation decisions in other provinces.

156. The first motion was defeated. The second motion, setting out a referendum procedure, passed, with a vote of 20 votes in favour and 10 votes against.[105]

157. Speaking in favour of the second motion, Bencher Tony Wilson clarified that the motion under consideration "expedites the referendum process already available under our legislation"[106]. Bencher Wilson also noted that while it had been argued that the Law Society was without the authority to initiate a referendum of this nature, "we are the Law Society of British Columbia regulating the legal profession in the public interest… the referendum model, or rather, motion… put forward expedites the process already permitted under the *Legal Profession Act* under section 13. We don't want to wait until a referendum brought in July 2015"[107].

158. Other Benchers made similar comments, observing that:

> So what we're really doing is, in my mind, by way of Mr. Wilson's resolution, accelerating the section 13 process. We're telling the membership there will be a binding resolution – referendum. We are following the procedure set out in the *Legal Profession Act*. We're doing it eight months early, nine months early, but

[105] McGee Affidavit #2, Exhibit 'N', at 514.
[106] Affidavit #1 of Teresa Lesberg, sworn December 12, 2014 ("**Lesberg Affidavit #1**"), Exhibit 'B', at 16.
[107] Lesberg Affidavit #1, Exhibit 'B', at 17.

> we're following the same rules. We're going down the path the legislation sets out.[108]

159. Bencher Miriam Kresivo addressed the argument that the Benchers were fettering their discretion, noting that "we are considering both potential outcomes of the resolution and whether in the future we would be willing to vote for either of the outcomes and the Benchers will have to consider it at this table once the results of the referendum are taken".[109]

160. Bencher Arvay, in the course of arguing in favour of the first motion, explained the impact of the section motion. He noted that the only way the Benchers should vote against the first motion is if the members were asking the Benchers to do something that would be contrary to their statutory duty, as is the limitation imposed under section 13(4). Bencher Arvay continued.

> Whatever that phrase means in our *Act* it cannot apply to this matter. It cannot be said that if you now give effect to the members' wishes that you would be acting contrary to your statutory duty. <u>All you would be acting contrary to is your opinion – your belief that the Supreme Court of Canada decision in the Teachers College case was determinative. Acting contrary to your opinion about the binding nature of a Supreme Court of Canada case is not the same as acting contrary to your duty – your statutory duty</u>. Indeed, for those of you who may be intending to support the motion of Tony Wilson to order a referendum now you will be acknowledging that whatever the outcome you would not be acting contrary to your statutory duty."[110]

161. Other benchers highlighted the critical nexus between the public interest and integrity of the law profession. For instance, after citing section 3 of the *Legal Profession Act*, Bencher Lee Ongman observed that fostering the integrity and honour of the legal profession is also among the Law Society's statutory obligations, adding:

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[108] Lesberg Affidavit #1, Exhibit 'B', at 58, Bencher Riddell. See also the comments of Bencher Ferris, who argued that if the membership speaking as a group in the course of "meeting the requirements that are in the statue, that on quorum and approval then this table I believe should reverse the decision" (at 54). He added that in supporting the motion, his "intention is to follow as closely as we can the statutory process for the referendum that's provided in the – in our *Act*" (at 55). And see Bencher Dhaliwal's comments, at 101 ("but I do believe in following the process that's set out in our governing legislation. What I can do today is to try to expedite that process and its's for that reason that I'll be putting my support behind the Wilson motion.")

[109] Lesberg Affidavit #1, Exhibit 'B', at 22.

[110] Lesberg Affidavit #1, Exhibit 'B', at 41-42.

> The integrity, the honour and competence of lawyers cannot be talked about without realizing the education of lawyers, the training, the training in non-discrimination and that's – that is inherent and should be inherent to students as they learn to become lawyers.[111]

162. It was clear that the views of many Benchers had evolved between the meeting on April 11th and the September 26th meeting, at least with respect to the process the Benchers should follow in exercising their discretion. Although initially voting in favour of approving TWU, at the September meeting Bencher Crossin provided the following comments on the duty of the Law Society in this matter:

> You know, my thoughts on this really boil down to first principles. We -- and when I say "we" I mean the lawyers of this province, are a self-governing profession and we well know that in order to maintain our independence and guard against unwarranted intrusions by the state or otherwise, it is critical in our decision making to ensure and foster public confidence in our profession and the administration of justice.
>
> Section 3 of our Legal Profession Act reflects that recognition. Section 3 isn't the voice of the government and it's not the voice of the courts and it's not the voice of the public. And it's not merely the voice of the Benchers. Section 3 is the voice of the lawyers and the members recognize as fundamental that any erosion of the public trust or surrender of the public interest, you know, places our profession as we know it in jeopardy. And so in order to carry out that mandate we, the members, settled on a democratic construct of governance. I'm elected by the members to govern their affairs and to make decisions to ensure the public is well served by a competent and ethical and independent bar. So my duty, as I see it, both as a matter of statute and as a covenant with the membership, is to do what I believe best serves the public and to do so with reflection, good faith, and a clear conscience.
>
> And — but my duty is not circumscribed. You know, this is just my view. Simply by resting my decision making on a personal view without regard to the circumstances. My duty is necessarily driven by the particular circumstance and it's always an assessment of all the circumstances that best determines the course that serves the public perspective. And so in this evolving factual landscape I think from the point of view of my statutory duty and logic and our democratic process that the issue should be determined frankly, by the hearts and minds of the many and not the few (…).[112]

[111] Lesberg Affidavit #1, Exhibit 'B', at 50.

[112] See also the comments of Bencher Merrill: "I have every confidence in the members, that they will participate in the referendum and will guide us further. The results will come back to this table to be ratified. For me the appeal of the referendum is that it allows all of the members of the Law Society an opportunity to be heard. As

> And I think we proceed to conclude a process that best fosters public confidence and trust and on balance and it's far from clear from my perspective, but on balance I think the referendum is the way to go… And whatever we decide our next steps will be, can I just say that her leadership will continue with that singular motive and that singular motive I suggest to you is to uphold the integrity of our Law Society and the integrity of our Benchers.[113]

163. Others, such as Bencher Elizabeth Rowbotham, clarified their comments from the April meeting with respect to the binding nature of *BCCT*:

> I would like to correct a misapprehension of the April 11th vote. This was reaffirmed in the TWU submissions. I found the issue before us on April 11th nuanced and complex and I ultimately, based on the view expressed by others, and both in favour and against I ultimately voted against approving TWU as a faculty of law. I appreciate that I am quoted as saying that BCTF [sic] is the law in Canada. I should have said it appears to be the law.[114]

164. Thus, notwithstanding previous statements, many Benchers had come to the view that "there is not really one right answer" to the question before them.[115] Even those who remained of the view that TWU should be approved, acknowledged the "valid arguments" that *BCCT* would not apply.[116]

165. As such, many concluded that *either* outcome – either approving or not approving TWU – would be consistent with the Benchers' statutory mandate. Bencher Van Ommen, for instance, noted:

> 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

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Mr. Crossin has said, this should be the voices of the many and not the few." See Lesberg Affidavit #1, Exhibit 'B', at 99-100.

[113] Lesberg Affidavit #1, Exhibit 'B', at 34-38.

[114] Lesberg Affidavit #1, Exhibit 'B', at 96.

[115] See Lesberg Affidavit #1, Exhibit 'B', at 23**,** Bencher Kresivo. See also e.g. Bencher Cheema's comments, at 70 ("The Wilson motion proposes a clear, defined course of action in the face of ongoing legal uncertainty"); Bencher Finch's comments, at 79-80; Bencher Petrisor's comments, at 84 ("It's central to my analysis was the current state of the law and the B.C. teachers case and I think it's fair to say that uncertainty regarding whether that decision still applies, whether that judicial authority will change, is really the central issue that's still under debate and the subject of disagreement within our group as Benchers and within the profession as a whole"); Bencher Morellato's comments, at 91 ("The courts will and must ultimately decide the question and it's a legal one"); and Bencher Maclaren's comments, at 104 ("There is also something close to universal acknowledgment that the issue of TWU law's accreditation will eventually rise to the Supreme Court of Canada").

[116] Lesberg Affidavit #1, Exhibit 'B', at 54, Bencher Ferris.

> permit that. To me that is a very significant factor for us to consider. The decision we make around this table has to be a decision made in the public interest, not solely on our personal views…
>
> We will have a referendum if this resolution passes and I will have no difficulty implementing that… if the referendum passes that will be a factor that will weigh in the court's decisions because the legal profession will have considered this issue, will have said in our view the public interest requires that there not be any discrimination in legal education. I will have no difficulty implementing that.[117]

166. The common theme amongst the Benchers, as summed up by President, was that the issue "before us today will ultimately be decided by the courts".[118]

167. Overall, then, a review of the speeches at this meeting reveal that the Benchers were alive to their statutory obligations, to the limits on their own power as set out by statute, to their obligations to protect an uphold the public interests and the duties in section 3 of the *LPA*, to their role as governors of a self-governing profession, as well as the other legal issues that arise in this Petition.

168. The Benchers thoughtfully considered and interpreted their power as conferred by the legislation and the rules with these considerations forefront in their minds, and concluded that a referendum was viable, consistent with the Benchers' powers and the Law Society's democratic nature, and was the best means of ensuring the public confidence and public interest in the administration of justice.

169. At the Law Society's Annual General Meeting ("**AGM**") on September 30, 2014, members voted on the following resolution:

> WHEREAS discrimination continues in the legal profession in Canada despite significant progress towards its elimination;
>
> WHEREAS ending discrimination in the legal profession benefits the profession by enabling it to represent itself with integrity as an advocate for justice;
>
> WHEREAS discrimination in legal education undermines the ethical underpinnings of the legal profession;

[117] Lesberg Affidavit #1, Exhibit 'B', at 94-96, Bencher Van Ommen.
[118] Lesberg Affidavit #1, Exhibit 'B', at 114.

> WHEREAS the existence of discrimination may contribute to an educational environment in which freedom of expression is inhibited;
>
> WHEREAS the formation of values in law school has a long-term impact on Canada's future lawyers;
>
> WHEREAS discrimination is not a recognized protected form of freedom of expression;
>
> WHEREAS any conflict between enumerated freedoms must consider the potential impact on the legal profession, the justice system and our society as a whole;
>
> BE IT RESOLVED THAT the Law Society of British Columbia require all legal education programs recognized by it for admission to the bar to provide equal opportunity without discrimination on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, gender expression, gender identity, age or mental or physical disability, or conduct that is integral to and inseparable from identity for all persons involved in legal education – including faculty, administrators and employees (in hiring continuation, promotion and continuing faculty status), applicants for admission, enrolled students and graduates of those educational programs.[119]

170. This motion passed at the AGM, with a majority of members present voting in favour.[120]

171. The referendum was conducted by mail-in ballot throughout October. Along with the ballot, members of the Law Society were provided access to audio-visual recordings and transcripts of the Benchers' discussions, the volume of submissions made to the Law Society (including from TWU), as well as the legal opinions before the Benchers, in order to inform their opinion and vote.[121]

172. The referendum results were announced on October 30, 2014. A total of 5,951 BC lawyers (74%) voted in favour of and 2,088 (26%) against a resolution declaring that the proposed law school at TWU is not an approved faculty of law for the purpose of the Law Society's admission program.[122]

173. On October 31, 2014, the Benchers reviewed the results of the referendum, and adopted a resolution under Subrule 4.1 that the proposed TWU law school was not an approved

[119] See exhibit to McGee Affidavit #3.
[120] See McGee Affidavit #3.
[121] See McGee Affidavit #2, Exhibit 'K', at 439-440, Exhibit 'P', at 588.
[122] McGee Affidavit #2, paras 19-20.

faculty of law for the purposes of admission to the BC Bar. The resolution was adopted with 25 votes for, one vote against, and four abstentions.[123]

174. On December 11, 2014, the then-Minister of Advanced Education Amrik Virk announced that he was revoking his approval of the proposed law school at TWU under the *Degree Authorization Act*.[124] The Minister stated in a letter to TWU that it may re-apply for approval in the future.

175. The effect of the Minister's decision to rescind accreditation is that TWU is not currently permitted to offer law degrees to students. Unless and until TWU is so permitted, there can be no graduates of TWU seeking admission to the Bar.

176. TWU sought judicial review of the Law Society's decision in a petition dated December 18, 2014, alleging that the Resolution was invalid as it was *ultra vires* of the Law Society, unconstitutional, involved an improper sub-delegation or fettering of authority, and represented an unreasonable application of the Law Society's discretion.

III. THE EVIDENTIARY ARGUMENTS OF THE PETITIONERS

A. Overview

177. The Petitioners claim that much of the material filed by the Law Society is not only to be accorded reduced weight, but is in fact inadmissible, on the basis that it was not part of the 'record' before the Benchers.[125]

178. 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".[126]

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[123] McGee Affidavit #2, Exhibit 'R', at 600-601.
[124] McGee Affidavit #2, Exhibit 'S'.
[125] Written Argument of Trinity Western University and Brayden Volkenant, filed July 20, 2015 ("**TWU Written Submissions**"), at para 101.
[126] *Waverly (Village) v. Nova Scotia (Minister of Municipal Affairs)* (1993), 126 N.S.R. (2d) 147 (S.C.) at 149.

179. However, the courts' role on judicial review is no longer so limited, and the standard for the admissibility of evidence must evolve accordingly. This has been recognized by numerous courts of appeal – including in this province – who have emphasized the need to revise antiquated notions about the scope of the material properly before a court on a judicial review application. These courts have endorsed a standard that would permit parties in a judicial review application to before a reviewing court all of the material which bears on the arguments they are entitled to make.

180. The courts' approach to the admissibility of evidence should also be sensitive to the context in which the decision was made – in this case, a policy-based, discretionary decision outside of an adjudicative setting. This is not a typical adjudicative decision between two well-defined, adversarial parties, with both being given the opportunity to tender evidence and submissions in advance. As such, a strict notion of the record should be relaxed in this context.

181. Adopting a modern approach to the record on judicial review is particularly critical in cases involving *Charter* rights and values, where the Court has a special obligation to review relevant evidence to ensure compliance with the constitution, whether or not that evidence was specifically before a decision maker.

B. The Modern Approach to Judicial Review on the 'Record'

182. Historically, remedies on judicial review were limited to circumstances disclosing a breach of natural justice, jurisdictional error, or errors 'on the face of the record'. Administrative decision makers acting within their jurisdiction had the 'right to be wrong', even egregiously so, as long as they did so within their jurisdiction.[127] As such, there was no reason to review material 'extrinsic' to the record, because in the absence of a breach of natural justice, such material simply was not relevant to permissible grounds of review.

[127] See e.g. *Rex v. Nat Bell Liquors Limited*, [1922] 2 A.C. 128 (P.C.) ("if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction, which he has not").

183. However, the scope of judicial review is no longer so limited. In *Dunsmuir*, the Supreme Court of Canada 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.[128]

184. *Dunsmuir* confirms that not only must the *decision* itself be reasonable, but it must also fall within a range of reasonable *outcomes*. As such, courts must have before them the material necessary to determine whether the decision, however rendered, is defensible both on the facts and the law.

185. This is further confirmed by the Supreme Court of Canada's repeated direction that, in affording deference to an administrative decision maker, courts on judicial review must pay "respectful attention" to the reasons that "*could* be offered in support of a decision".[129] 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."[130] In order to fully appreciate the reasons that could be offered in support of a decision, consideration of material extrinsic to the record may be necessary.

186. Therefore, given that strictly limiting the record does not always permit the court to undertake the review mandated in *Dunsmuir*, courts have recently applied a more flexible approach. 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:

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[128] *Dunsmuir v. New Brunswick*, 2008 SCC 9 ("***Dunsmuir***") at para 47.
[129] *Dunsmuir*, *supra* at para 48.
[130] *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 ("***ATA***") at paras 52-54; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 ("***Agraira***") at para 58.

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.[131]

187. In the Law Society's submission, this is the approach that should be followed in this case. The Petitioners are not only challenging the jurisdiction of the Law Society to render its decision, they are asserting that its decision is a violation of the *Charter* interests of TWU and its religious community. They are also challenging the *basis* of the Law Society's Resolution, namely that the Law Society's decision furthers the public interest in the administration of justice and is sensitive to the *Charter* rights and interests of many persons beyond just TWU and Mr. Volkenant.

[131] *SELI Canada Inc. v. Construction and Specialized Workers' Union, Local 1611*, 2011 BCCA 353 ("***SELI***"), paras 84-85 (emphasis added); *Hartwig v. Commission of Inquiry into matters relating to the death of Neil Stonechild*, 2007 SKCA 74 ("***Hartwig***").

188. In light of these submissions, the Law Society must have the ability to tender evidence relating to the impact of TWU's proposed school of law on LGBTQ persons and others, and the other material presented in the Tso Affidavit.

C. Implications of Charter Values on the 'Record'

189. Applying the modern approach to evidence on judicial review is all the more important with respect to administrative decisions which may impact *Charter* rights and values. In this area, too, the jurisprudence has evolved considerably over the past decade. The approach courts now apply to administrative decisions touching on *Charter* interests was set out in *Doré v. Barreau du Québec*:

> 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] 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).[132]

190. 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'.

191. Today, 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 the petition before this Court, a court must determine whether the

[132] *Doré v. Barreau du Québec*, [2012] 1 SCR 395, 2012 SCC 12 ("***Doré***"), at paras 55-56 (emphasis added).

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".[133]

192. 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 did not do so explicitly, and even if that evidence does not make up part of the 'record' before the decision-maker.

193. The importance of considering evidence 'extrinsic' to the record is all the more critical in cases involving potentially conflicting *Charter* rights and interests. In such cases, in order to properly review the impact on constitutional interests, the court must be assured that *Charter* considerations were adequately and proportionately balanced.[134]

194. As noted in the Supreme Court of Canada's recent decision in *Loyola*, "*Doré* proportionality analysis finds analytical harmony with the final stages of the Oakes framework used to assess the reasonableness of a limit on a Charter right under s. 1".[135] Thus, as in the section 1 context, a respondent may – indeed must – tender evidence to demonstrate that any restriction on *Charter* rights was reasonably necessary to achieve a legitimate statutory objective.

195. Moreover, a court may require evidence that was not before a decision maker in order to determine whether a decision rendered "reflected a proportionate balance" between the statutory mandate and the *Charter* interests engaged. This analytical process was described in *Loyola* as follows:

> As Aharon Barak explained, the purpose of a constitutional right is the realization of its constitutional values: Human Dignity: The Constitutional Value and the Constitutional Right (2015), at p. 144. In the *Doré* analysis, Charter values — those values that underpin each right and give it meaning — help determine the extent of any given infringement in the particular administrative context and, correlatively, when limitations on that right are proportionate in light of the applicable statutory objectives: *Hutterian Brethren* at para. 88; Lorne Sossin and Mark Friedman,

[133] *Doré*, *supra* at para 56.
[134] See generally *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 ("***Loyola***") at paras 35-42.
[135] *Loyola*, *supra* at para 40.

> "Charter Values and Administrative Justice" (2014), 67 S.C.L.R. (2d) 391, at pp. 403-4.
>
> On judicial review, the task of the reviewing court applying the Doré framework is to assess whether the decision is reasonable because it reflects a proportionate balance between the Charter protections at stake and the relevant statutory mandate: *Doré*, at para. 57. Reasonableness review is a contextual inquiry: *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 (CanLII), [2012] 1 S.C.R. 5, at para. 18. In the context of decisions that implicate the *Charter*, to be defensible, a decision must accord with the fundamental values protected by the *Charter*.
>
> The Charter enumerates a series of guarantees that can only be limited if the government can justify those limitations as proportionate. As a result, in order to ensure that decisions accord with the fundamental values of the Charter in contexts where Charter rights are engaged, reasonableness requires proportionality: Doré, at para. 57. As Aharon Barak noted, "Reasonableness in [a strong] sense strikes a proper balance among the relevant considerations, and it does not differ substantively from proportionality": "Proportionality (2)", in The Oxford Handbook of Comparative Constitutional Law (2012), Michel Rosenfeld and András Sajó, eds., 738, at p. 743.
>
> The preliminary issue is whether the decision engages the Charter by limiting its protections. If such a limitation has occurred, then "the question becomes whether, in assessing the impact of the relevant Charter protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the Charter protections at play": *Doré*, at para. 57. 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: *Doré*, at paras. 43-45.[136]

196. As this passage makes clear, a court has a special responsibility in situations where *Charter* interests are engaged by an administrative decision. The Court must ensure that a decision accords with *Charter* values and reflects a proportionate balance between those constitutional interests and the statutory mandate. This is the court's responsibility. Whether or not the decision maker expressly considered the evidence pertaining to those interests or values, a court must ensure those interests are protected in the course of determining the reasonableness of a given outcome.

197. In recognition of these considerations, courts have begun to follow a more relaxed standard in *Charter* cases, particularly where the admission of such evidence is necessary "to ensure

[136] *Loyola*, *supra* at para 36-39.

that the legal issues can be properly assessed and dealt with", and in recognition that such issues "should not be addressed in an evidentiary or factual vacuum".[137]

198. 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.[138]

199. The fact that an administrative decision-maker may not have considered *specific* 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, and reflected a proportionate balance of *Charter* values. In short, whether the decision reflects an appropriate balance under the *Charter* does not depend on whether the specific evidence confirming or questioning that balance was before the decision maker.

D. Context of the Decision

200. In applying the modern approach to evidence, the context in which a decision was made is important. The context of the Resolution challenged in this Petition was not the product of a decision made before an adjudicative tribunal, where any affected parties are given notice and where the parties provided with an opportunity to submit evidence before an adjudicator at first instance, in accordance with doctrines of natural justice. It is therefore unlike the decision rendered by the Human Rights Tribunal in *Asad*, relied upon by the

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[137] *R v Kilpatrick*, 2013 ABCA 168 at paras 6-7; *Provident Energy Limited v Alberta (Utilities Commission)*, 2008 ABCA 362 at para 17 ("This court depends on a complete record to enable it to make fully informed decisions, particularly where contested matters of such importance are at issue. Without that foundation, serious questions of law cannot be fairly adjudicated"); *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 ("With the enactment of the Charter in 1982, the use of extrinsic evidence transformed from something that was allowed to something that was desirable and, in some cases, practically required"); See also *Lockridge v. Director, Ministry of the Environment*, 2012 ONSC 2316.

[138] *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25 ("***TWU v. NSBS***") at para 26 (emphasis added).

Petitioner.[139] In effect, the administrative decision-makers in non-adjudicative settings exercise discretionary authority to determine the contents of their own record.

201. It should also 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 courts on appeal.

202. In the context of non-adjudicative settings, such as the decision currently under review, a decision-maker may or may not gather its own evidence, may choose to rely upon submissions from the public, does not provide reasons, and only limited, if any, procedural rights are afforded to those effected.

203. Thus, the rationale for limiting the record on a judicial review of an adjudicative decision of an administrative tribunal is not directly applicable in the context of non-adjudicatory decision making, where there is no discrete 'record of proceedings', no evidence formally tendered, no natural justice afforded, no explicit findings of fact or interpretations of law, and importantly, no reasons given (or required).

204. If the information available to a court on review in this context were as limited as TWU claims, a public body in a non-adjudicative setting could effectively immunize its decisions from any scrutiny under the *Charter*, through deliberately and artificially limiting the range of considerations it takes into account prior to rendering its decision.

205. 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*.

206. 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

[139] TWU Written Submission, at para 104.

decision was defensible on the facts and the law and reflects a proportionate balance of *Charter* interests.

207. As the speeches of the Benchers and the content of the submissions indicate, many of the factors described and elaborated upon in the material contained in the Tso Affidavit – such as the impact of the Covenant upon LGBTQ persons and the scarcity of law school placements in Canada – were very much at the forefront of the Benchers' minds in rendering their decision. The evidence tendered through the Tso Affidavit simply provides a more comprehensive basis upon which the Court can review the validity of these considerations.

208. TWU itself has tendered considerable 'extrinsic' affidavit evidence in the petitions before the court, and not all of that material was before the Benchers.[140] The Petitioners' evidence is relevant to whether the decision makers adequately appreciated and accounted for the implications of their decision on the *Charter* interests of TWU's religious community. The Law Society does not seek to object to this evidence, as it is confident that the decision rendered is defensible on the facts and the law.

209. However, it should be noted that while TWU has the institutional capacity to collect expert and other evidence to put before the decision maker prior to any decision being rendered, many others affected by the decision – and whose rights and interest are directly impacted by it – have no such opportunity or capacity. Their interests can only be represented through the Law Society defending the reasonableness of its decision. They should not be ignored through the strict application of evidentiary rules that no longer serve the purposes of judicial review, and indeed, have been rejected by the Court of Appeal.

E. Summary Regarding Evidentiary Objections

210. In summary, TWU's argument that it would be improper to allow the Law Society to rely on evidence in the Tso Affidafit because this specific evidence did not inform the Decision

[140] TWU notes that "most" of the materials relied upon by the Petitioners were specifically before and brought to the attention of the Law Society. TWU Written Submission, at para 109.

under review, misconstrues the modern role of the courts on judicial review, especially where *Charter* values and interests are implicated.

211. As there were no written reasons for the Resolution, and none required by law,[141] the court's task is to determine whether the ultimate conclusion was reasonable and defensible in light of the facts and the law, and whether the decision struck an appropriate balance between the statutory objectives and *Charter* rights and values. This exercise must include a consideration of factors that could be offered in support of the decision, and material in support of those reasons, even if that evidence does not expressly make up part of the 'record' before the decision makers.

212. As the Law Society is required to defend the reasonableness of the outcome reached in this case, it must be afforded the opportunity to put material relevant to that issue before the reviewing court. The Court can then determine the extent to which it sheds light on the issues raised by the Petitioners.

213. Again, the contrary position only makes sense to the extent that the *Charter* interests of LGBTQ persons, and the related affidavit material, is not relevant to whether 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.

214. And finally, while TWU may have the institutional capacity to prepare, submit, and tender information to the Law Society, and to formally and vigorously defend their interests, many persons who would be impacted by the Law Society's decision would not be so well positioned. Their interests must nevertheless be taken into account.

215. For these reasons, permitting the evidence in Tso Affidavit to be considered in this petition – to the extent that it is relevant and probative of a live issue – will permit a comprehensive record to be before the court. It will permit the Court to fully address the *Charter* interests of members of TWU's religious community, as well as the *Charter* interests of LGBTQ persons and others who would be effectively denied access to TWU's proposed school of law, in order to determine whether the outcome is "defensible in respect of the facts and

[141] See the helpful analysis in *TWU v. LSUC, supra* at paras 46-50.

the law", and whether the ultimate decision adequately accounted for the severity of any impact on the respective *Charter* interests at issue.

216. Considering such evidence will provide the court with the evidence necessary to determine whether the outcome is reasonable and defensible, on both the facts and the law. 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".[142]

IV. LEGAL ARGUMENT

A. Standard of Review

217. The Law Society submits that because the legal issues raised in this Petition concern the interpretation and application of the Law Society's powers and obligations under the *Legal Profession Act*, relate to the self-governance of the profession, and involve the discretionary application of rules in the public interest, the standard of review for the administrative law questions raised in this Petition is reasonableness.

218. Similarly, on the clear authority of *Doré* and *Loyola*, the question of whether the Law Society's statutory objectives were appropriately reconciled with the applicable *Charter* rights and values must be also approached by a reviewing court on a standard of reasonableness.

a) Presumption of Reasonableness

219. The Petitioner submits that the standard of review on the administrative law issues raised in this petition is correctness, because those issues engage the Law Society's "jurisdiction" to pass the Resolution.

220. As the Supreme Court has observed in a similar context, "(w)hile such a view may have carried some weight in the past, that is no longer the case."[143] TWU's submission on this

[142] *SELI*, *supra* at paras 84-85.
[143] *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 ("***McLean***") at para 31.

point is inconsistent with the courts' modern approach to standards of review, and in particular the significant developments in the law that have occurred following *Dunsmuir* and *Doré*.[144]

221. As the Supreme Court's recent jurisprudence confirms, the category of "true jurisdictional" questions is now very small, to the point that the Court has repeatedly questioned whether such a category exists at all.[145] The Court in *ATA* observed:

> Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.[146]

222. It is now well established that where an administrative decision maker is interpreting and applying its home statute, and *a fortiori* the rules passed thereunder,[147] there is a strong presumption that a standard of 'reasonableness' applies.[148]

223. In *TWU*, the Nova Scotia Supreme Court adopted the modern approach to judicial review and therefore rejected TWU's argument that a 'correctness' standard should apply on the basis that the question is 'jurisdictional' in nature:

> The issue then is what if anything is left of jurisdictional issues. There is some question as to whether questions of "true jurisdiction or vires have any currency" at all anymore. Justice Rothstein said that he was unable to provide a definition of what might constitute a true question of jurisdiction. The idea is to eliminate the need for the old debate about whether something is jurisdictional or not. It appears

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[144] The Court has recognized that *Dunsmuir* was a "transformative" decision with respect to the identification and application of standards of review: see *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 ("***Newfoundland Nurses***") at para 1.

[145] See e.g. *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 ("***ATA***"); *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40 ("***CNRC***") at para 61.

[146] *ATA*, *supra* at para 34.

[147] *British Columbia v. International Forest Products Limited*, 2012 BCSC 746 at paras 18-21.

[148] *ATA*, *supra* at para 39; *McLean*, *supra* at para 21. See also *Charlottetown (City) v. Island Reg. & Appeals Com.*, 2013 PECA 10 at para 26 (the Court in *ATA* adopted "a very strong presumption of deferential review when a statutory authority is interpreting its home, or constitutive statute").

> safest to assume, for now, that getting into whether the decision was "jurisdictional" for purposes of the standard of review is not going to get anyone very far. That does not mean that administrative decision makers have unlimited authority to regulate beyond their ordinary scope. They simply have to be reasonable when making the decision to regulate, the same way that they have to be reasonable about how to regulate.
>
> (…)
>
> However, the NSBS is in that situation interpreting its home statute with the presumption of a reasonableness standard of review. The shrinking of the scope of review on jurisdictional matters does not mean that every administrative actor has jurisdiction based on whim. Of course, the NSBS could not regulate doctors in Nova Scotia or lawyers in Nunavut. Administrative bodies still have to act within their mandates. They are now seen as having more scope within which they can determine their mandates without court interference. The scope is defined by reasonableness.[149]

224. As such, the Court found, like the Ontario Divisional Court,[150] that a standard of reasonableness applies to the question of whether the Law Society had the statutory authority to refuse to accredit TWU. There is no reason to depart from the presumption in this case, with respect to any of the challenges raised by the Petitioners.

225. This is all the more so given that TWU has not challenged the Law Society's authority to enact the Rules in question. TWU suggest that there is only one 'right' answer to the question of whether TWU should be deemed an 'approved' faculty of law under Rule 4.1.[151]

226. However, TWU has not challenged the validity or *vires* of Rule 2-27, or Rule 2-27(4.1), as set out in the Law Society Rules. It has not argued that the Benchers did not have the statutory authority, under sections 20-21 to enact Rule 4.1, in particular, or to give the Law Society the discretion to refuse to approve a faculty of law for the purposes of admission. TWU *only* challenges the discretionary *application* of those Rules in this unique set of circumstances.

[149] *TWU v. NSBS*, *supra* at paras 154-156.
[150] *TWU v. LSUC*, *supra* at paras 33-51.
[151] TWU Written Submission, at para 237.

227. The administrative law questions raised by the petitioner therefore relate solely to the interpretation of the BC *Legal Profession Act* and the application of the Law Society's own rules validly established. More specifically, the question before the Benchers was the meaning of the public interest in the context of the statutory mandate of the Law Society, and on what grounds a law school should be "approved" by the Law Society. This is quintessentially a question upon which considerable deference should be afforded.

b) BCCT Does Not Dictate the Appropriate Standard of Review

228. The Supreme Court of Canada's decision in *BCCT* does not decide the standard of review, as the Petitioner submits.[152] In *BCCT*, the issue of whether the Teachers College had the jurisdiction to consider discriminatory practices in dealing with the TWU application was not in dispute between the parties,[153] and the application of the correctness standard was premised on the fact that the question before the Teachers College was "a question of law that is concerned with human rights and not essentially educational matters". *BCCT* was therefore expressly based on the 'jurisdictional' conception of judicial review that, as just noted, has long since lost its currency.

229. Following *BCCT*, the Supreme Court of Canada has been clear that questions of law within the statutory framework are to be assessed on a reasonableness standard, and the fact that they involve human rights principles or considerations does not change that standard of review.[154]

230. The Nova Scotia Supreme Court rejected TWU's argument that *BCCT* dictated the appropriate standard of review, explaining that, in any event, the court (and Barristers' Society) were answering a different question than that posed in *BCCT*:

[152] TWU Written Submission, at para 158.

[153] *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 *("**BCCT**")* at para 14 ("All parties accepted that the standard of correctness applied to this decision because it was determinative of jurisdiction and beyond the expertise of the members of the Council.")

[154] See generally *Doré*, *supra*. See also *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 ("***Whatcott***") at paras 166-168; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 ("***Mowat***") at paras 23-27; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 ("***Irving Pulp***") at para 7.

> The issues in this case are not so identical that the same standard of review can be assumed to apply. It is a different administrative decision maker, making a different kind of decision. In *TWU v. BCCT* the case was about speculative assumptions regarding how teachers might behave in the classroom based on the education they received from TWU. Here, the matter involves a decision of the NSBS that explicitly makes no assumptions about potential TWU law graduates and deals with a statement of principle about discrimination. The issue of standard of review cannot be determined by the application of the *TWU v. BCCT* precedent.[155]

231. Indeed, the Court has since found that a determination of what is in the public interest for the purposes of a decision makers home statute is to be reviewed on the standard of reasonableness.[156] The decisions of law societies are routinely deferred to, in recognition of their specialized expertise.[157] There is no basis for departing from the standard of reasonableness in this context.

c) Decision not of central importance to the legal system and outside the expertise of the Law Society

232. The presumption of reasonableness will only be rebutted in a very narrow set of circumstances.[158] As noted above, the decision rendered in this case does not involve questions of 'jurisdiction', nor does it involve a question of overlapping jurisdictional lines between tribunals, or questions of constitutional law outside of the *Doré* reasonableness framework.[159]

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[155] *TWU v. NSBS*, *supra* at para 138.

[156] See e.g. *Cartaway Resources Corp. (Re)*, 2004 SCC 26 at para 48 ("The interpretation of s. 162 is a question of statutory construction of the Commission's enabling statute. As I stated above, the application of s. 162 requires the determination of when an order is in the public interest, and this calls for the Commission to apply its expertise." (emphasis added)) See also *Professional Conduct Committee of the Saskatchewan College of Paramedics v Bodnarchuk*, 2015 SKCA 81 at para 31.

[157] See generally *Law Society of New Brunswick v Ryan*, 2003 SCC 20.

[158] See generally Lauren J. Wihak, "Wither the Correctness Standard of Review? Dunsmuir, Six Years Later" (2014) 27 CJALP 173.

[159] See the discussion of the *Dunsmuir* 'exceptions' in *Canada (Attorney General) v. Public Service Alliance of Canada*, 2011 FCA 257 at para 33; *British Columbia (Forests, Lands and Natural Resource Operations) v. British Columbia (Forest Appeals Commission)*, 2014 BCSC 2192 at para 83.

233. TWU submits, however, that the decision falls within an exceptional category: that is, questions of central importance to the legal system and outside of the decision maker's area expertise.[160]

234. The decision to adopt the Resolution is undoubtedly of importance to TWU, to prospective law students, and to the integrity and public confidence in the legal profession in British Columbia.

235. However, that does not mean that the application of the rules attracts a correctness standard on the basis that they raise general questions of law of central importance to the legal system and outside of the decision maker's expertise, as TWU argues.[161] Not every decision of importance rises to the level of 'central importance', in the relevant sense. The Court has recently cautioned that "it is important to resist the temptation to apply the correctness standard to all questions of law of general interest".[162]

236. In order to attract a correctness standard on this basis, such questions must be of "importance to the legal system *and* fall outside the specialized administrative tribunal's area of expertise".[163] *Both* prerequisites must be met to attract a standard of correctness.[164] Moreover, they must be the types of question that "require uniform and consistent answers" and must be necessary to achieve "basic consistency in the fundamental legal order of our country".[165]

237. Determining whether it would be in the public interest in the administration of justice, in the context of the *Legal Profession Act*, to approve of TWU's proposed law school is a singular exercise, and the Law Society's authority to undertake the inquiry is related to its specific statutory mandate. This exercise of discretion and policy making cannot arise in

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[160] TWU Written Submission, at paras 180-184.

[161] Administrative decision which can be characterized as of 'central importance to the legal system' as a whole will be rare. The Supreme Court of Canada has routinely rejected efforts to characterize a decision as falling within this exception, even in the application of general concepts which cut across legal fields: see e.g. *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59 at para 38; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 at para 34; *ATA*, *supra* at para 32, 46.

[162] *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 ("***Saguenay***") at para 48.

[163] *Dunsmuir*, *supra* at paras 55, 60.

[164] *Mowat*, *supra* at para 22; *ATA*, *supra* at para 46.

[165] *McLean*, *supra* at para 27.

the same way in another context. It is a fact-specific, policy-based inquiry that depends on an appropriate balancing of the unique interests engaged in this case against the statutory mandate of the Law Society as set out in the *Legal Profession Act*.

238. TWU seeks to rely on *McLean* for the proposition that there is only one 'right' interpretive answer in the case at hand. However, in *McLean*, the Court actually adopted a standard of reasonableness in determining whether the Securities Commission had the statutory authority to institute proceedings against the claimant.

239. On the basis of the antiquated approach to judicial review the Petitioner adopts, the question in *McLean* would clearly be a jurisdictional one, or what used to be called a 'jurisdictional fact'[166]: did the Commission have the power to institute proceedings, or was it deprived of that power due to the expiry of the limitation date?

240. Nevertheless, the applicable standard of review was found to be reasonableness, because the resolution of interpretive issues in the decision maker's home statute "is usually best left to the decision maker".[167]

241. It is, in this case, solely the task of the Law Society to determine whether approval would be in the public interest, and how to exercise its discretion regarding whether to approve a law faculty for the purposes of admissions.[168]

242. The Court in *McLean* also rejected the notion that the question required a correctness standard because it fell within the 'central importance' exception to the presumption of reasonableness. While noting that the issue of limitation periods may arise in various contexts and statutes, it nevertheless must be decided in the unique context of each. Thus, while the Court agreed that "limitation periods, as a conceptual matter, are *generally* of central importance to the fair administration of justice, it does not follow that the

[166] See e.g. *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756, and *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227.
[167] *McLean*, *supra* at para 33.
[168] *McLean*, *supra* at para 24.

Commission's interpretation of this limitation period must be reviewed for its correctness".[169]

243. The question in this case does not involve seeking to define 'public interest' or 'approved' or 'requirements, including academic requirements' as legal terms in the abstract, to be applied across legal systems and statutory regimes. Indeed, these terms simply cannot be sensibly applied *without reference* to the specific statutory scheme, with which the Law Society has particular expertise. The exercise of discretion in this context defies a singular 'correct' or 'consistent' legal definition, does not fall outside the Benchers' area of expertise, and is plainly not the type of issue that falls within this narrow exception.

d) The Nature of the Question and Decision Maker

244. TWU has therefore not provided any sound basis for departing from a presumptive reasonableness standard of review in this case. To the extent that a more wide-ranging standard of review analysis is required, the Law Society submits that the nature of the question at issue, and the nature and expertise of the decision maker, clearly counsel considerable deference.

245. The determination of what is in the public interest for the purposes of the *Legal Profession Act*, and on what basis a law school should be 'approved' or not by the Law Society, directly engages the core function and responsibility of the Law Society itself as a self-governing profession. It is in precisely this context where deference should be afforded.

246. This point was succinctly made by the Ontario Divisional Court:

> The reality is that the analysis required for the decision involves a weighing of competing interests in the overall context of the impact of any decision on the legal profession in Ontario and the obligation of that profession to serve the public interest. The respondent has special expertise, developed over two centuries, in legal education and the licensing of lawyers. The respondent is uniquely qualified to consider those interests in the context of the competing Charter rights, as they arose in this case.[170]

[169] *McLean*, *supra* at para 28.
[170] *TWU v. LSUC*, *supra* at para 42.

247. The deference afforded to the decisions – particularly discretionary, policy-based decisions – of self-governing professions is considerable. In *Pearlman*, the Supreme Court of Canada observed that "a large part of effective self‑governance depends upon the concept of peer review".[171] In the context of the legal profession in particular, the Court stated that the legislature "has spoken, and spoken clearly… (t)he *Law Society Act* manifestly intends to leave the governance of the legal profession to lawyers and, unless judicial intervention is clearly warranted, *this expression of the legislative will ought to be respected*."[172]

248. With respect to the nature of the question, it should also be acknowledged that there were, and still are, vastly differing views within the legal community and public generally regarding the appropriateness of approving, or refusing to approve, TWU's proposed law school. This case demonstrates exactly the type of situation where a standard of reasonableness is most obviously warranted, as such issues "do not lend themselves to one specific, particular result".[173]

249. Members of the governing councils of the various law societies are almost evenly divided on the issue. For instance, the Benchers in Ontario voted 28-21, the Council in Nova Scotia voted 10-9, and the Benchers in New Brunswick split directly in half, 12-12. While the Nova Scotia found that the decision rendered in that jurisdiction was unreasonable, the Ontario Divisional Court found the opposite.

250. As the history of the issue surrounding TWU's discriminatory Covenant shows, the legal profession in British Columbia, and the Benchers, were and remain deeply divided. Although the Law Society membership as a whole spoke in a clear voice, and emphatically determined that the Law Society should not approve TWU's proposed law school, the complexity and difficulty of the issue cannot be doubted.

251. As described above, the majority sentiment during the Benchers' September 26th meeting was that there was no single, obviously correct legal answer to the issues raised by the

[171] *Pearlman*, *supra* at 890.
[172] *Pearlman*, *supra* at para 888 (emphasis added).
[173] *Dunsmuir*, *supra* at para 47

decision. Many Benchers articulated their view that any decision rendered by the Law Society would likely be ultimately decided by the Supreme Court of Canada.

252. The decision whether to approve TWU's proposed school of law was, moreover, not an adjudicatory decision of a tribunal, which is typified by clearly defined adversarial parties and the opportunity to formally tender evidence. It does not involve the interpretation or application of clear statutory rules; it involves the exercise of discretion pursuant to Rules enacted under legislation conferring a wide array of self-governing powers.

253. This was a discretionary and multifaceted policy-based decision, targeted at what outcome best achieves the public interest in the administration of justice and best fulfills the Law Society's statutory mandate. The decision further potentially engages a range of *Charter* rights and values, and impacts a wide range of interests well beyond the parties to this Petition, which further counsels deference.

254. In short, as the Supreme Court of Canada has observed, "(d)etermining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright-line application."[174]

255. If ever there were a situation where a reasonableness standard should be applied, it is this case.

e) <u>The Content of the Reasonableness Standard</u>

256. The real question therefore is not whether a standard of reasonableness applies to the decision, but how rigorous a standard of reasonableness to apply. The Supreme Court of Canada has stated that the content of the reasonableness standard is determined by the context in which the decision was made.[175]

257. The Law Society has considerable expertise regarding issues relating to the obligations of the legal profession, its home statute and the rules made under it, in particular those relating

[174] *Bruker v. Marcovitz*, 2007 SCC 54 at para 2.
[175] *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 ("***Khosa***") at para. 59; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 ("***Catalyst***") at paras 17-18.

to admissions. Significant deference is afforded where a decision maker is interpreting its home statute, with which it will have particular familiarity.[176] In these contexts, the question is whether there was "any reasonable basis on the law or the evidence" for the decision rendered.[177]

258. Moreover, the decision taken by the Law Society in this case is quasi-legislative, involving complex matters of policy and implicating the broader public interest. The courts will afford significant deference to decision-makers in this context, and will seek to avoid substituting its preferred disposition for that reached by the administrative decision maker.[178]

259. Although, the decision was made with reference to a single institution, TWU's proposed school of law, it was a decision reached through the thoughtful and repeated deliberations of a self-governing body, and in consultation with the democratic wishes of the Law Society as a whole.

260. The content of the reasonableness standard in this case is therefore directly analogous to the applicable standard for a judicial review of the decisions of other administrative but democratic bodies: that is, the courts should only intervene if "no reasonable body" could have arrived at the result.[179] As the Supreme Court of Canada observed in *ATA*, "(i)f there exists a reasonable basis upon which the decision maker could have decided as it did, the court must not interfere".[180]

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[176] *CNRC*, *supra* at paras 55-57.
[177] *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, [2012] 1 SCR 364, 2012 SCC 10 ("***Halifax (Regional Municipality)***") at paras 44-45.
[178] DJM Brown & JM Evans, *Judicial Review of Administrative Action in Canada*, (Toronto: Carswell, 2009), looseleaf, at §15:2121.
[179] *Catalyst*, *supra* at para 20.
[180] *ATA*, *supra* at para 53.

f) Reconciling the Law Society's Statutory Mandate with Charter Values

261. To the extent that the decision can be meaningfully bifurcated, the reasonableness standard also applies to the Law Society's consideration of *Charter* rights and values in exercising its statutory powers, as the Petitioners concede.[181]

262. While a direct challenge to the constitutionality of a provision of the *Legal Profession Act* or the Law Society Rules would attract a correctness standard, the exercise of discretion under valid rules – even those which involve sensitivity to *Charter* interests – has been found subject to reasonableness review.[182]

263. On this standard, the discretion conferred by the legislature upon the Law Society must be exercised reasonably, and in a manner demonstrating a proportionate balance between the statutory objectives and *Charter* interests.

264. The Court in *Doré* noted, in the context of a decision rendered by a law society, that "(a)n administrative decision-maker exercising a discretionary power under his or her home statute, has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values".[183] The approach courts should take reviewing such decisions was explained as follows:

> 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).

[181] TWU Written Submission, at para 186.
[182] *Whatcott*, *supra* at para 168.
[183] *Doré*, at para 47.

> On judicial review, the question becomes whether, in assessing the impact of the relevant Charter protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the Charter protections at play. As LeBel J. noted in Multani, when a court is faced with reviewing an administrative decision that implicates Charter rights, "[t]he issue becomes one of proportionality" (para. 155), and calls for integrating the spirit of s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the Oakes framework, since both contemplate giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing Charter values against broader objectives.[184]

265. The availability of the *Doré* approach to discretionary decisions involving *Charter* rights and values again alerts us to the inapplicability of the Supreme Court of Canada's decision in *BCCT*. Today, the case law dictates that discretionary decisions implicating *Charter* values should now be reviewed on a standard of reasonableness.[185] This was the considered conclusion of both superior courts which have addressed similar issues with respect to TWU already, and it should be adopted in this case.[186]

266. As will be explained below, the Law Society's decision to adopt the Resolution was a reasonable exercise of its statutory powers and is consistent with *Charter* rights and values.

267. However, if there is a need to determine the legal correctness of the Law Society's Resolution, which is denied, the Law Society submits that in adopting the Resolution, it correctly exercised its statutory obligation to protect the public interest in the administration of justice in a manner consistent with *Charter* rights and values.

B. The Law Society is authorized under the *Legal Profession Act* to adopt the Resolution

a) Overview

268. The Petitioners contend that the Law Society only has the power to disapprove a law school where its graduates would not be expected to meet the Law Society's competency and

[184] *Doré*, *supra* at paras 56-57. See also *Loyola*, *supra* paras 37-42.
[185] See *Doré*; see also *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at para 49 and *Gichuru v. The Law Society of British Columbia*, 2014 BCCA 396, at paras 107-108; *Whatcott*, *supra* at para 168.
[186] See *TWU v. LSUC*, *supra* at paras 33-51; *TWU v. NSBS*, *supra* at paras 154, 159, 165.

fitness requirements. According to TWU, the Law Society's mandate is limited to determining the technical qualifications of prospective applicants to the Bar.

269. With respect, this is far too narrow a view of the Law Society's mandate, for the reasons outlined above. The Law Society has not only the *discretion*, but the statutory *duty*, to consider the public interest in the course of exercising its statutory powers regulating admission to the Bar, and in applying the Rules validly enacted pursuant to those powers.

270. The exercise of its statutory duty to act in the public interest in the administration of justice is at the heart of the Law Society's governance of the profession. All decisions must be consistent with and directed at this overriding obligation, and the legislature has given the Law Society considerable room to achieve, and discretion over how to best achieve, its statutory mandate.

271. Moreover, the Law Society has a *constitutional* obligation to undertake this task in light of the *Charter* values that are engaged by its decision, and to seek to achieve a proportionate balance between those values and its broad statutory objectives and obligations.

272. A decision to refuse to approve a law school on the basis of a discriminatory admissions policy impeding equal access to the legal profession is directly related to the statutory mandate of the law society, and its duties and obligations thereunder.

273. It cannot be reasonably suggested that the decision considered over the course of a year, in countless meetings and debates, a Special General Meeting, a referendum, with the benefit of many submissions from TWU itself, was in any sense capricious or arbitrary. Nor can it be claimed that it was made without regard to the Law Society's and the Benchers' statutory mandate; to the contrary, the speeches reveal that the *overriding* consideration of the Benchers throughout their deliberations was how best to achieve their statutory mandate, and how best to do so within the broad confines of the *Legal Profession Act*.[187]

[187] For references to the *Legal Profession Act* or the Law Society's statutory mandate in the Benchers' debates at the April and September meetings, see McGee Affidavit #2, Exhibit 'J', at 387, 392-393, 394, 399, 401, 402, 404, 405, 410,412, 414, 415, 417, 423, 424, 424, 426, 427, 428, 431, 434. See also Lesberg Affidavit #1, Exhibit 'B', at 8-9, 11-12, 17, 21-22, 26, 30, 34-35, 36, 37-38, 40, 40-41, 49-50, 52, 53-56, 58, 66, 67.

274. The Law Society unquestionably has the authority to approve or disapprove of a school of law for reasons related to its statutory mandate to act solely in the public interest in the administration of justice, and to fulfil its obligations to preserve and protect the rights and freedoms of all persons, and to enact and apply rules regulating admissions to the bar that are consistent with that objective.

b) Authority to Disapprove a School of Law is Consistent with the Legal Profession Act

275. Despite its submission that the Law Society "is not given authority to approve or regulate universities or their law schools in the *LPA*",[188] TWU accepts that the Law Society *does* have the authority to exercise its discretion to deny approval to a law school.

276. It must be emphasized again that TWU does not challenge the *vires* of Rule 2-27 generally, or Rule 2.27(4.1) specifically. It is not TWU's submission that either of the Rules, as enacted by the Benchers, exceeds the Benchers' or the Law Society's statutory powers. TWU's only submission on this point is that the specific Resolution at issue, that is, the specific exercise of discretion under those valid rules, was beyond the 'jurisdiction' of the Law Society.

277. What TWU argues is that the Law Society cannot make such a decision *on the basis that it did*, that is, because of the discriminatory nature of a proposed law school's admissions policies, and because of the impact such policies will have on equal access to legal education in the province, and the public interest in the administration of justice more generally.

278. The nature of TWU's argument is confirmed in the next paragraph of its written argument, where TWU argues that the Law Society, in TWU's submission, is "not entitled to judge the policies of a law school *that have no impact on academic qualification*",[189] and when it characterizes the Resolution as one interfering with a proposed law school's "religiously based *non-academic* policies".[190]

[188] TWU Written Submission, at para 192.
[189] TWU Written Submission, at para 193.
[190] TWU Written Submission, at para 190.

279. TWU therefore takes no issue with a possible refusal to approve a law school on the basis of the school's ability to ensure the technical competence of graduates. Doing so would require consideration of a University's 'policies', and therefore 'regulation' in the sense that TWU uses that term.

280. TWU's actual submission is therefore not that the Law Society is without the power to 'disapprove' of a law school because that would amount to 'regulating' law schools, but rather that the Law Society cannot 'regulate' university policies *on the basis that it did*, notwithstanding the considerable latitude a self-governing profession must be given in the course of self-governance and interpreting its statutory authority.

281. This is the basis of the Petitioner's frequent references to *Roncarelli v. Duplessis*.[191] The decision in *Roncarelli* is based on the proposition that no discretionary decision of a statutory actor is wholly unfettered. The reason it is not wholly unfettered is because it is always guided by the purposes and objects of the decision makers' constituting *Act* itself. A decision which is arbitrary for the purposes of the *Act*, in the sense of unrelated to the statutory mandate of the decision maker, can be subject to judicial review. The Law Society agrees with this general proposition.

282. In *Roncarelli*, however, the Minister exercised his power to grant or refuse a liquor license in order "deliberately and intentionally to destroy the vital business interests of a citizen".[192] This basis for the decision clearly had no connection to the purposes of the statute in question, *An Act Respecting Alcoholic Liquor*, or the Minister's statutory mandate thereunder, as Justice Rand explained:

> 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. (…) there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. (…)

[191] *Roncarelli v. Duplessis*, [1959] S.C.R. 121 ("***Roncarelli***").
[192] *Roncarelli*, *supra* at 137.

> 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.[193]

283. To be successful on the ground or logic applied in *Roncarelli*, TWU must convince the court that the decision of the Law Society to refuse approval for a law school on the basis of the discriminatory admissions criteria of a law school was capricious or made on grounds "totally irrelevant" to its statutory mandate, or made for a purpose entirely unrelated to the nature and object of the *Legal Profession Act* in creating a self-governing profession dedicated to the promotion of the public interest.

284. Section 3 of the *Legal Profession Act*, which sets out the duties of the Law Society, is the primary guidepost as to what decisions are reasonably consistent with and related to the Law Society's statutory mandate, and which decisions are so unreasonable or arbitrary that no reasonable body could adopt them.

285. As described above, the statute provides that it is the "object and duty of the society to uphold and protect the public interest in the administration of justice". The statute obligates the Law Society to fulfil this role by, *inter alia*, "preserving and protecting the rights and freedoms of all persons"; "ensuring the independence, integrity, honour and competence of lawyers"; and "establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission".

286. These objectives are deliberately broad, indicating the legislature's intent to empower the Law Society to exercise a comprehensive supervisory function over the legal profession in B.C.[194] As a self-regulating profession, the decisions of the law society must also consider the impact of those decisions on the broader community, and to uphold public confidence in the profession and its commitment to fundamental values.[195] Decisions which are

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[193] *Roncarelli*, *supra* at 140.

[194] See *Pearlman*, *supra* at 888-890.

[195] See *Adams v. Law Society of Alberta* 2000 ABCA 240 at paras 6-10 (discussing the importance of Law Society's ensuring "public confidence in the administration of justice and trust in the legal profession"); *Pharmascience Inc. v. Binet*, 2006 SCC 48 at para 36 (noting the "the crucial role that professional orders play in protecting the public interest"); *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232 at 249 ("(i)t is difficult to overstate the importance in our society of the proper regulation of our learned professions").

reasonably directed towards these ends will be consistent with the statutory mandate of the Law Society.

287. As a result, the Law Society has a statutory obligation to consider whether approving of a law school that discriminates against LGBTQ people, and has an exclusionary impact on other persons as a result of their personal characteristics, is consistent with the duties and the statutory mandate of the Law Society as established by the Legislature. This is all the more important in this particular context, given the critical role that law schools play in furthering the mission of the Law Society, and controlling access to the legal profession and the judiciary.

288. Thus, while the Law Society is undoubtedly charged with "ensuring competent individuals are practicing law in accordance with protecting the administration of justice", as TWU argues,[196] that this is clearly not the Law Society's *only* function. [197]

289. TWU's argument appears premised on the following amended version of section 3:

> **Object and duty of society**
>
> **3** It is the object and duty of the society to uphold and protect ~~the public interest in~~ the administration of justice by
>
> ~~(a) preserving and protecting the rights and freedoms of all persons,~~
>
> (b) ensuring the ~~independence, integrity, honour and~~ competence of lawyers,
>
> (c) establishing standards and programs for the ~~education, professional responsibility and~~ competence of lawyers and of applicants for call and admission,
>
> ~~(d) regulating the practice of law, and~~
>
> ~~(e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.~~

290. This is not the mandate of the Law Society as set out in the *Legal Profession Act*, and therefore there is no basis in the *Legal Profession Act* for concluding that the scope of the

[196] TWU Written Submission, at para 240.
[197] TWU Written Submission, at para 240.

Law Society's authority to establish and apply rules must be related solely to the question of individual, technical competence in the law.

291. Finally, the broad statutory mandate in section 3 of the *Legal Profession Act* is not circumscribed in this context by the sections under which Rule 2-27 was enacted, as TWU argues. Among the statutory duties of the Law Society, as just highlighted, is "establishing standards" for the education of lawyers and of applicants for call and admission.

292. The Law Society's specific authority to set rules to accomplish its statutory mandate in the context of enrolment and admissions is contained in sections 20 and 21 of the *Legal Profession Act*. In relevant part, those provisions state as follows:

> **20** (1) The benchers may make rules to do any of the following:
> (a) establish requirements, including academic requirements, and procedures for enrollment of articled students;
> (…)
>
> **21** (1) The benchers may make rules to do any of the following:
>
> (…) (b) establish requirements, including academic requirements, and procedures for call to the Bar of British Columbia and admission as a solicitor of the Supreme Court;

293. Under the terms of the legislation, the Law Society is responsible for establishing "requirements, *including academic* requirements" for the enrolment of articling students and for admission to the Bar.

294. The use of the term "including" makes clear that academic requirements are not the *only* relevant requirements for enrolment and admission. Had the legislature intended to limit the Law Society's discretion to considering *academic* requirements *relating solely to an individual applicants fitness and competence to practice*, as the Petitioner contends, it would have done so by using language to that effect.

295. These sections as written provide the Law Society with broad latitude to impose rules relating to requirements and procedures regarding admission to the bar, which enables the Law Society to achieve its statutory mandate in this context. The Law Society's, and the Benchers', interpretation of their home statute and the scope of the power granted under it

was entirely reasonable and entitled to considerable deference owed to a self-governing profession.

c) Statutory Authority not Limited by the Law Society Rules

296. TWU therefore cannot successfully claim that the Resolution was arbitrary or inconsistent with the Law Society's broad statutory mandate to govern the profession in the public interest.

297. TWU further seeks to rely on the Rules promulgated under the *Legal Profession Act* as restricting the bases upon which the Law Society may achieve its statutory mandate.[198] It argues that because Rule 2-27(3) uses the phrase "academic qualifications", that phrase must be interpreted restrictively, notwithstanding the broad statutory mandate outlined above.

298. However, as described in more detail below, the phrase 'academic qualifications' is defined in those very same Rules, and can in any event not restrict the broad statutory mandate conferred by the legislature. While the impact of the Rules on the reasonableness of the result reached in this particular case will be addressed below, it is clear that the Rules do not restrict the statutory authority conferred in the *Legal Profession Act*.

d) Conclusion on Statutory Authority to Adopt the Resolution

299. The power to establish "requirements" under sections 20 and 21, beyond those necessary to ensure academic competence for admission to the bar is, as noted above, not unfettered. These powers, and the exercise of discretion under them, must be referable to, and directed at, the broader purposes and objects of the *Act*.[199]

300. The standard to be applied in exercising discretion under the Rules, including Subrule 4.1, is therefore the statutory mandate as set out by the Legislature.[200] Although TWU claims

[198] See TWU Written Submission, at paras 244-253.
[199] See *Halifax (Regional Municipality), supra* at para 43.
[200] TWU is thus wrong to suggest that the decision was not based on any "standard" in its argument. See TWU Written Submission, at para 280.

that it was unaware of the basis upon which this discretion would be exercised,[201] the Benchers were not confused about this point, all of whom recognized that their decision was to be based upon and guided by their duties as set out in the *Act*.[202]

301. Therefore, both the enactment of rules under ss. 20-21, and the subsequent interpretation and application of those rules, requires consideration of factors relating to the Law Society's statutory mandate. This mandate is not limited to ensuring the "competence of lawyers", as TWU's argument presumes. [203]

302. Rather, this mandate includes but is not limited to ensuring the independence, integrity, and honour of the profession through maintaining the public confidence in the profession and the administration of justice, and upholding of the rights and freedoms of all persons, including the right of persons to access the legal profession without hindrance on the basis of their sexual orientation.

303. Thus, the Law Society not only retains the discretion under the *Legal Profession Act* to consider the public interest in the administration of justice in creating and applying rules relating to standards for education and qualifications for admission, but it *must* do so, in order to fulfil its statutory mandate.

304. The adoption and application of Rule 4.1 in this context is therefore entirely consistent with the overall purpose of the *Legal Profession Act* and the function of the Law Society, which as a self-governing profession, must have considerable latitude to make and apply rules relating to governance of the profession in the public interest.

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[201] TWU Written Submission, at para 279-282.

[202] *LPA*, ss. 3, 4. See McGee Affidavit #2, Exhibit 'J', at 387, 392-393, 394, 399, 401, 402, 404, 405, 410,412, 414, 415, 417, 423, 424, 424, 426, 427, 428, 431, 434. See also Lesberg Affidavit #1, Exhibit 'B', at 8-9, 11-12, 17, 21-22, 26, 30, 34-35, 36, 37-38, 40, 40-41, 49-50, 52, 53-56, 58, 66, 67.

[203] TWU Written Submission, at paras 241-242.

C. The Benchers did not sub-delegate its statutory authority or improperly fetter its discretion

a) Overview on Fettering and Subdelegation

305. The Benchers did not sub-delegate their statutory powers to the membership of the Law Society, nor have the Benchers fettered their statutory discretion.

306. It is important to emphasize that the Petitioner does not assert that the Benchers delegated or fettered their statutory responsibility to "make rules" under ss. 20-21. This is the specific statutory authority conferred upon the Benchers by the *Legal Profession Act*. As TWU notes, in exercising their discretion under Rule 4.1, the Benchers were not making rules; they were applying them to the circumstances of a particular case.

307. As such, TWU challenges only the *application* of that valid rule in the context of this case. Specifically, it challenges the Benchers' ability to "sub-delegate its *decision* under" and "fetter [their] *discretion*… under" Subrule 4.1.[204]

308. TWU appears to suggest that because the authority to "make rules" is that of the Benchers, only the Benchers are permitted to be involved in the subsequent *application* of the rules that are enacted. TWU points to no basis in the *Legal Profession Act* for such a restriction on the discretion of Benchers to determine how best to fulfil its statutory mandate.

309. The Petitioner's argument on this point therefore misunderstands the power conferred by the statute, misinterprets the scope of Subrule 4.1, and would arbitrarily circumscribe the range of legitimate mechanisms available to be employed in exercising discretion under that rule.

b) Scope of Subrule 4.1

310. The Benchers drafted and adopted Subrule 4.1 under their statutory power to "make rules" to "establish requirements, *including* academic requirements". This power must be interpreted in accordance with the Law Society's statutory duty to make standards for

[204] Petition, at para 8.

education of lawyers, and more generally to protect and uphold the public interest. For the reasons just stated, ss. 20-21 expressly contemplate requirements beyond mere "academic requirements".

311. TWU argues that "proof of academic qualification under subrule (4)" in Rule 2-27(3) artificially circumscribes this power to make rules.[205] An 'academic qualification' does not merely or necessarily entail technical competence, as a matter of language or logic. 'Academic qualification' is not defined in the *Legal Profession Act*; rather, it is expressly defined *in the Rules themselves*, including Rule 4.1.

312. The Rules, read together, are:

> (3) An applicant may make an application under subrule (1) by delivering to the Executive Director the following:
> (…)
> (b) proof of academic qualification under subrule (4);
> (…)
>
> (4) Each of the following constitutes academic qualification under this Rule:
> (a) successful completion of the requirements for a bachelor of laws or the equivalent degree from an approved common law faculty of law in a Canadian university;
> (b) a Certificate of Qualification issued under the authority of the Federation of Law Societies of Canada;
> (c) approval by the Credentials Committee of the qualifications of a full-time lecturer at the faculty of law of a university in British Columbia.
>
> (4.1) For the purposes of this Rule, a common law faculty of law is approved if it has been approved by the Federation of Law Societies of Canada unless the Benchers adopt a resolution declaring that it is not or has ceased to be an approved faculty of law.

313. The meaning of "academic qualifications" in Rule 2-27(3) is therefore defined by Rules 2-27(4) and 2-27(4.1). TWU's restrictive interpretation of 'academic qualification' does not circumscribe the power to enact Rule 4.1 defining what 'academic qualifications' means, and with respect, it is not open to the Petitioners to assert that a defined term in the Rules is defined improperly vis-à-vis those same Rules. It is, in essence, a defined term.

[205] TWU Written Submission, at paras 245-246.

314. TWU is correct that the application of an otherwise valid rule can be circumscribed by the relevant provisions of the *Legal Profession Act* or by the purpose of the statute as a whole. However, the *Act* is not as limited as TWU argues, as explained in detail above.

315. The objective of Subrule 4.1 was not limited to considerations relating to the ability of a law school to provide an academically sound and adequate technical legal education.

316. Rather, Subrule 4.1 was passed in order to reserve to the Benchers, and ultimately the Law Society as a whole, the discretion to declare a law school to not be an approved faculty of law, where approving the school would not be consistent with the statutory obligations of the Law Society, including the obligations to protect and promote the public interest in the administration of justice, to uphold the rights and freedoms of all persons, and to ensure the honour and integrity of the profession.

317. The Petitioner therefore misses the point in seeking to interpret Rule 4.1 out of existence by equating it with the considerations the FLSC takes into account under the national requirement.[206] If the scope of Subrule 4.1 were merely limited to the technical qualifications and presumed future competence of lawyers, there would have been no need for the amendment giving the Law Society the power to declare a faculty of law approved or not approved, which amendment is not challenged by TWU.

318. Therefore, and contrary to TWU's submission,[207] there is no 'inconsistency' between delegating certain considerations to the FLSC, while reserving to the Law Society its power to refuse to approve where it would be inconsistent with its statutory obligations. If anything, it would be the unqualified, wholesale delegation of that authority to another body, such as the FLSC, that may cause issues of improper delegation, if that delegation deprived the Law Society of its ability to fulfil its statutory mandate and to act in the public interest.

319. Overall, it cannot be said that the interpretation of Subrule 4.1 leading to the adoption of the Resolution was unreasonable, much less that it was so unreasonable that no reasonable

[206] TWU Written Submission, at para 247.
[207] TWU Written Submission, at para 73.

body could have adopted it. The Benchers' application of the Rule to TWU is consistent with both its language and purpose, and is entitled to considerable deference.

320. In determining whether the interpretation was reasonable, it is important to understand the precise scope of Subrule 4.1. It states:

> 2-27 (4.1) For the purposes of this Rule, a common law faculty of law is approved if it has been approved by the Federation of Law Societies of Canada unless the Benchers adopt a resolution declaring that it is not or has ceased to be an approved faculty of law.

321. This Rule provides a broad, discretionary power to not approve a faculty of law for the purposes of admission, where approval of a law school would undermine the Law Society's legal obligations and statutory mandate.

322. Subrule 4.1 does not say "unless the Benchers *conclude*" or "*decide*" or "*determine*"; it says "unless the Benchers *adopt* a resolution", without specifying upon which grounds that resolution must be based, or the considerations to be taken into account in deciding whether to adopt a resolution.

323. The language of Subrule 4.1 does not even imply, much less expressly require, that the decision must be made by the Benchers without consultation with the membership, as TWU argues.

324. The Benchers are, however, required to interpret this rule, and exercise the discretion it confers, reasonably in each case, and consistently with the Law Society's statutory duties and the relevant *Charter* values that may be implicated. They did so in this case.

c) Application of Subrule 4.1 to TWU

325. The Benchers' initial decision not to invoke Subrule 4.1 with respect to TWU's proposed law school for bar admission purposes was not reached because the Benchers were unconcerned about the discriminatory aspects of TWU's Covenant. As noted above, the debates amongst the Benchers, mirroring the controversy generated in the legal community, were contentious and displayed a range of sometimes sharply divergent views.

326. The extensive discussions focused on the impact of approval of the proposed law school on the public interest in the administration of justice, the diversity and inclusivity of the legal profession, as well as the impact of the *Charter* and prior case law on the decision. This is shown in the discussions among Benchers at both the April 11th and September 26th meetings.

327. The Benchers consulted widely throughout the process. They did not take their initial decision lightly, but neither was that decision cast in stone. As a democratic body charged with the heavy responsibility of self-governance in the public interest, the Benchers were well aware of their obligation to ensure that decisions impacting the overall public confidence in the profession require attention to and respect for the views of the membership.

328. Following the Benchers' April decision, the matter was brought forward by the membership, many of whom agreed with those Benchers who had argued in April that TWU's proposed law school should not be an approved faculty of law. In fact, an overwhelming majority of the members at the SGM expressed the view that, because of TWU's discriminatory admissions policy, it would be contrary to the public interest to approve a TWU law school for the purposes of admission to the Bar.

329. The SGM Resolution itself had no legal effect at that time; it was an expression of the collective wishes of the majority of those members who participated in the SGM.

330. Following the SGM, the Benchers received and discussed further legal advice with respect to the scope and mandate of the Law Society with respect to its decision to accredit TWU. The Benchers again debated the possibility of invoking Subrule 4.1, and the implications of the SGM Resolution on the governance and obligations of the Law Society.

331. By motion dated September 26, 2014, the Benchers decided that a referendum should be conducted in order to give effect to the Law Society's statutory mandate to protect and uphold the public interest in the administration of justice, as described above.

332. The motion adopted by the Benchers stated that the referendum would be binding on the Benchers in the event that (a) 1/3 of all members in good standing of the Law Society vote

in the Referendum; and (b) 2/3 of those voting vote in favour of the Resolution. It also included the statement that the "Benchers hereby determine that *implementation of the Resolution does not constitute a breach of their statutory duties, regardless of the results of the Referendum*".

333. The clear implication of the motion is that the Benchers in favour of the September resolution calling for a referendum had collectively determined that *both* approving TWU and refusing to accredit would be consistent with the Law Society's statutory duties, in that both decisions would be a reasonable exercise of the Law Society's powers under the *Legal Profession Act*.

334. Having reached that conclusion, the Benchers decided that the best and most legitimate way to resolve the matter would be for the Law Society to adopt the views of the membership as a whole on this important decision impacting the public interest in the administration of justice and the honour and integrity of the profession.

335. It is important to emphasize at this stage that s.3 of the *Legal Profession Act* states that it is the "object and duty *of the society* to uphold and protect the public interest in the administration of justice", and to fulfil the specific duties outlined in section 3. These obligations are, therefore, *owed by the society as a whole*, not only the Benchers.

336. The members of the Law Society have an obvious interest in the governance of and public confidence in the profession, and in maintaining and upholding the public interest in the administration of justice.

337. The Benchers determined that, in the unique context of a decision affecting the public interest in the administration of justice, implicating the honour and integrity of the legal profession as a whole, which had provoked vigorous arguments on both sides of a contentious legal and policy issue, the best way to meet the Law Society's statutory obligations was to provide the Law Society as a whole with the opportunity of collectively fulfilling its statutory mandate.

338. Moreover, the conditions placed on the referendum by the Benchers mirror those conditions for a referendum set out in section 13 of the *Legal Profession Act*, namely the

requirement for a sufficient proportion of the membership voting, and a super-majority of voters voting in favour of the resolution. As those speaking in favour of the September resolution noted, the referendum was designed with that very purpose, in order to follow the specific criteria set out in the *Act*.

339. As such, the October referendum followed a procedure expressly contemplated by the *Act* as a means by which the membership can collectively decide upon a resolution to be adopted by the Benchers.

340. Contrary to TWU's submission, the Law Society is lawfully entitled to consider the views of its members in deciding on matters relating to the governance of the profession in the public interest, and the Benchers' interpretation of Subrule 4.1 as allowing the Law Society to proceed in this manner is entitled to considerable deference.

341. It is also important to emphasize the Benchers' awareness that, at the end of the day, they were the ones voting on the Resolution. Rule 4.1 permits the *Benchers* to adopt a resolution, without specifying the process by which the Benchers should decide that a resolution should be adopted. It was ultimately the Benchers' decision. Indeed, despite the passage of the resolution dictating that the results would be binding, there was one vote against passing the Resolution, and four abstentions.

342. Clearly, then, the Benchers ultimately exercised their independent judgment; the independent judgment of the majority of the Benchers was either that they agreed with the outcome of the referendum, or that they believed that it was a reasonable, principled result on a complex question reached through an inclusive and democratic process, in a manner consistent with the *Act*, and that they would adopt it on that basis.

343. The question before the Benchers was clearly not, as TWU submits, "whether a future applicant to the bar… who graduates from TWU's school of law has adequate 'academic qualifications'… to become a competent lawyer".[208]

[208] TWU Written Submission, at para 238.

344. As described above, the Benchers were asked whether TWU's proposed school of law should be "approved" by the Law Society.

345. And contrary to TWU's submission, the Benchers did not close their 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".[209]

346. There are no such applicants. All that the Law Society had before it was TWU as an institution, seeking the Law Society's approval for a proposed faculty of law which effectively banned certain groups from participation in its program of legal education.

d) Section 13 Does not Limit the Discretion to Hold an Expedited Referendum

347. The Petitioners argue that the result of the October referendum cannot be considered "binding" because the Law Society failed to strictly comply with the terms of section 13 of the *Legal Profession Act*.[210] As a result, TWU submits that the Benchers' decision to hold a referendum was unreasonable, improperly fettered the Benchers' discretion, and constituted an improper sub-delegation of authority.[211]

348. With respect, this argument misunderstands both section 13, and the process initiated by the September 26th motion.

349. Section 13 of the *Act* described the conditions under which the membership can legally *oblige* the Benchers to adopt a resolution of a general meeting. It reads as follows:

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

[209] TWU Written Submission, at para 214.
[210] TWU Written Submission, at paras 95-98.
[211] See TWU Written Submission, at paras 201-206, 211-214, 310-314.

(a) 1/3 of all members in good standing of the society vote in the referendum, and

(b) 2/3 of those voting vote in favour of the resolution.

(4) The benchers must not implement a resolution if to do so would constitute a breach of their statutory duties.

350. Section 13 is designed to provide a mechanism by which the membership may impose a resolution on the Benchers, even if the Benchers disagree with that course of action, unless the latter find it contrary to their statutory duties. Section 13(2) clearly stipulates when a referendum *must* be held, and when the results of that referendum will be considered binding on the Benchers.

351. These sections do not *preclude* the Benchers from holding a referendum, where the Benchers determine that two or more decisions are within its jurisdiction to determine and consistent with its constitutional and statutory duties.

352. Section 13(2)(a) accommodates a situation where a specific resolution adopted at a general meeting had not been previously considered by the Benchers. In such a case, the 12 month delay provides the Benchers with the opportunity to study the resolution and its implications, and the opportunity to obtain advice and consider what their statutory and constitutional duties require.

353. The waiting period in s. 13(2)(a) is clearly designed to permit the Benchers the opportunity to carefully consider and adopt a resolution passed at general meeting without the need for a referendum, or to propose an alternative that would be consistent with the wishes of the membership, making a referendum unnecessary.

354. Section 13 is not intended to *prohibit* the Benchers from determining that the most reasonable way to resolve a highly contentious issue in the public interest – particularly a contentious issue affecting the legal profession as a whole – is to abide by the wishes of is membership, as long as the outcome is consistent with its statutory (and constitutional) duties.

355. Moreover, the Benchers may hold a referendum for any purpose. The Benchers have a general power to hold a referendum, in Rule 1-37 of the *Rules,* which provides:

Referendum ballots

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

356. As such, the preconditions contained in section 13, including the requirement to wait 12 months, are not directly applicable to the process followed in holding the October referendum for the purposes of applying Subrule 4.1, and do not circumscribe the Benchers' decision-making process. The Benchers simply expedited the procedure expressly contemplated in the *Legal Profession Act* and followed the criteria outlined therein, which was a reasonable decision under the circumstances.[212]

357. Aside altogether from the ability of the membership to require the Benchers to adopt a resolution under section 13, the Benchers are lawfully entitled under the *Legal Profession Act* to adopt a resolution that is endorsed by its members, as a method whereby Subrule 4.1 is applied.

e) Conclusion on Fettering and Subdelegation

358. To repeat, the Petitioners do not allege that the Benchers illegally delegated their authority or fettered their discretion to "make rules" under ss. 20-21 of the *Legal Profession Act.* They seek to challenge the Benchers decision as to how their discretion under the Rules they have enacted should be exercised.

359. As the Record reveals, the Benchers were deeply divided on whether and how the discretion conferred by Subrule 4.1 should be exercised in this case. As the majority of Benchers determined that neither outcome was clearly inconsistent with the Benchers statutory or constitutional duties – as they must have to vote in favour of the September

[212] As noted above, the discussion at the September meeting confirms that the Benchers were alert to the process outlined in section 13, and sought to design the referendum to conform as much as possible to that process. The Benchers merely sought to expedite that process, in the course of exercising its discretion under Rule 4.1.

resolution to hold a referendum – both were considered to be available to the Benchers and the Law Society as a whole.

360. Far from fettering their discretion by calling a referendum, the Benchers thoughtfully *exercised* their discretion in determining the basis upon which they would invoke (or decline to invoke) Subrule 4.1.

361. As that determination constituted a reasonable interpretation of the power conferred both by Subrule 4.1 itself and by the statute under which it was made, and was consistent with the procedure expressly contemplated in the *Act*, the referendum process was open to the Benchers, and no issue of fettering or sub-delegation arises.

D. No Breach of Procedural Fairness

362. TWU argues that it was denied procedural fairness, notwithstanding its extensive opportunity to address the Benchers and the Law Society on countless occasions throughout the accreditation process.

363. As noted above, the Law Society's decision making process in evoking section 4.1 was quasi-legislative, for which little or no duty of procedural fairness was owed.[213] The Law Society was deciding whether to approve a proposed law school that discriminates on the basis of prohibited grounds, thereby impeding equal access to the legal profession.

364. The fact that the specific Resolution only applied to a single entity, in this case TWU, does not mean that it was not quasi-legislative in nature.[214] There is no question that the decision was discretionary and policy-oriented and involved "broad considerations of public policy", which further confirms its quasi-legislative nature, as well as the limited procedural rights in this context.[215]

[213] See generally *Att. Gen. of Can. v. Inuit Tapirisat et al.*, [1980] 2 S.C.R. 735.
[214] *Wells v. Newfoundland* [1999] 3 S.C.R. 199 at para 61.
[215] *Martineau v. Matsqui Disciplinary Board*, [1980] 1 S.C.R. 602 at 628-629; *Office and Professional Employees' International Union, Local 378 v British Columbia (Hydro & Power Authority)* 2004 BCSC 44 at paras 88-89.

365. In any event, TWU was given considerable and extensive participatory rights throughout the process including the opportunity to make written submissions, which more than met any duty of fairness owed in this instance.

366. TWU provided extensive submissions in its proposal to the Law Society; TWU's representatives attended the Benchers' meetings; TWU was kept informed throughout the process; and TWU provided written submissions prior to the April meeting, following the SGM, and following the September 26th motion.[216] These submissions were reviewed and considered by the Benchers, were posted online, and available to the Law Society membership and the broader public. In total, TWU's submissions to the Law Society amount to many hundreds pages of evidence and argument.[217]

367. TWU was represented at the SGM, and observed the counting of ballots.[218] TWU sent out public appeals to lawyers.[219]

368. As such, it is clear from the record that TWU was kept fully informed of the decision making process, and had access and a full opportunity to respond to all of the information available to the Benchers and membership in making their decision, including the submissions of the public and legal opinions.

369. Both the Benchers and the membership as a whole have been fully informed of TWU's position, and TWU has repeatedly had opportunity to present its position to the Law Society, both through the formal consultation process and through public advocacy.

370. TWU suggests that a particularly high duty of fairness was owed in this case because the decision affects "one's ability to practice their profession".[220] With respect, that is incorrect.

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[216] See generally Affidavit #1 of Earl Phillips, sworn December 15, 2014 ("**Phillips Affidavit #1**"), at paras 10-14, 18-19, 22, 25-28, 39, 47, 49, 50, Exhibits 'B', 'C', 'P', 'T', 'Z', 'AA', 'FF', 'HH'.
[217] See Phillips Affidavit #1, Exhibits 'B', 'J', 'AA', 'HH'.
[218] Phillips Affidavit #1, at para 35.
[219] Phillips Affidavit #1, at para 45-46.
[220] TWU Written Submission, at para 216.

371. The Resolution affects whether TWU's proposed law school, which has no students, is an approved faculty of law. That may impact TWU's ability to operate a commercially attractive or economically viable law school, but it does not impact the ability of evangelical Christians or anyone else to practice their profession. Evangelical Christians, like all other persons undifferentiated by personal characteristics, are welcome in every law school across the country, and have equal access to the law school seats available.

372. TWU was aware of the basis for the decision and the "grounds upon which the decision would be made",[221] as well as the concerns of the Law Society, through the many submissions before the Benchers and posted online. The statutory mandate of the Law Society, including the public interest in the administration of justice, was the overwhelming consideration of the Benchers throughout the decision making process, as a review of their discussions reveal. It is on that basis that the decision was to be made, and TWU was fully aware of that fact.

373. Nor could TWU have a reasonable expectation "that the academic component of its JD Program proposal would be assessed on the Federation's uniform national requirement".[222] They may have had that expectation, but it would not be reasonable, in light of the fact that the Rules expressly deferred to the FLSC, *unless the Benchers adopt a motion declaring the school of law not to be approved*.

374. In short, TWU was provided with extensive access to the Law Society's decision making process and considerable opportunities to provide submissions to the Benchers and the public. It was given these opportunities with respect to what was in essence a policy-laden, quasi-legislative decision impacting the profession as a whole, and affecting the interests of all future law students, including those who would be systematically excluded and denied equal access to the legal profession. If any duty of fairness was owed to TWU in this context, it was more than met by the process followed.

[221] TWU Written Submission, at para 218.
[222] TWU Written Submission, at para 222.

E. The Law Society's Decision was Reasonable, and Correct

a) Overview on the Reasonableness, and Correctness, of the Law Society's Decision

375. Once it is determined that the discretion to render the decision fell within the statutory mandate of the Law Society, and that the process followed in rendering its decision is legitimate, as described above, the question is whether the Law Society's ultimate decision was reasonable.

376. This requires an examination of whether the Law Society's Resolution to disapprove of TWU for the purposes of admission to the bar was a reasonable decision, consistent with the Law Society's statutory and constitutional obligations.

377. The decision to invoke Subrule 4.1 was a discretionary exercise of the powers conferred by the Law Society's home statute, which counsels deference on a standard of reasonableness. As noted above, in order to be overturned, it must be a decision for which there was no reasonable basis, or a conclusion at which "no reasonable body" could have arrived. Alternatively, the Petitioners must establish that the Law Society's Resolution does not come "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".

378. The exercise of discretion under Subrule 4.1 also implicates *Charter* values, and therefore the Law Society must strike a reasonable balance between the statutory objectives and those *Charter* values.

379. As there were no written reasons for the Resolution, and none required, the court's task is to determine whether the ultimate conclusion was reasonable. In undertaking that task, the court must pay "respectful attention" to the reasons that "*could* be offered in support of a decision".[223] If there was a reasonable basis upon which to render the decision in question,

[223] See *Dunsmuir*, *supra* at para 48; *ATA*, *supra* at para 52-54; *Agraira*, *supra* at para 58; *Newfoundland Nurses*, *supra* at paras 11-12.

the court should not interfere, particularly in light of the democratic nature of the Law Society and the decision rendered.

380. This point was made by the Ontario Divisional Court, with specific reference to the Supreme Court of Canada's decision in *Catalyst*, observing that a reasonableness standard applied, and referencing the nature of the Law Society as a democratic organization:

> We would add that an elected body that reaches a decision, which is then the subject of a judicial review, does not lose the right to have its decision adjudicated on a reasonableness standard just because there are no reasons for a court to review. Indeed, given the democratic process that is inherent in reaching such a decision, it is likely unrealistic to expect that reasons will be provided. This point was directly addressed in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 (CanLII), [2012] 1 S.C.R. 5 where McLachlin C.J.C. said, at para. 29:
>
> > Formal reasons may be required for decisions that involve quasi-judicial adjudication by a municipality. But that does not apply to the process of passing municipal bylaws. To demand that councillors who have just emerged from a heated debate on the merits of a bylaw get together to produce a coherent set of reasons is to misconceive the nature of the democratic process that prevails in the council chamber. The reasons for a municipal bylaw are traditionally deduced from the debate, deliberations and the statements of policy that give rise to the bylaw.[224]

381. Such considerations are even more pertinent in this case than in the decision under review by the Ontario court. While the Law Society of Upper Canada decision was indirectly democratic, made as it was primarily by elected Benchers, the Law Society of British Columbia's decision expressly incorporated the views of the membership into the decision making process, which attracts an even higher level of deference from a reviewing court.

382. In this case, the reasons that were offered, and could be offered, for the decision demonstrate that the Law Society's Resolution was not only reasonable, but also correct, if that is the applicable standard of review (which is denied).

383. The Covenant, and therefore TWU, discriminates against LGBTQ applicants, women, persons of other faiths or no faith at all, and individuals in common law relationships and others; it imposes unequal access to the legal profession and the judiciary in British

[224] *TWU v. LSUC, supra* at para 50.

Columbia. It is contrary to the Law Society's statutory mandate and constitutional obligations to admit graduates of a law program that restricts access based on the imposition of an exclusionary and mandatory Covenant as a condition of admission.

b) <u>What the Resolution Does and Does not Do</u>

384. The Petitioners have erected an impressive array of "straw men" in an attempt to impugn the Law Society's decision in this case. As such, it is important to set out clearly the effect and basis of the Resolution prior to undertaking a review of its reasonableness.

i. The Resolution is not based on the religious character of TWU

385. The Law Society's refusal to approve TWU is not focused at all, much less "solely", "on the character of its religious community as expressed in the Community Covenant", as TWU argues.[225]

386. As the Law Society has made clear, it places no restrictions on the legal practice of evangelical Christians, who are welcome in the Law Society. Similarly, persons who choose to live their lives according to the Covenant or the values it espouses are welcome in the Law Society, and the Resolution does not impact them. Persons with views on marriage and sexuality which deviate from the state of Canadian law are welcome in the Law Society, and the Resolution does not impact them. The Resolution simply does not impose any restrictions on evangelical Christians, former, current or future.

387. Not a single Bencher suggested that TWU should not be approved because of its "Christian character". This was not a consideration. What was a consideration, and ultimately the basis of the Resolution, was that the Covenant imposes a discriminatory bar to access to TWU's proposed school of law, thereby effectively denying equal access to the legal profession and the judiciary.

[225] TWU Written Submission, at para 5.

ii. The Resolution does not impact the "autonomous existence" of TWU's religious community

388. Based on the recent the Supreme Court of Canada decision in *Saguenay*, TWU argues that the Resolution impacts TWU's right to an "autonomous existence", and violates the state's duty to observe religious neutrality. [226] The Court has said that this duty will be met "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".[227]

389. Contrary to the premise of this argument, the Resolution does not hinder TWU's freedom to operate a law school, with or without a discriminatory admissions policy, and to govern its proposed law school as autonomously as it pleases. However, TWU is not requesting an "autonomous existence" for its proposed law school in this Petition, untouched by the state. [228] It is not seeking to be left alone to establish and run its law school.

390. Rather, TWU wants to play an integral role in the training of lawyers and judges in our legal system and at the same time to adopt an admissions policy which is inconsistent with the fundamental tenants of that same legal system, and effectively denies equal access to the legal profession

391. In doing so, TWU is demanding the affirmative *approval* of the Law Society, as a public body, in order to *facilitate* the issuance of secular law degrees and to participate in the legal profession. TWU wants the courts to impose this upon the Law Society, which has concluded that approving TWU would be inconsistent with its statutory and constitutional obligations.

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[226] TWU Written Submission, at paras 7, 371, 373-375.

[227] *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7 ("***S.L.***") at para 32.

[228] Whether or not TWU can grant law degrees at such an institution is a decision for the Minister, under the *Degree Authorization Act*, SBC 2002, c 24, s. 4. The Minister has refused to grant consent to TWU to issue law degrees, but TWU does not need the Law Society's permission in order to put up a law school building, establish a law library, hire faculty and staff, enroll students, and provide courses on the law.

392. This is therefore not a claim for an 'autonomous existence' free from state regulation, which is always and at all times open to TWU, but rather for the affirmative approval of a public regulatory body of its proposed law school notwithstanding its negative impact on the public interest in the administration of justice and equal access to the legal profession.

iii. The Resolution does not regulate or impede religious beliefs

393. Contrary to what TWU asserts, the Resolution does not amount to 'regulating' or impeding the beliefs of TWU's membership or religious community.

394. TWU argues that the *LPA* was "never intended for members to make decisions disqualifying an individual based on religious belief",[229] that the Law Society cannot refuse to approve TWU on the basis that TWU "holds 'discriminatory' religious beliefs", and that the Resolution forces TWU or its membership to give up their religious beliefs.[230]

395. The Resolution does no such thing. Evangelical Christians and TWU's religious community may freely believe whatever they want. The Resolution does not prohibit or prevent TWU's community from believing, or freely and voluntarily adhering to the commitments in the Covenant.

396. The Law Society undoubtedly has members who find same sex relationships or sexual activity objectionable or are opposed to same sex marriage. The Resolution does not regulate, limit or in any fashion impact the freedom of individuals, including its members, to have such personal beliefs, religious or otherwise.

397. TWU argues that the Law Society's decision is unreasonable, on the basis that '[t]he freedom to hold beliefs is broader than the freedom to act upon them'. The freedom to hold discriminatory beliefs does not mean a lawyer can discriminate in practice."[231]

[229] TWU Written Submission, at para 261.
[230] TWU Written Submission at para 195.
[231] TWU Written Submission, at para 251.

398. The Resolution does not affect the ability of TWU's prospective graduates to believe what they want, nor does it presume that because they have personal views on the validity of someone's marriage, they will discriminate in practice.

399. The Resolution does not impact an individual's freedom *to hold or express beliefs*. In this case, however, TWU's beliefs have manifested themselves in conduct to which the Law Society must take notice. TWU intends to impose a Covenant on all applicants to law school, as a condition of admission to law school and continued attendance, which has the effect of limiting equal access to the legal profession on the basis of sexual orientation and other prohibited grounds of discrimination.

400. Religious beliefs, on their own, do not deprive a person of access to a legal education; it is the imposition of those beliefs and practices on others, *as a condition of access to law school*, that has led to the Law Society to refuse to approve TWU's proposed law school.

401. The entire basis of the Resolution is that individual's protected beliefs may become harmful and contrary to the public interest when they are imposed on others as a condition of entry to a law school. Imposing a discriminatory condition of enrollment is emphatically *conduct*, while the freedom of each individual to believe and follow those beliefs remains protected and unimpacted by the Law Society's Resolution.

402. This is therefore not a case about the religious *beliefs* of TWU or its membership. As TWU notes, the Law Society has not regulated the beliefs of persons of the profession.[232] This case is about TWU's proposal to *impose* those beliefs and practices upon those who will not or cannot abide by them, as a condition of admission to law school.

iv. The Resolution does not begin down a slippery slope

403. TWU also argues that if the Law Society can express its disapproval of a law school with a discriminatory admissions policy, "it is hard to see why it could also not screen, prohibit, and disbar other applicants holding similar and unpopular beliefs".[233]

[232] See the following section.
[233] TWU Written Submission, at para 257,

404. It is, in fact, very easy to see why this is the case: because the individual with unpopular or unorthodox, even discriminatory, beliefs, impedes no one's access to legal education, and undermines no duty of the Law Society. Unless those beliefs manifest themselves in objectionable *conduct* – such as through discrimination in practice, or in TWU's case, impeding equal access to legal education – the Law Society has no intention of 'regulating' them.

405. Similarly, individuals who voluntarily abide by the Covenant or other behavioural codes of conduct, and institutions which make such codes of conduct voluntary, harm no one. The Law Society's Resolution has no impact on a person's freedom to abide by a code of conduct, or the TWU's Covenant. Students may live according to any moral or religious code of conduct they see fit, and may do so at any law school across the country.

406. In a similar vein, TWU argues that if the Law Society can disapprove of a law school:

> it might have the authority to 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.[234]

407. With respect, again, it is very easy to see why this "same logic" would not apply. High schools, charities and churches do not serve as gateways to the legal profession or the judiciary.

v. The Resolution does not deny individuals entry to the bar

408. TWU states that the Resolution denies TWU graduates access to the Bar.[235] That is untrue, for two reasons.

409. First, many students who have attended TWU undergraduate programs, and have subsequently attended law schools *without* discriminatory admissions policies, have been granted access to the Bar.

[234] TWU Written Submission, at para 183.
[235] See TWU Written Submission, at paras 164, 268.

410. Indeed, the Law Society has expressed no concern that graduates of the proposed TWU school of law would be incapable of practicing law,[236] or that their competence as legal practitioners would be compromised by attending TWU. Rather, the concern is that in imposing the Covenant, the proposed law school is imposing discriminatory barriers to entry into its legal education program therefore impeding equal access to the legal profession.

411. Second, there *are* no graduates from TWU's proposed school of law, and there will not be any graduates until or unless TWU's proposed law school is accredited by the Government.

412. It is entirely speculative that such accreditation will, or lawfully can, be granted.

413. Until there are graduates, the issue of the effect on TWU graduates does not arise. It may *never* arise. The question in this case is simply whether the Law Society has the authority to disapprove of TWU's proposed law school on the basis that it would limit equal access to the legal profession and the judiciary.

414. Therefore, the Resolution does not have the effect of impacting actual TWU graduates; if anything, it only affects TWU's ability to attract students. The Law Society submits that the Ontario Divisional Court put this point succinctly:

> Further, the consequence of the decision of the British Columbia College of Teachers was that TWU would not be able to operate its own teacher education program. This result, in turn, meant that persons who attended TWU would not be certified as public school teachers. That is not the result of the respondent's decision in this case. The respondent's denial of accreditation does not preclude TWU from opening and operating a law school. Quite the contrary. TWU remains free to operate its law school, and persons who attend it are free to pursue their legal education within an overriding atmosphere of evangelical Christian beliefs. Graduates of TWU's law school will have the right to become members of the Bars in those Provinces where TWU's law school has been accredited. Indeed, as we shall explain further towards the end of these reasons, those graduates can still apply, and the respondent will be under an obligation to consider any individual

[236] Some Benchers made this point expressly in the course of their comments. See e.g. McGee Affidavit, Exhibit 'J', at 426, Bencher Ongman ("I have absolutely no doubt that the law school at Trinity Western will produce students that will make fine lawyers and that there are fine lawyers at this table that are Christians and can do their job and I would certainly would never have any fault with the students from TWU").

> application, to be accredited for membership in the Bar of Ontario. That is a manifestly different result than was the case in BCCT.[237]

415. Therefore, TWU's claim that their graduates are either being denied access to a strictly evangelical Christian law school or being refused access to the Bar are both untenable.

416. The Resolution constitutes a refusal by the Law Society to approve and facilitate TWU's proposed law school. It is TWU's proposed law school as an institution that is imposing a discriminatory Covenant upon all potential future students, and for that reason cannot be approved or facilitated by the Law Society.

vi. The Resolution does not impact whether graduates of a religious institution can become lawyers

417. TWU seeks to describe the Resolution as declaring "whether graduates of a religious institution can become lawyers".[238] That is not so. The Resolution does not impact whether graduates of religious institutions can obtain access to the bar. Rather, it denies approval of a proposed law school that discriminates against certain groups with respect to participating in its program of legal education.

418. The Resolution has no impact on a religious law school which maintains an non-discriminatory admissions policy, that is, a religious law school which does not effectively deny access to legal education on the basis of prohibited grounds of discrimination.

419. Moreover, graduates of religious institutions can become lawyers. TWU students have become lawyers, through attending schools which do not discriminate in granting access to legal education.

420. There is therefore no merit to the claim that the Resolution impacts whether persons attending religious institutions, as such, can become lawyers. It is not the religious nature of the institution that has led to the Resolution; it was the discriminatory admissions policy in the specific context of the provision of a legal education that led to TWU's proposed law school not being approved.

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[237] *TWU v. LSUC*, *supra* at para 68.
[238] TWU Written Submission, at para 183.

vii. The Resolution does not 'demand' that that TWU abandon the Community Covenant

421. TWU claims that the Law Society has 'demanded' that "TWU abandon the Community Covenant".[239] That is not so.

422. What the Law Society has said through its Resolution is that it will not give its approval to TWU's proposed law school if it imposes the Convention as a condition of participation in its program of legal education.

viii. The Resolution does not ban or regulate codes of conduct

423. As TWU points out, many educational institutions have codes of conduct.[240] Typically these codes seek to ensure a safe and welcoming learning environment.

424. The Resolution does not say that TWU cannot have a code of conduct. It simply says that a proposed law school that has a code of conduct that effectively denies, on the basis of prohibited grounds, equal access to a legal education is not approved by the Law Society.

425. Put simply, TWU has no right to the Law Society's approval for a law school that denies equal access to the legal profession on the basis that the members of its religious community want to study law only with people who commit to abide by their religious beliefs and codes of conduct.

426. Moreover, it is important to emphasize that there are only a few aspects of the Covenant that are the basis for the Resolution: namely, those which prescribe discriminatory barriers to admission. This is not a Resolution that expresses any view on, or impacts, the vast majority of terms of the Covenant, which have no discriminatory effect on admission to law school.

427. With the greatest of respect, TWU's evidence of the importance of the Covenant to evangelical Christians seeking to practice law is therefore largely beside the point.[241] The basis of the Resolution has nothing to do with the Covenant, *as such*, but rather those

[239] TWU Written Submission, at para 6.
[240] TWU Written Submission, at paras 379, 384-385.
[241] TWU Written Submission, at paras 31-35.

aspects of the Covenant which impose discriminatory barriers to admission to the law school and hence the legal profession.

ix. Conclusion on the true impact of the Resolution

428. TWU argues against a resolution which bans evangelical Christians from practicing law, which coercively regulates the belief of individuals, which prohibits graduates from TWU from admittance to the bar, which bans religious persons from adhering to a codes of conduct, which forces TWU to abandon its Covenant, which bans law schools from imposing a code of conduct, and which generally prohibits persons of faith or those harbouring "objectionable" views from becoming lawyers.

429. That is not the Resolution adopted by the Law Society.

430. The Resolution expresses the Law Society's disapproval of TWU's proposed law school, and denies the Law Society's stamp of approval to the proposed school of law, because the imposition of TWU's Covenant would impede equal access to legal education on the basis of sexual orientation and other prohibited grounds, and thereby impedes equal access to the legal profession and the judiciary.

431. The Resolution therefore reflects the Law Society's determination that to condone, facilitate, and or otherwise endorse TWU's proposed law school, and therefore to ignore a discriminatory admissions policy that effectively denies persons of equal access to the legal profession, would be contrary to the Law Society's statutory and constitutional obligations.

c) Trinity Western University v. BCCT does not resolve this case

432. Contrary to TWU's submission, the Supreme Court of Canada has not already ruled in the *BCCT* case on the issue of whether TWU's proposed law school should be approved.

433. The *BCCT* case involved different facts, different legislation, a different constitutional focus, and is as a result not binding on the issues raised in this petition.[242]

[242] See *TWU v. LSUC*, *supra* at para 60 (the "issue raised before the Supreme Court of Canada in *BCCT* involved different facts, a different statutory regime, and a fundamentally different question")

434. In the *BCCT* case, the Supreme Court ruled on whether a Teachers College could require the graduates of TWU's already existing education school to take additional courses elsewhere to qualify them to be teachers certified by the College.

435. In this case, there is no existing law school with existing students, there is only a proposed law school with hypothetical future students that does not have consent to issue law degrees. Therefore, there are no actual graduates or current students of TWU's law school who are harmed by the Resolution.

436. Second, the statutory discretion afforded to the Law Society is considerably broader than that afforded to the Teachers College in *BCCT*. The statute at issue in *BCCT* described the objects of the Teachers College as "*to establish*, having regard to the public interest, *standards for the education, professional responsibility and competence of its members*".[243]

437. Unlike the Teachers College, the Law Society has an express statutory mandate to act in the public interest in the administration of justice generally, and in particular, to preserve and protect the rights and freedoms of all persons. The obligation of the Law Society to ensure equal access to the legal profession is the critical factor in this case.

438. The impugned decision of the College was issued under its statutory power to make bylaws "respecting the *training and qualifications* of teachers and establishing standards, policies and procedures with respect to the *training and qualifications*".[244] As noted above, the Benchers' statutory mandate and rule-making power expressly contemplates requirements for enrolment and admission *beyond* mere academic requirements.

439. Thus, both the jurisdiction of the Law Society, and the statutory objects that must be weighed in relation to *Charter* values, differ in this context. The valid statutory objectives

[243] *BCCT*, *supra* at para 9, citing *Teaching Profession Act*, R.S.B.C. 1996, c. 449, s.4.
[244] *BCCT*, *supra* at para 9, citing *Teaching Profession Act*, R.S.B.C. 1996, c. 449, s. 23(1)(d). On this point, see *TWU v. LSUC*, *supra* at para 61 (the "public interest mandate of the British Columbia College of Teachers was directly, and solely, linked to the setting of standards for the education, professional responsibility and competence of its members").

of the Law Society are broader, and on a modern *Doré* analysis, this will affect the manner in which they are balanced in relation to *Charter* values.

440. Third, the evidence in *BCCT* did not demonstrate that persons would be denied access to TWU on the basis of inability to comply with the Covenant due to personal characteristics, or that access to teachers colleges was limited.[245]

441. In this case, TWU does not dispute that persons refusing to sign the Covenant are ineligible to attend TWU, and that persons who sign but do not comply with the behavioural restrictions in the Covenant can be punished, up to and including expulsion.[246] TWU itself concedes that access to law schools is limited, and competition for those placements is fierce. This will necessarily result in harm to those effectively excluded from access to TWU's proposed law school, and therefore denied equal access to the profession.[247]

442. Fourth, as the Court explained in *BCCT*, "(s)tudents 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*". The Court found that the appropriate place to draw the line was between discriminatory *beliefs*, which must be tolerated, and discriminatory *conduct*, which must not.

443. The focus of the Supreme Court's decision in *BCCT* was the alleged possibility that graduates of TWU's teachers school would discriminate against primary and secondary school students, or create a discriminatory teaching environment in the classroom. The relevant 'conduct' was therefore the hypothetical and speculative *future discrimination against pupils* by TWU graduates. The Court ruled that there was insufficient evidence that this would occur, and therefore no concern that TWU students would "interfere with the rights of others".[248]

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[245] *TWU v. LSUC*, *supra* at para 62-67.
[246] See *TWU v. LSUC*, *supra* at paras 62-65.
[247] See *TWU v. LSUC*, *supra* at para 67 (noting that "(a)bsent access to a law school, of course, persons cannot pursue a legal education or their dream of becoming a lawyer").
[248] *BCCT*, *supra* at paras 33-35.

444. By contrast, the relevant 'conduct' in this case is the direct and harmful *discrimination against LGBTQ and other applicants* to TWU's proposed law school. The harm caused by this conduct is not hypothetical and speculative, but is rather inevitable, deliberate and institutionalized. Endorsing such discrimination will negatively impact LGBTQ applicants and students. Moreover, condoning and facilitating such conduct will injure the public interest in the administration of justice, and hence the public confidence in the legal profession.

445. The Resolution is not premised upon an assertion, and indeed the Law Society does not assert, that graduates of TWU would be incompetent to practice law, or that they would be reasonably expected to engage in discriminatory conduct in the future.

446. Rather, the Resolution is designed to prevent harm to LGBTQ people and others effectively excluded from participation in TWU's proposed program of legal education, as well as to the administration of justice and the honour and integrity of the profession. In short, effectively prohibiting LGBTQ persons and others from attending TWU law school transforms religious belief into discriminatory conduct. As such, the Resolution represents a refusal to condone and facilitate discriminatory *conduct* by TWU.

447. Finally, even if it could be said that *BCCT* addressed and resolved the issues raised in this petition, which is denied, a lower court can still subsequently revisit that decision if circumstances have changed.

448. As the Supreme Court of Canada has recently observed, it is incumbent on lower courts to reconsider a decision, for instance, if "new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate".[249]

449. Since the time *BCCT* was decided, Canadian courts and lawmakers have been increasingly vigilant in protecting the rights of LGBTQ persons, and have been solicitous to ensure their full participation in society.

[249] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para 42; *Carter v. Canada (Attorney General)*, 2015 SCC 5 at paras 42-48.

450. Following *BCCT*, the courts have rendered decisions recognizing the unavailability of the provocation defence on the basis of same-sex advances;[250] finding that differential treatment of same-sex couples in the context of survivor benefits is unconstitutional;[251] recognizing that the common law bar against same-sex marriage is unconstitutional;[252] recognizing the constitutionality of same-sex marriages;[253] recognizing the right to include the names of both same-sex parents on birth certificates;[254] and requiring civil marriage commissioners to perform same-sex marriages, even if contrary to their religious beliefs;[255] amongst others.

451. So much has the state of the law changed in this area that the unanimous Supreme Court of Canada recently adopted the logic of the dissenting reasons of Justice L'Heureux-Dube in *BCCT*, quoting – with approval – the following passage:[256]

> [69] I am dismayed that at various points in the history of this case the argument has been made that one can separate condemnation of the "sexual sin" of "homosexual behaviour" from intolerance of those with homosexual or bisexual orientations. This position alleges that one can love the sinner, but condemn the sin. . . . The status/conduct or identity/practice distinction for homosexuals and bisexuals should be soundly rejected, as per Madam Justice Rowles: "Human rights law states that certain practices cannot be separated from identity, such that condemnation of the practice is a condemnation of the person" (para. 228). She added that "the kind of tolerance that is required [by equality] is not so impoverished as to include a general acceptance of all people but condemnation of the traits of certain people" (para. 230). This is not to suggest that engaging in homosexual behaviour automatically defines a person as homosexual or bisexual, but rather is meant to challenge the idea that it is possible to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood.

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[250] *R v Tran*, 2010 SCC 58 at para 34 ("It follows that the ordinary person standard must be informed by contemporary norms of behaviour, including fundamental values such as the commitment to equality provided for in the *Canadian Charter of Rights and Freedoms*… it would not be appropriate to ascribe to the ordinary person the characteristic of being homophobic if the accused were the recipient of a homosexual advance").
[251] *Canada (Attorney General) v. Hislop*, 2007 SCC 10.
[252] See e.g. *Barbeau v. British Columbia (Attorney General)*, 2003 BCCA 251 and *Halpern v. Canada (Attorney General)*, (2002) 215 D.L.R. (4th) 223.
[253] *Reference re Same-Sex Marriage*, 2004 SCC 79. See also *Civil Marriage Act*, S.C. 2005, c. 33, s. 2.
[254] *Rutherford et al v. Ontario (Deputy Registrar General)*, (2006) 81 OR (3d) 81 (CA).
[255] *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3 ("***Marriage Commissioners***")
[256] *Whatcott*, *supra* at para 123.

452. In short, this petition raises new legal issues, the implications of new legal doctrine, and reflects a change in circumstances and evidence that fundamentally shifts the parameters of the debate, with the result that the decision in *BCCT* is in no way determinative of this case.

453. The question is not, as was the case in *BCCT*, whether students of TWU's proposed law school may discriminate in the future; it is whether TWU's proposed law school itself discriminates against LGBTQ persons in its admission policies. This issue must be decided on the evidence and arguments developed in this context, and in light of changes to the law over the past decade.

454. The different statutory context in which the decisions were made, the significant developments with respect to the law of equality and deference to administrative decision makers applying *Charter* values, the greater legal recognition of the rights of same-sex persons, and the focus on the directly discriminatory admissions requirement as opposed to the hypothetical and speculative future conduct of graduates, all indicate that this court is not bound by the Court's decision in *BCCT*.

d) The Imposition of the Covenant is Discriminatory and Impedes Equal Access to the Legal Profession

455. In order to understand the reasonableness of the Law Society's decision to adopt the Resolution, it is critical to understand the impact of the Covenant, and the effect of imposing the Covenant as a barrier to equal access to the legal profession.

456. The Petitioner contends that the Covenant does not have the effect of excluding LGBTQ or other applicants on the basis of prohibited grounds, and that the Community Covenant cannot be discriminatory because it is non-binding. With respect, both positions are unsustainable.

i. The Covenant Has a Discriminatory Impact Upon Historically Disadvantaged Groups

457. First, it is important to reemphasize that the Community Covenant is not a voluntary statement of faith, or merely an expression of religious beliefs. As noted, persons can

ascribe to, and act according to, any religious belief system they choose. They may do so, and live according to such a Covenant, on a voluntary basis or while attending secular law schools.

458. If all the Community Covenant did was give persons the opportunity to freely ascribe to a statement of faith or a personal code of conduct, we would not be here.

459. However, the Covenant imposes upon all students of the proposed law school, and binds them to, a religious code of conduct – touching on and regulating the core aspects of their identity – as a condition of enrollment and continued attendance at TWU.

460. If a student does not or cannot abide by the Covenant, that student is denied entry to TWU's proposed law school, and therefore is not entitled to access the scarce law school placements the proposed law school would provide.

461. As described above, the Covenant is a solemn pledge that all members of TWU must embrace. Individuals cannot attend TWU if they do not assent to, or act in defiance of, the proscriptions in the Covenant.

462. Admitted students can be punished, up to and including expulsion, for acting in a manner inconsistent with the Covenant, and TWU effectively conscripts other members of the TWU community to police the sexual practices of its membership, and to report deviations from the principles contained in the Covenant.

463. This can be expected to impose significant peer pressure and social coercion to adhere to the Covenant, over and above any formal or informal reprisals visited upon students through the administrative apparatus of TWU.

464. The Covenant is therefore coercive by design, and has a direct impact on who is able to attend TWU. It is exactly because TWU does not permit individuals the freedom to accept or reject the Covenant that it has a discriminatory impact on those who choose not to, or because of their sexual identity or orientation, marital status, or gender, cannot, abide by it.

465. As the Supreme Court of Canada observed in *BCCT*:

> Although the Community Standards are expressed in terms of a code of conduct rather than an article of faith, we conclude that a homosexual student would not be tempted to apply for admission, and could only sign the so-called student contract at a considerable personal cost.[257]

466. The imposition of a behavioural code, including the requirement that persons modify their behavior, to be enforced by the proposed law school through various forms of punishment, therefore goes well beyond the mere holding or expression of a belief. It is a binding contractual agreement, and the failure to comply with it leads to serious consequences.

467. To the extent TWU relies on the fact that the Covenant does not *explicitly* exclude LGBTQ students or others who are unable to abide by it, but rather only condemns and prohibits same-sex conduct and other behavioural norms, this position also cannot be sustained.

468. Rules or policies which have the *effect* of excluding members on the basis of a protected ground are as discriminatory as rules or policies which directly exclude members of a protected group. This has been long recognized in *Charter* and human rights code jurisprudence.[258] A rule neutrally applied will be discriminatory where it "discriminates in effect".[259]

469. Beyond the obvious fact that TWU's proposed law school would inhibit equal access to a legal education and therefore to the legal profession for certain historically disadvantaged groups, the expert evidence in this case confirms that the imposition of the Covenant as a condition upon acceptance to TWU's proposed law school would undoubtedly have a detrimental impact on LGBTQ persons seeking admissions to the bar.

470. The historic pattern of discrimination of LGBTQ persons continues in the legal profession,[260] and requiring sexual minority students to renounce their own natures as a

[257] *BCCT*, *supra* at para 25.
[258] *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at 551; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 ("***Andrews***").
[259] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3 at para 19.
[260] See Tso Affidavit #1, Exhibit 'C', at paras 49-59.

condition of enrollment self-evidently causes harm.[261] As observed by one of the expert affiants:

> (A)ny implementation or enforcement of a policy of exclusion reproduces the conditions that lead to well demonstrate deleterious consequences for lesbian, gay and bisexual people. The use of the sexuality of lesbian, gay and bisexual people as a disqualification for educational opportunities contributes to a historic pattern of diminished citizenship and consequent psychological harm.[262]

471. Similarly, in her expert report, Professor Chenier observes:

> Based on decades of historical research, it is clear that a policy that prohibits people who engage in same-sex sexual activity from membership, employment, or participation has two principal effects for lesbians, gays and bisexuals: they will either be deterred from seeking employment, membership or from participating, or, they will pursue the opportunity and hide their sexual orientation. In both instances one is harmed: in the first instance by exclusion and loss of opportunity, and in the second by being forced to hide a part of oneself, and to live in a state of fear and anxiety that one's sexual orientation will be discovered.[263]

472. The role of public bodies in combatting and delegitimizing this discrimination, even if performed by private actors, is critical:

> History has shown that the state can perpetuate discrimination and prejudice, and it can also combat it. State policies do not alone produce or end prejudice and racism, but from an historical point of view it is clear that states play a pivotal role in both cases. The additional harm caused by the state sanctioning of discriminatory policies is that it legitimizes those policies. By legitimizing acts of discrimination, it sends a clear signal to its citizens that discrimination is acceptable and justifiable, and will be defended.[264]

473. The serious harm caused by the approval of TWU's discriminatory covenant is also beyond question from the perspective of persons who would be so affected.[265] One affiant

[261] See Tso Affidavit #1, Exhibit 'D', at para 6.
[262] Tso Affidavit #1, Exhibit 'C', at para 25.
[263] Tso Affidavit #1, Exhibit 'F', at 6.
[264] Tso Affidavit #1, Exhibit 'F', at 10. See also Tso Affidavit #1, Exhibit 'H', at para 19 ("The fact that the State, as an institutional body has provided accreditation to Trinity Western University Law School, knowing full well of the existence of a discriminatory Covenant, only adds to the deleterious impacts of minority stress already experienced by LGB people in the larger community".)
[265] See e.g. Tso Affidavit #1, Exhibit 'J', at paras 41-50.

observed that same sex intimacy was intertwined with his identity, and requiring him to sign the Covenant "would be to strip[] me of a core aspect of my identity".[266]

474. Ms. Jill Bishop, who attended TWU as an undergrad, described the environment for LGBTQ students at TWU as "oppressive". She found it "very hard to constantly guard my sexual identify from discovery", and felt like she was being "forced to live a double-life, and did not like having to lie about my personal circumstances."[267] She further observed that, from her personal experience:

> The Community Covenant is a part of the TWU culture and reflects that culture. The values expressed in the Covenant are reinforced constant in all aspects of life and instruction on campus…. I observed that the lens of evangelical Christianity was omnipresent. The effect of this was that people did not give opinions in class discussions that did not align with those values... I did not feel able to raise other perspectives on homosexuality. I felt a real risk of expulsion… In a sense, I believed that I had signed away my right to have a position on homosexuality in the TWU environment; by signing the Covenant, I had agreed to abide by their values even though they were wrong."[268]

475. Ms. Bishop provided a similar report of her experience to the Benchers, in a letter dated February 11, 2014[269]. She noted that she found herself at TWU for the same reason many people did: it was where she was admitted. She noted that "a school that welcomes diversity would not require students to sign away their right to be diverse", and

> [H]iding my sexuality and relationship had a negative impact on my personal life and my friendships with other TWU students. I perceived a real threat of expulsion if my 'deviance' was discovered.. (and) I was forced to maintain secrecy about a significant portion of my life…[270]

476. Ms. Bishop also provided her opinion to the Benchers about the importance of ensuring equal access to law schools:

> A law school is unique: servicing as the gateway to the judiciary branch of government. Therefore, regardless of the public or private nature of the institution, all law schools serve a vital public function and should be subject to the standards

[266] Tso Affidavit #1, Exhibit 'I', at para 54.
[267] Tso Affidavit #1, Exhibit 'G', at para 9.
[268] Tso Affidavit #1, Exhibit 'G', at paras 16, 20.
[269] See McGee Affidavit #3, Letter of J. Bishop.
[270] See McGee Affidavit #3, Letter of J. Bishop, at 2.

> of a public institution. TWU's covenant violates the *Charter* and fails to uphold the standards of a public institution.[271]

477. Notwithstanding the self-evidently discriminatory nature and impact of the Covenant, and the harmful impact on those who would be affected, TWU seeks to have the court to accept that a mandatory Covenant describing same-sex activity as vile, sinful and unnatural is actually beneficial to LGBTQ persons. It has, according to TWU, a *positive impact* on LGBTQ persons.[272]

478. As the Ontario Divisional Court noted, this is clearly not the case: "Community Covenant, by its own terms, constitutes a prejudicial treatment of different categories of people. It is, therefore, by its very nature, discriminatory".[273] The Court added:

> in order for persons, who do not hold the beliefs that TWU espouses, to attend TWU, they must openly, and contractually, renounce those beliefs or, at the very least, agree not to practice them. The only other apparent option for prospective students, who do not share TWU's religious beliefs, but who still desire to obtain one of its coveted law school spots, is to engage in an active deception, in terms of their true beliefs and their true identity, with dire consequences if their deception is discovered…
>
> This reality is of particular importance for LGBTQ persons because, in order to attend TWU, they must sign a document in which they agree to essentially bury a crucial component of their very identity, by forsaking any form of intimacy with those persons with whom they would wish to form a relationship.[274]

479. TWU's protestations notwithstanding, the impugned provisions of the Covenant impose a severe and blatant discriminatory impact on persons seeking access to the legal profession.

480. With respect, there is an air of unreality to TWU's submissions that the imposition of the Covenant as a condition of admission does not adversely impact or harm the interests of LGBTQ persons, or others who are effectively barred from admission, and therefore would have access to fewer scare law school places than everyone else, impeding equal access to the legal profession.

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[271] See McGee Affidavit #3, Letter of J. Bishop, at 2.
[272] TWU Written Submission, at para 41.
[273] *TWU v. LSUC*, *supra* at para 108.
[274] *TWU v. LSUC*, *supra* at para 112.

481. For example, TWU seeks to defend the inclusiveness of its institution on the basis that, for instance, that derogatory comments made on the basis of sexual orientation are prohibited and subject to administrative sanction.[275]

482. However, disrespectful and discriminatory remarks *are contained in the mandatory Covenant itself*, which describes such activity as vile, sinful, shameful, and unnatural, and which all persons must sign as a condition of admission. TWU seems to believe that as long as occasional, discrete offensive remarks or bullying by classmates is prohibited, discriminatory and derogatory comments that are *institutionalized* in the overall ethos and contractual prerequisites of an educational program are acceptable. That is not so, particularly since the institutional discrimination denies equal access to TWU's proposed law school program.

483. Moreover, as stated above, the Covenant imposes a range of other discriminatory impacts on vulnerable and historically disadvantaged groups, which the Benchers were entitled to consider in rendering their decision in the public interest. In particular, the Covenant requires women to uphold the dignity and worth of persons "from conception to death", which restricts the reproductive freedom of women to lawfully and safely terminate a pregnancy.

484. As indicated in one of the letters received by the Law Society prior to the Resolution: "women may face sanction and/or expulsion for exercising their constitutionally protected right to access abortion care".[276] Therefore, as a condition of enrollment at TWU's proposed law school, women would be required to forgo their autonomy over their bodily integrity, in a way that men attending TWU's proposed law school need not.

[275] TWU Written Submission, at para 43.

[276] McGee Affidavit #3, Letter of West Coast LEAF, at 1. See also McGee Affidavit #3, Letter of Janine Benedet, at 2 ("In addition, the requirement to affirm that life begins at conception … encourages an environment in which women are shamed for deciding to terminate a pregnancy." And see McGee Affidavit #3, Letter of UBC Faculty, Staff and Students, at 30 ("the Community Covenant Agreement also engages the equality rights of women in respect of their reproductive freedoms")

485. The Supreme Court has also confirmed 'marital status' as a ground of discrimination under the *Charter*, and has found that unmarried common law couples have suffered "historical disadvantage stemming from societal prejudice".[277]

486. Just as the Covenant imposes an unequal and discriminatory burden on married LGBTQ persons seeking admission, it also serves to discriminate against those who are in committed and long term common law partnerships. Like both married and unmarried LGBTQ persons, individuals in common law marriages are required to abstain from sexual intimacy, notwithstanding their lawfully recognized union, in a way that heterosexual married couples need not.

487. Finally, imposing the mandatory Covenant on all applicants is incompatible with an open, accepting and inclusive educational environment in which all can feel comfortable, because it requires all students at the proposed law school to abide by evangelical Christian precepts and teachings

488. As the Supreme Court recently confirmed in *Saguenay (City)*,[278] the institutional affirmation of a sectarian religious viewpoint can interfere, in a discriminatory manner, with the religious freedom of members of other faiths and of non-believers. In that case, the Court held that the state was under a duty of neutrality, which prohibited it from reciting prayers prior to a municipal council meeting.

489. The Court found in *Sanguenay* that the "exclusion caused by the practice and the By‑law in the case at bar resulted in an infringement of Mr. Simoneau's freedom of conscience and religion, and it follows that the prayer necessarily had the effect of impairing his right to full and equal exercise of that freedom".[279] Importantly, the Court found that while "non‑believers could also participate [in municipal council meetings], the price for doing so was isolation, exclusion and stigmatization".[280]

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[277] *Quebec (Attorney General) v. A*, 2013 SCC 5 ("***Quebec v. A***") at paras 316-318.
[278] *Saguenay*, *supra*.
[279] *Saguenay*, *supra* at para 126.
[280] *Saguenay*, *supra* at para 120.

490. Importantly, beyond the affirmation and institutionalization of a particular religious creed, the Covenant imposes religious *standards of conduct* upon *all* students, and requires them to live according to these religious precepts, whether or not they abide by an evangelical Christian worldview. Thus, the Covenant imposes a discriminatory impact upon non-believers, or persons of other religious faiths, who will necessarily and by design feel unwelcome.

491. While TWU is not directly bound by the *Charter*, the discriminatory impact of imposing an evangelical Christian mission *and* behavioral norms on all students – and in particular the obligations contained in the Covenant – necessarily results in the isolation, exclusion and stigmatization of non-believers and adherents of other faiths who would otherwise seek to attend law school in the province. This is a relevant and important consideration in determining the reasonableness of the Resolution.

492. The direct discriminatory impact on LGBTQ students remains at the heart of the issues raised by this petition, and to a large extent has animated the Law Society's Resolution. However, these additional discriminatory impacts, imposed by the Covenant on other disadvantaged or vulnerable groups or persons, cannot be ignored in determining the reasonableness of and justification behind the Resolution.

493. The clear effect of the Covenant is to serve as a barrier to access to TWU's proposed law school for LGBTQ persons, women, common law couples, and those of other faiths or no faith at all. This would have the effect of impeding equal access to law school in the province, and would therefore impede equal access to the legal profession. This self-evidently imposes a discriminatory impact and directly harms those deprived of that equal access.

ii. TWU's 'Separate but Equal' Argument

494. Nor does the fact that LGBTQ applicants would have access to law schools that do not discriminate lessen the discriminatory impact of the Covenant, as the Petitioner suggests.[281] TWU states that the "creation of additional opportunities to attend law school cannot be

[281] TWU Written Argument, at para 307-308.

construed as a disadvantage"[282] to those who are excluded from those opportunities, on the basis of their personal characteristics. This argument is premised upon the notion that as long as students excluded from TWU have access to *other* law schools, no disadvantage would be imposed on them because they could not access a placement at TWU's law school.

495. This is reminiscent of the argument that was rejected, over sixty years ago, by the US Supreme Court in *Brown v. Board of Education.*[283] In that case, it was argued that there was no discrimination or inequality in depriving access to educational opportunities in the context of public education on the basis of race, as long as such children still had access to other schools. The Court found that this did deprive such students of the equal protection of the laws:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[284]

496. The Court then quoted approvingly from a previous decision, where the Court noted the detrimental impact on those excluded from the opportunity for equal education, and added that "(t)he impact is greater when it has the sanction of the law".[285]

497. In short, the "separate but equal" justification for discriminatory treatment, so "majestically discarded" in *Brown v. Board of Education,*[286] is a discredited notion with a pernicious history, and has no place in Canadian law. It was expressly rejected by the Supreme Court

[282] TWU Written Argument, at para 307.
[283] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) ("***Brown v. Board of Education***").
[284] *Brown v. Board of Education*, *supra* at 493.
[285] *Brown v. Board of Education*, *supra* at 494.
[286] *Moore v. British Columbia (Education)*, 2012 SCC 61 at para 30.

of Canada in the seminal *Charter* decision of *Andrews*, as a "loathsome artifact" of a previous era.[287] The Law Society submits that this court should not revive it.

iii. TWU's 'Love the Sinner, Hate the Sin' Argument

498. TWU's argument that the Covenant does not have a discriminatory impact on LGBTQ people because it only prohibits same sex intimacy, as opposed to sexual orientation expressly, is directly contrary to two recent and leading Supreme Court of Canada decisions.

499. TWU's argument proceeds on the assumption that condemning and prohibiting same-sex intimacy does not constitute discrimination against LGBTQ persons. This premise was rejected in the Supreme Court's recent decision in *Whatcott*, where the Court unanimously recognized that impacting certain behavior that is "integral to and inseparable from the identity of the group" is no different from discriminating against the group directly.[288]

500. As noted above, the unanimous Court in *Whatcott* quoted – with approval – from Justice L'Heureux-Dube's dissenting judgment in *BCCT*, and soundly rejected the idea that "it is possible to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood."[289] The Court in *Whatcott* confirmed that where the targeted conduct "is a crucial aspect of the identity of the vulnerable group, attacks on this conduct stand as a proxy for attacks on the group itself".[290]

501. The Petitioner's submission that the Covenant does not discriminate because LGBTQ people may attend TWU if they refrain from same-sex intimacy has also been recently rejected by the Supreme Court of Canada. In *Quebec v. A*, the Court confirmed that the ability to avoid the discriminatory impact of a rule or policy does not negate

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[287] *Egan v. Canada*, [1993] 3 FCR 401 at para 59; *Moore*, *supra* at para 30 (describing the 'separate but equal' standard as having been "majestically discarded" in *Brown v. Board of Education*); see also *The Queen v. Drybones*, [1970] SCR 282 at 300, Hall J.
[288] *Whatcott*, *supra* at para 122.
[289] *Whatcott*, *supra* at para 123, citing *BCCT*, *supra* at para 69.
[290] *Whatcott*, *supra* at paras 123, 125.

discrimination.[291] The majority cited approvingly the following passage from *Lavoie v. Canada*:[292]

> . . . the fact that a person could avoid discrimination by modifying his or her behaviour does not negate the discriminatory effect. If it were otherwise, an employer who denied women employment in his factory on the ground that he did not wish to establish female changing facilities could contend that the real cause of the discriminatory effect is the woman's "choice" not to use men's changing facilities. The very act of forcing some people to make such a choice violates human dignity, and is therefore inherently discriminatory. The law of discrimination thus far has not required applicants to demonstrate that they could not have avoided the discriminatory effect in order to establish a denial of equality under s. 15(1).

502. TWU accepts that heterosexual married couples may engage in sexual intimacy as members of TWU, but does not permit same-sex married couples to do the same. LGBTQ persons can attend TWU only at the "unacceptable personal cost" of renouncing an aspect of their identity and their legal rights. The Covenant therefore has the effect of discriminating against LGBTQ persons. The fact that the Covenant is harmful and discriminatory toward LGBTQ persons, as the Ontario court found, is quite simply "self-evident".[293]

iv. The Law Society Cannot Ignore its Constitutional and Statutory Obligations because TWU is a 'Private' Institution

503. TWU argues that because it is ostensibly a 'private' institution, the Law Society was unreasonable for taking into account the effects of TWU's proposed conduct on equal access to the legal profession in determining whether to exercise its discretion to approve a proposed faculty of law, and on the ability of the Law Society to fulfil its statutory mandate.

504. As described above, TWU is not seeking to perform a 'private' function, nor is it seeking to provide a purely 'religious' education. It is not seeking an autonomous religious existence, free from state control.

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[291] *Quebec v. A*, *supra* at paras 336-337 (" this Court has repeatedly rejected arguments that choice protects a distinction from a finding of discrimination")
[292] *Lavoie v. Canada*, 2003 SCC 23, McLachlin C.J. and L'Heureux Dubé J. See also *Brooks v. Canada Safeway Ltd* [1989] 1 SCR 1219 at 1247-1249.
[293] *TWU v. LSUC*, *supra* at para 105.

505. TWU is seeking to provide secular law degrees, which in turn determines who can and cannot access the legal profession; and it is seeking to require a public body – bound by the *Charter* – to *facilitate* its discriminatory conduct. To equate this to the mere formalization of a Church, as TWU seeks to do,[294] requires ignoring the important public roles of law schools and the importance of law societies ensuring equal access to the legal profession.

506. Moreover, as the logic of the Court in *Brown v. Board of Education* recognized, the discriminatory practice of a law school would be made all the more harmful where it has the sanction of the law, and the approval of those bodies dedicated to upholding the public interest.[295] The Ontario Divisional Court made a similar observation:

> In exercising its mandate to advance the cause of justice, to maintain the rule of law, and to act in the public interest, the respondent was entitled to balance the applicants' rights to freedom of religion with the equality rights of its future members, who include members from two historically disadvantaged minorities (LGBTQ persons and women). It was entitled to consider the impact on those equality rights of accrediting TWU's law school, and thereby appear to give recognition and approval to institutional discrimination against those same minorities. Condoning discrimination can be ever much as harmful as the act of discrimination itself.[296]

507. The effect of approving TWU would be to condone and facilitate discrimination against applicants to the bar on the basis of sexual orientation, and other prohibited grounds as well.

508. The mandatory Covenant sends a clear message to LGBTQ people that they are not wanted at the proposed TWU law school. Had the Law Society approved of TWU's proposed law school, this would send a message to prospective students and to the community as a whole that it is acceptable to discriminate against LGBTQ people and deny them equal access to

[294] TWU Written Submission, at paras 347-349.
[295] See also *Bob Jones University v. US*, 461 U.S. 574 (1983) ("***Bob Jones University***") at 598 ("Indeed, it would be anomalous for the Executive, Legislative, and Judicial Branches to reach conclusions that add up to a firm public policy on racial discrimination, and at the same time have the IRS blissfully ignore what all three branches of the Federal Government had declared").
[296] *TWU v. LSUC* at para 116 (emphasis added).

fundamental institutions in the legal systems, regardless of the principle of equality before and under the law and the rule of law generally.

509. As was the case in *Vriend v. Alberta*,[297] the failure of public bodies to condemn the discriminatory practices and policies of TWU sends the message that "it is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation".[298]

510. This is a serious concern for the Law Society, dedicated as it is to promoting the public interest in the administration of justice, ensuring the honour and integrity of the profession, and upholding the rights and freedoms of all persons.

511. To approve and facilitate a law school that imposes by a mandatory and discriminatory Covenant would therefore imperil the integrity of a profession dedicated to equal access to the legal profession, and would seriously compromise the Law Society's obligation to assure a diversity of persons and views within the profession and the legal system generally. Such approval would serve to discredit the legal profession - the honour and integrity of which the Law Society is statutorily required to uphold - and harm its essential role in protecting the rights of all persons.

512. Similarly, the public perception and legitimacy of the legal profession in British Columbia would be jeopardized by granting the Law Society's imprimatur to TWU, as the many submissions to the Law Society pointed out. The public's faith and confidence in the administration of justice is undermined if the legal profession accepts that it is permissible for a law school to discriminate against certain groups in our society, such as LGBTQ people.

513. The relevant consideration for the Law Society, and the relevant consideration taken into account, is not the public's views on TWU's religious beliefs. Rather, as just described, it is the negative impact of the Law Society's endorsement of a law school with a discriminatory admissions policy on the public's confidence in the administration of

[297] *Vriend v. Alberta*, [1998] 1 S.C.R. 493 ("***Vriend***")
[298] *Vriend*, *supra* at para 102.

justice. This was a perfectly legitimate consideration in light of the Law Society's statutory mandate.[299]

514. A decision to approve TWU would represent to the public that the administration of justice is reserved for certain groups in society and their views. This will negatively affect public respect for, and acceptance of, our justice system and the role of lawyers in it. As one national newspaper editorial put the point: "a law school that purports to be a homosexual-free zone is a contradiction in terms… Equality before the law is at the heart of Canadian law, and a law school that won't accept that idea has no legitimacy".[300]

515. Approval by a public body would therefore seriously impact the rights of LGBTQ persons and others who would be excluded from accessing law school places in the province made available by the Government. The Law Society reasonably concluded it could not countenance such an exclusion from a fundamental social institution as being consistent with its obligations under the *Legal Profession Act* and the *Charter*, and on that basis, it would not approve TWU's proposed law school.

516. The fact that TWU describes itself as a 'private' institution therefore does not negate the very real *public* function of a law school in the administration of justice, nor does it relieve the Law Society of its obligations to act resolutely in the pursuance of the public interest in the administration of justice, and to protect and preserve the rights and freedoms of all persons.

e) <u>The Resolution is Reasonable, Consistent with the Law Society's Statutory Mandate and Law Society Rules, and Ultimately Correct</u>

517. For the reasons outlined above, the obligations of the Law Society are considerably broader than merely ensuring the bare "competence of lawyers", and its mandate is not exhausted

[299] See e.g. *Krieger v. Law Society of Alberta*, [2002] 3 SCR 372, 2002 SCC 65 at para 50 (describing the Law Society's role as "regulating the legal profession and maintaining public confidence"); *Skogstad v. The Law Society of British Columbia*, 2007 BCCA 310 at para 9 (noting that the Law Society is "a self-regulated body requiring public confidence").

[300] Globe and Mail, "No gay-free law school should stand in Canada" (Feb 07, 2013, 7:30 PM), online: <http://www.theglobeandmail.com/globe-debate/editorials/no-gay-free-law-school-should-stand-in-canada/article8356107/>.

by ensuring that applicants meet certain technical academic qualifications. This is so, both as a matter of the *Legal Profession Act* and the nature of law societies generally. As Justice Sandra Day O'Connor put it in a speech at Vanderbilt Law School:

> Although lawyers have historically not been the most popular group of professionals in society, it can scarcely be doubted that, for better or for worse, lawyers occupy a special position in the administration of justice. In a society of laws, lawyers control the tools that are necessary for orderly social change. In many respects the public can gain access to our system of justice only through the services of lawyers. As lawyers, we must recognize fully the heavy responsibility that comes with the special privilege that we hold as the primary actors in our legal system.[301]

518. As previously discussed, the Law Society has the statutory duty and professional obligation to ensure equal access to and diversity in the legal profession, which necessarily involves consideration of the admission policies of law schools which serve as the gateways to the legal profession.

519. The broad power conferred by the *Legal Profession Act* is entirely consistent with the fact that the legal profession has "a special role to recognize and protect the dignity of individuals and the diversity" of the legal profession, and that "*the ethos of the profession is determined by the selection process at the law schools*".[302]

520. Therefore, the acceptance of TWU's admission policy by the Law Society for bar admission purposes would be condoning a violation of the legal principles the Law Society is mandated to uphold – the right of everyone in our society to be governed by the rule of law and hence to be treated equally before and under the law.

521. The Resolution declaring TWU to not be an approved faculty of law is therefore fully within the Law Society's authority under the *Legal Profession Act*, and is fully consistent with its broad statutory mandate under section 3 to act in the public interest in the administration of justice.

[301] Sandra Day O'Connor, "Professional Competence and Social Responsibility: Fulfilling the Vanderbilt Vision" (1983) 36 Vanderbilt L Rev 1 at 5.
[302] Chief Justice Dickson, "Legal Education" (1986) 64:2 Can Bar Rev 374 at 378.

f) Approving of TWU Does Not Represent a Proportionate Balance of Charter Values

522. The discriminatory barriers to accessing a legal education that would be imposed by TWU's proposed law school directly implicate the constitutional obligations of the Law Society. In exercising its statutory powers, the Law Society must take into account, and act in a manner consistent with, *Charter* rights and values.[303]

523. TWU argues the Law Society's Resolution breaches the freedom of religion, expression and association rights of TWU and the members of its religious community under the *Charter*.

524. In response, the Law Society submits that the discrimination against LGBTQ and other persons imposed by the Covenant is not necessary to the exercise of these fundamental freedoms, and that it has no legal right to compel the Law Society to condone or approve of its discriminatory conduct.

i. The Doré Analysis

525. The first step in a *Charter* analysis is to define the scope of the *Charter* interests. Where there are competing *Charter* values at play, the courts will seek to define the scope of the rights in such a way as to reconcile them.[304]

526. In the context of the *Doré* analysis for the review of discretionary administrative decisions impacting *Charter* rights or values, a court must first seek to delineate the scope of the *Charter* interests at stake, in a way that reconciles competing *Charter* rights. Then, the court must balance any remaining impact of the decision upon the *Charter* interests against the statutory objectives sought to be achieved.[305]

527. The Law Society submits that given the limited, if not non-existent, impact of the Resolution on the *Charter* rights and freedoms of TWU and its membership, and the severe

[303] As noted above, the fact that TWU is not subject to the Charter does not mean that its conduct is irrelevant to whether the Law Society is fulfilling its statutory and constitutional obligations in approving of a law school with a discriminatory admissions policy.
[304] See e.g. *R. v. N.S.*, 2012 SCC 72 at paras 30-33.
[305] See *Loyola*, *supra* at para 39.

impact on the *Charter* interests of those who would be denied equal access to the legal profession if TWU was approved by the Law Society, there is no real definitional balancing that needs to be done in this case.

528. Moreover, because the Resolution is consistent with both the Law Society's statutory mandate, and the proper balancing of *Charter* rights and interests in this case, there is no basis for finding the Law Society's decision unreasonable.

ii. The Charter Rights and Interests of Those Systematically Excluded from TWU's Proposed School of Law

529. The equality rights of LGBTQ persons and others would be severely and negatively impacted by a mandatory Covenant as a condition of admission to law school, and by a public body endorsing or facilitating that discriminatory conduct, as described in some detail above.

530. On the basis of their sexual orientation, LGBTQ persons are effectively barred from attending TWU, may be expelled for engaging in sexual conduct within marriage, and in any event, would be subject to an environment in which the validity of their very identity is condemned, and described as vile, shameful, unnatural and sinful.

531. The result of approving of TWU's proposed law school would be that individuals seeking admission to law schools in British Columbia would have differential access to an important public good depending on their sexual orientation, marital status, gender or religion. This would have a severe impact on the equality rights of many persons in British Columbia seeking admission to law school.

532. The harm of exclusion is particularly acute in this context, given that law schools are a critically important institution in Canadian society. They are the sole gateway to the legal profession, and all of the benefits and responsibilities that attend that privilege. Law schools are the only means through which persons can gain access to the legal profession and the judicial branch of government.

533. The necessary effect of approving TWU, should it ever be accredited by the Government, would be to create a pool of scarce law school seats reserved solely for those who are able

to abide by the discriminatory aspects of TWU's mandatory Covenant. TWU seeks the approval of a public body, the Law Society, in order to facilitate the creation of this two-tiered system of legal education.

534. The approval of TWU's proposed law school would therefore create two tiers of accessibility to legal education in B.C.: one for those who are able to abide by the Covenant, who would have access to all available law school seats, and another for LGBTQ applicants and others who are unable to abide by the Covenant, who would only have access to a portion of available seats.

535. The Law Society's approval of TWU's proposed law school would further serve to perpetuate the discrimination and historical disadvantage faced by the LGBTQ community. As Madam Justice Abella found in *Quebec v. A*:

> The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory." [at para 332]

536. The historic disadvantage, prejudice and discrimination suffered by the LGBTQ community is well recognized, and continues to this day. As the Supreme Court of Canada noted in *Egan*, "Same-sex couples are a highly socially vulnerable group, in that they have suffered considerable historical disadvantage, stereotyping, marginalization and stigmatization within Canadian society."[306] Women and persons in common law relationships have also been found to be historically disadvantaged groups, whom section 15 was designed to protect.[307]

537. This exacerbates the discriminatory impact of the Covenant, and consequently, any decision of a public body to facilitate or endorse such discrimination. Approving of TWU

[306] *Egan v. Canada*, [1995] 2 S.C.R. 513 at 600-601; *Vriend*, *supra* at 543-544; *M. v. H.*, [1999] 2 S.C.R. 3 at para 69.
[307] See e.g. *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872 at 877-878 ("women generally occupy a disadvantaged position in society in relation to men"; *Quebec v. A*, *supra* at paras 316-318 ("unmarried spouses have faced historical disadvantage stemming from societal prejudice").

would widen the gap between this historically disadvantaged group and the rest of society, and is therefore prohibited by section 15 of the *Charter*.

538. Not only does this harm the members of this group by denying them the same opportunity to participate in the legal profession as other persons, it also harms the administration of justice by restricting the diversity of people and views involved in the justice system. These factors should all weigh heavily in the course of assessing the reasonableness of the Law Society's decision in this case.

iii. The Charter Rights and Interests of TWU as an Institution

539. By contrast, if the *Charter* interests of TWU or its membership are engaged by the Resolution, they are only minimally impacted.

540. It is important to reemphasize that this case is not about TWU's prospective, hypothetical graduates. TWU's proposed law school has no students and no graduates. The Law Society Resolution does not directly impact TWU graduates – it expresses the Law Society's disapproval of TWU's institutional code of conduct which would have a discriminatory impact on applicants.

541. Although TWU argues that its own *Charter* rights and freedoms have been impacted by the Resolution, that is not the case. TWU, as a corporate entity, does not have any sincere beliefs to protect, and therefore the Resolution cannot impact TWU's religious freedom.

542. The test for establishing a breach of section 2(a) of the *Charter* requires showing that (a) the claimant sincerely holds a belief that has a nexus with religion, and (b) that the state action at issue has interfered with the claimant's ability to act in accordance with his or her sincere religious beliefs.[308]

[308] See *Whatcott*, *supra* at para 155; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 ("***Hutterian Brethren***") at para 32; *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at paras 46 and 56-59.

543. At the second stage of the analysis, a subjective belief that a religious belief or practice has been interfered with is not sufficient; the claimant must adduce objective proof of an interference with a sincere belief in order to establish an infringement.[309]

544. Members of TWU's religious community, or prospective law school membership, are capable of holding sincere religious beliefs. However, TWU, as an institution, is incapable of either sincerity or belief.[310] As Peter Hogg has explained:

> Some of the rights [in the *Charter*], although guaranteed to 'everyone' or 'any person', are by their very nature not available to a corporation. For example, the right to 'freedom of conscience and religion' in s. 2(a) does not apply to a corporation, because a corporation cannot hold a religious belief or any other belief.[311]

545. Most recently, the majority of the Court in *Loyola* declined to find that a non-profit educational corporation has religious beliefs protected by section 2(a), instead focusing on the effect – if any – on the individuals who may be impacted.[312] While the minority sought to create a standard by which the religious freedom interests of institutions could be measured, the majority expressly declined to adopt this approach.

546. TWU states in its argument that the Nova Scotia court found that the Nova Scotia Barrister Society's resolution was "an infringement of TWU's *Charter* rights".[313] In fact, the Court found that the "beliefs held by Evangelical Christians are sincere", that "(t)hey have a right to hold those beliefs and the right to act upon them", and that the NSBS does not have the

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[309] See *S.L.*, *supra* at para 1 ("Although the sincerity of a person's belief that a religious practice must be observed is relevant to whether the person's right to freedom of religion is at issue, an infringement of this right cannot be established without objective proof of an interference with the observance of that practice.")

[310] See Wallace Rozefort, "Are Corporations Entitled to Freedom of Religion under the Canadian Charter Rights and Freedoms?" (1986) 15 Man L.J. 199, p. 213-215 ("From that point of view, it becomes hard to see how a corporation can have a religion or a belief. All the concepts that are associated with religion such as "thought", "creed", "conscience", and so on, are psychic activities that only a natural being with a brain can manifest. This reason in itself should suffice to deny religious freedom to corporations").

[311] Peter Hogg, *Constitutional Law of Canada*, 5th ed, looseleaf, §37.1(b), at 37-2.

[312] See *Loyola*, *supra* at paras 33-34.

[313] TWU Written Submission, at para 69.

authority to "try to coerce them into changing those beliefs so that they conform to those of mainstream society".[314]

547. This suggests that the court in Nova Scotia found that the failure to accredit TWU would infringe the religious freedoms of prospective, future TWU students, not TWU itself. As such, the Law Society submits that if there is any impact on religious beliefs and freedom of religion relevant to the *Doré* balancing exercise, it is exclusively the religious beliefs of prospective law students.

548. While TWU benefits from freedom of expression under the *Charter*, the Resolution has no impact whatsoever on TWU's ability to express its religious beliefs, for reasons developed more fully below; and while TWU is a *venue* for associational activity, TWU as an institution cannot associate.

549. The Ontario Divisional Court explained the true nature of the impact of such a resolution on TWU:

> Like other aspects of this case, that observation is not, itself, without countervailing considerations. The applicants assert that that result would arise from the interference with their religious freedom. Viewed from an opposite perspective, the warning from TWU that its law school will not open, if it is not accredited in Ontario, can be seen, not as arising from any interference with religious beliefs, but rather as a consequence of the fact that the single largest market for law school graduates may be foreclosed to them. Viewed from that perspective, the result appears to represent much more an economic decision, as opposed to a religious one.[315]

550. Thus, the primary effect of the Resolution on *TWU itself* is to limit TWU's ability to attract students and to obtain revenues; however, TWU has no economic rights under the *Charter*.[316] TWU as an institution therefore does not benefit from any *Charter* rights or interests that are engaged by the Resolution.

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[314] See *NSBS v. TWU*, *supra* at paras 235-237. See also at para 234 ("There is no real doubt here about the sincerity of the belief of those involved with TWU." (emphasis added))

[315] *TWU v. LSUC*, *supra* at para 85. See also *Bob Jones University*, *supra* at 603-604.

[316] See e.g. *Irwin Toy ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 1003; *Reference re ss. 193 and 195.1(1)(C) of the criminal code (Man.)*, [1990] 1 S.C.R. 1123 at 1171; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 53; *Quebec (Attorney General) v. Laroche*, 2002 SCC 72 at para 52.

iv. The Charter Rights of Members of TWU's Religious Community who Want to Attend TWU

a. TWU is not seeking to protect the freedom of its members, but to eliminate it

551. If, as discussed above, TWU has no *Charter* rights at stake, the only *Charter* interests that must be considered – beyond those of persons who would be excluded from TWU and therefore denied equal access to the legal profession – are the *Charter* interests of those who would seek to attend TWU and could and would like to abide by TWU's Covenant.

552. However, the Resolution imposes no direct impact on the *Charter* interests of members of TWU's religious community. This fact flows primarily from the true impact of the Resolution, and from the inherent nature of the fundamental freedoms, which require that the state not prohibit or coerce or otherwise limit the exercise of those freedoms, but do not generally impose positive obligations on the government to *facilitate* the exercise of those freedoms.

553. The *Charter* protects the freedom of persons to freely practice their religion, express themselves, and associate together, subject only to reasonable limits. In the context of section 2, freedom is primarily characterized by the absence of coercion or constraint,[317] and seeks to ensure that "no one is to be forced to act in a way contrary to his beliefs or his conscience".[318]

554. The fundamental freedoms therefore require protection for an individual's decision, not only how to worship, express or associate, but whether to do so at all. For instance, the courts have consistently found that coerced speech is in itself an abrogation of freedom of expression: "freedom of expression necessarily entails the right to say nothing or the right not to say certain things".[319] Similarly, freedom of religion entails the freedom to not

[317] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at para 95 ("***Big M***").
[318] *Big M.*, *supra* at para 95.
[319] *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1080.

practice or observe religious rites or convictions, while freedom of association entails the freedom to not associate.[320]

555. It is not necessary to protect or promote the ability of TWU students to freely practice their religion or proclaim their beliefs, alone or with others, in whatever fashion suits them, that TWU have the right to impose a mandatory Covenant on all students. To the contrary, the entire purpose of the Covenant is to *require* students to express their adherence to the principles contained in the Covenant, and to establish and enforce behavioral norms, on pain of rejection or expulsion from TWU's proposed school of law.

556. Having the right to impose the Covenant as a condition upon attending TWU, therefore, does not seek to preserve any individual's freedom of religion, expression or association, but rather seeks to compel individuals to exercise their freedom of religion, expression and association in a given way.

557. Moreover, TWU seeks to *impose* the commitments found in its Covenant on prospective law students, not as a Church or a private organization, but in the context of issuing secular law degrees, ostensibly available to all, and to do so with the complicity of public bodies subject to the *Charter*.

558. TWU is therefore not seeking to ensure that students at its institution, as individuals, are free from coercion and constraint. They are not seeking to ensure that students are able to freely practice their religion or to express themselves, however they may choose. The religious freedom of members of TWU's religious community would be perfectly intact, and indeed far better served, with a truly *voluntary* Covenant.

559. Rather, TWU is seeking a *right* to coerce and constrain others in the course of issuing law degrees, and further, a *right* to have the Law Society facilitate that practice, or confer the privilege to do so.

[320] *Big M., supra*; *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 and *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70.

560. Thus, TWU says it has the right to the approval of public bodies to impose a mandatory Covenant that all students must proclaim and by which all students must abide. To the extent that the Resolution has any direct impact on TWU's ability to operate a law school – which it does not – TWU's prospective students, such as Mr. Volkenant, are seeking the same right: to have the Law Society approve a school which would impose upon them, and all others, as a condition of admission, a religious code of conduct, which has the effect of excluding others who cannot abide by that Covenant except at an unacceptable personal cost.

561. The object of this Petition does not seek to have anyone's 'freedom' preserved, as that term is understood in Canadian constitutional law. Rather, it is seeking a positive right to state facilitation of certain exclusionary religious beliefs and practices, in the context of providing a secular legal education. The Law Society submits that neither TWU nor evangelical Christians have a constitutional entitlement, under the fundamental freedoms or otherwise, to the affirmative approval of the Law Society for TWU's proposed law school.

b. Freedom of Religion is not Impacted by the Resolution

562. Freedom of religion does not require state support or sanction for a person's religion, or the conferral of a state benefit or privilege to facilitate religious practice, such as the right to offer or obtain secular degrees at an approved law school.

563. This was accepted by the Ontario Court of Appeal in *Adler*, in a decision upheld by the Supreme Court, where it was found that the freedom of religion required the state to refrain from imposing restrictions on religious belief and practice, but did not entail "any entitlement to state support for the exercise of one's religion".[321]

564. Although the majority of the Supreme Court did not directly address this point, it was expressly accepted by then-Justice McLachlin in confirming, that "(n)ever, to borrow the

[321] *Adler v. Ontario* (1994), 19 O.R. (3d) 1 at 10.

reasoning of Dubin CJ, has it been suggested that freedom of religion entitles one to state support for one's religion."[322]

565. Dissenting, but not on this point, L'Heureux-Dube J. agreed with McLachlin J, noting that the legislation in issue "does not compel the appellants to violate the tenets of their religion with respect to education. The burden complained of by the appellants… being not a prohibition of a religious practice but rather the absence of funding for one, has not historically been considered a violation of the freedom of religion".[323]

566. Similarly, Justice Sopinka (Major J. concurring) observed in *Adler*:

> In addition, failure to act in order to facilitate the practice of religion cannot be considered state interference with freedom of religion. The fact that no funding is provided for private religious education cannot be considered to infringe the appellants' freedom to educate their children in accordance with their religious beliefs where there is no restriction on religious schooling. As submitted by the intervener, the Canadian Civil Liberties Association, there are many spheres of government action which hold religious significance for religious believers. It does not follow that the government must pay for the religious dimensions of spheres in which it takes a role. If this flowed from s. 2(a), then religious marriages, religious corporations, and other religious community institutions such as churches and hospitals would all have a Charter claim to public funding. The same could also be said of the existing judicial system which is necessarily secular. The appellants' argument would lead to an obligation by the state to fund parallel religious justice systems founded on canon law or Talmudic law, for example. These are clearly untenable suggestions.[324]

567. Although stated in the context of public funding, the same constitutional rationale applies: the state may not act to *impede* religious belief or practice, but it need not actively *facilitate* religious practices, or institutions which would facilitate religious practices, particularly to the exclusion of others. To the contrary, favouring or supporting one religion to the exclusion of others will be struck down as incompatible with the state's obligation of religious neutrality.[325]

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[322] See *Adler v. Ontario*, [1996] 3 SCR 609 ("***Adler SCC***") at 199-200.
[323] See *Adler SCC*, *supra* at para 58.
[324] *Adler SCC, supra* at paras 175.
[325] See e.g. *Big M*, *supra*; *Saguenay*, *supra*.

568. Robert Charney (now Justice Charney) made this point clearly in a recent article, where he observed that religious freedom does not impose positive obligations on state actors:

> The next issue is whether 'freedom of religion' obligates the government (in this case the LSUC as the governing body of the legal profession) to 'accredit' such a school or program. For the reasons given above, my view is that 'accreditation' is a form of 'state support for the exercises of one's religion', and is not part of the *Charter* guarantee of freedom of religion. There is no 'conflict here between freedom of religion and the right to equality because the religious freedom of TWU (or, more properly, its students) is fully satisfied by the fact that it is free to operate and detach what it wants to whomever it wants.[326]

569. Thus, neither TWU nor its prospective students have a religious *right* to require public bodies - governed by the *Charter* and required to uphold the public interest and the rights and freedoms of all persons - to sanction, condone, or otherwise endorse discriminatory practices and beliefs.

570. The following passage from Justice Stevens' concurring opinion in the U.S. Supreme Court's decision *Christian Legal Society v. Martinez*,[327] upholding the right of Hastings College of Law to deny a Christian student organization status within the Law School is applicable to the situation at hand:

> In this case, petitioner excludes students who will not sign its Statement of Faith or who engage in "unrepentant homosexual conduct," App. 226. The expressive association argument it presses, however, is hardly limited to these facts. Other groups may exclude or mistreat Jews, blacks, and women—or those who do not share their contempt for Jews, blacks, and women. A free society must tolerate such groups. It need not subsidize them, give them its official imprimatur, or grant them equal access to law school facilities [emphasis added].

571. Similarly, the US Supreme Court in *Bob Jones University* upheld a decision of the Internal Revenue Service denying Bob Jones University tax-exempt status as a result of the University's policies prohibiting interracial relationships. The Court firmly rejected Bob Jones University's argument that such a University policy was not discriminatory because it allows all persons to enroll, and only imposes restrictions on conduct (i.e. interracial

[326] Robert E Charney, "Should the Law Society of Upper Canada Give Its Blessing to Trinity Western University Law School?" (2015) 34 NJCL (forthcoming) at 16 ("***Charney***").
[327] *Christian Legal Society v. Martinez*, 130 S.Ct. 2971 (2010) at 2998.

dating and sexual intimacy) which apply equally to everyone attending. The Court further concluded that it was not an interference with the free exercise of religion to refuse to provide tax-exempt status, because while the denial may have some impact on the University, it "will not prevent those schools from observing their religious tenets".[328]

572. Similarly, the Law Society (or the Government) is not required to give its approval to a proposed law school that discriminates against LGBTQ persons and others in its admission policy, and which would impede equal access to the legal profession thereby.

573. While in exceptional cases, the fundamental freedoms have been found to confer a positive right to access to a benefit or privilege, this is only where the positive conferral of an advantage or protection it is truly a "necessary precondition" to the exercise of a freedom or where it would be "impossible to exercise" the freedom otherwise.[329]

574. However, the Petitioners do not assert that adherence to evangelical Christianity requires access to a law school with a discriminatory admissions policy. They do not assert that attending or operating a law school governed by the Covenant is a "necessary precondition" to practicing evangelical Christianity,[330] to expressing evangelical Christian views or associating for that purpose, nor that abiding by the tenants of the faith would be "effectively impossible" without access to a law school that prohibits same-sex intimacy.

575. In fact, by TWU's own admission, adherence to the evangelical faith does not require insulation from non-adherents, such that members of the evangelical community could not obtain a law degree elsewhere or at TWU in the absence of the mandatory Covenant. TWU's evidence is to the contrary:

> Since evangelicalism is an "engaged subculture" in that they do not physically remove themselves from the broader culture, they develop a greater understanding

[328] *Bob Jones University*, *supra* at 603-604.
[329] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 at para 5; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 at paras 46-48.
[330] Were it such a necessary precondition, all evangelical Christians without a law degree, or not seeking a law degree, would not be practicing evangelical Christianity.

> of their distinctiveness through interaction with non-evangelicals. This also strengthens their identity.[331]

576. It is therefore difficult to see how freedom of evangelical Christian students is engaged by the Resolution. As one member of the Law Society put the point: "is it necessary for one to enjoy freedom of religion, to be concerned about what the person sitting next to them in torts class is doing within the confines of their intimate relationship"?[332]

577. To the extent that religious freedom is engaged at all by the refusal of the Law Society to confer a positive benefit upon TWU or to actively facilitate the comfort of evangelical Christians in the context of legal education, it is important to recognize the limits on this freedom.

578. In the context of section 1, the balancing inquiry with respect to freedom of religion revolves around "whether the limit leaves the adherent with a meaningful choice to follow his or her religious beliefs and practices".[333]

579. Even if their religious freedom is engaged by the Law Society's resolution, which is denied, evangelical Christian law students remain left with a meaningful choice as to how and whether to practice their religion in the context of law school:

> They are all, of course, free to go to TWU law school whether it receive LSUC accreditation or not. That is their first choice. And if they want to go to one of the LSUC accredited law schools they are all free to apply, and if accepted, attend. That is their second choice. And the significant point here is that *neither* choice would interfere with their religion beliefs. There is no evidence that the religious beliefs of Evangelical Christians preclude their attendance at one of the secular law schools already accredited by LSUC. The prospective students at TWU may prefer to receive their legal education surrounded exclusively by teachers and students who share their religious beliefs and values. To the extent that they want to do this for the sake of religious education (rather than professional training) they are free to do so and require neither sanction nor approval from LSUC. But the state does not interfere with religious freedom simply because it refuses to accommodate the parochial 'preferences' of any religious group by granting their school formal recognition or accreditation.[334]

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[331] Reimer Affidavit #1, at para 43; see also *TWU v. LSUC*, *supra* at para 80.
[332] McGee Affidavit, Exhibit 'J', at 419, Bencher Matthews.
[333] *Hutterian Brethren*, *supra* at para 88.
[334] Charney, *supra* at 19.

580. Thus, to the extent that the Resolution in any way impacts freedom of religion, that impact is minimal, and should not weigh heavily in the *Doré* balance.

c. Freedom of Expression is not Impacted by the Resolution

581. With respect to freedom of expression, this fundamental freedom also does not entail a right to any state support or approval for expressive activities. The freedom of expression contained in s. 2(b) prohibits gags on expression, but does not compel the distribution of megaphones.[335]

582. There is no basis to assert that the freedom of expression of TWU, or members of its religious community, is in any way impacted by the Resolution. As noted above, the Resolution has no impact on any individual's freedom to voluntarily sign a Covenant or express their commitment to values therein, and TWU cannot articulate any basis for drawing such a conclusion.

583. The Resolution simply confirms that so long as that Covenant is imposed on all applicants as the price of admission, the Law Society will decline to approve the proposed law school given its discriminatory impact on access to legal education and the legal profession.

584. Even if this had any impact on freedom of expression, which it does not, section 2(b) does not shield persons from any and all consequences of their expression, and certainly does not shield an educational institution from any consequences of seeking to coerce others into so expressing themselves as a condition of admission, especically where such a condition would impede equal access to the legal profession.

d. Freedom of Association is not Impacted by the Resolution

585. Similarly, outside of the unique labour relations context, TWU has not pointed to a case which supports the proposition that there is any affirmative obligation on the state to facilitate or otherwise sanction or approve of certain associational activities or ventures.

[335] See *Baier v. Alberta*, 2007 SCC 31 at para 21; *Haig v. Canada*, [1993] 2 S.C.R. 995 at 1035. See also *Native Women's Assn. of Canada v. Canada,* [1994] 3 S.C.R. 627 and *Siemens v. Manitoba (Attorney General),* 2003 SCC 3.

586. As noted above, TWU may have its law school, and such a school may facilitate the association of evangelical Christians – to the exclusion of others – for a specific purpose, but that does not give TWU the positive right to the Law Society's *approval* for that same discriminatory exclusion from an important pillar of the legal system.

587. Again, TWU is not an insular religious institution, nor does it grant solely religious degrees. The granting of law degrees is not a religious practice; it is a fundamentally secular activity. The granting of law degrees is not worshiping, professing or associating for the purpose of religious worship, and the imposition of discriminatory norms of behavior on others is not necessary to meaningfully adhere to the tenants and obligations of the faith.

588. In summary, the Resolution has no impact on the ability of any individual to freely express themselves, to hold, manifest or abide by a person's religious beliefs, nor does it prevent people from associating for religious purposes or otherwise.

589. At most, the Resolution amounts to a refusal by the Law Society to approve or facilitate TWU's proposed conduct, which does not engage the fundamental freedoms. TWU's submissions ignore the fact that there is a "very real constitutional chasm between what the state cannot prohibit us from doing, and what it must ensure we are able to do".[336]

590. The Law Society submits that neither TWU, nor evangelical Christians, have any positive right under section 2 to the Law Society's express approval of TWU's proposed law school, nor does the absence of approval affect their ability to freely practice or express their religious beliefs, or associate for that purpose.

e. The Resolution does not impact the section 15 interests of TWU's religious community

591. TWU submits that the Law Society has no power under the *Legal Profession Act* to "discriminate against applicants to the bar who attended TWU".[337]

[336] Brian Langille & Benjamin Oliphant, "The Legal Structure of Freedom of Association" (2014) 40 Queen's LJ 249 at 267; Benjamin Oliphant, "Exiting the Freedom of Association Labyrinth" (2012) 70 UT Fac L Rev 36 at 67-79.
[337] TWU Written Submissions, at para 245.

592. However, there are no graduates and no students. At this stage, the issue is whether the Law Society is legally required to approve a law school that discriminates in its admission policies.

593. The section 15 interests of Mr. Volkenant and other prospective students are not impacted by the Resolution.

594. Section 15 requires a "flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group".[338]

595. The unanimous Court in *Taypotat* set out the following standard for a breach of section 15:

> To establish a prima facie violation of s. 15(1), the claimant must therefore demonstrate that the law at issue has a disproportionate effect on the claimant based on his or her membership in an enumerated or analogous group. At the second stage of the analysis, the specific evidence required will vary depending on the context of the claim, but "evidence that goes to establishing a claimant's historical position of disadvantage" will be relevant….[339]

596. First, attending a specific educational institution is not a protected characteristic under s. 15. The Resolution therefore does not make a distinction on the basis of a prohibited ground, given that the Resolution is based on the discriminatory nature of the admissions policies of TWU.

597. The Law Society can legitimately base its decision as to whether to approve a school of law on the basis of the school's treatment of its applicants and students. Any law school seeking the approval of the Law Society, while imposing unequal access on the basis of prohibited grounds of discrimination, would be subject to the same response, whether religious belief was the basis for the policy or not.

598. Unlike attendance at a specific institution, *religion* is a protected characteristic. However, the Resolution draws no distinctions, and imposes no disadvantage, on the basis of religion.

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[338] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at para 16 ("***Taypotat***"); *Quebec v. A*, *supra* at para 331 (emphasis added).
[339] *Taypotat*, *supra* at para 21.

599. The Resolution does not in any way impact the ability of evangelical Christians to acquire a law degree, as described above. The Resolution therefore does not involve discrimination on the basis of religion, in purpose or effect.

600. For the same reason, the Resolution does not impose a 'disadvantage' on evangelical Christians. Even if the Resolution had the effect of prohibiting TWU from operating a law school, which it does not, Evangelical Christians are not treated differently than anyone else by the Resolution; they are left in a position of complete equality.

601. Nor does the Resolution have the effect of discriminating against evangelical Christians. Many evangelical Christians have obtained law degrees at law schools that do not discriminate against LGBTQ people in the admission policies. Indeed, the Law Society has many evangelical Christian members, who necessarily obtained their degree at other institutions.

602. Even if the effect of the Resolution were to deprive TWU of the ability to operate a law school, evangelical Christians would have the same access to law school spots as any other person in Canada, undifferentiated by religion, gender, sex, ethnicity, sexual orientation or any other impermissible ground of discrimination.

603. TWU has provided no evidence that evangelical Christians are somehow uniquely disadvantaged in effect by the absence of a special school dedicated to their faith, and the ability to exclude those who would not or cannot abide by the religious Covenant. It would be hard to provide this evidence, as it would entail establishing that evangelical Christians are *uniquely* unable to engage with the broader population, and would be contrary to TWU's own evidence that evangelical Christians seek to engage with the broader community, and that everyone is equally welcome at TWU.

604. At most, TWU suggests that its students would feel more comfortable in an environment in which evangelical Christian behavioural norms were enforced, on pain of non-admittance or expulsion.

605. This is, with respect, not enough to engage freedom of religion under the *Charter* or to rise beyond a trivial and insubstantial burden on freedom of religion.[340] Nor does it suffice to establish that evangelical Christians have been discriminated against by the Resolution, in the absence of any evidence that evangelical Christians are unable, expressly or otherwise, to obtain law degrees at institutions without discriminatory admissions policies.

606. Importantly, and unlike many who would seek to apply to TWU's proposed law school, evangelical Christian lawyers were not required to deny their identity as the price of admission to other law schools in Canada. They were free to attend any institution in the country, and to abide by whatever code of conduct they considered appropriate.

607. In summary, the section 15 inquiry "recognizes that persistent systemic disadvantages have operated *to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages*".[341]

608. TWU's claim in essence is that the Law Society's refusal to approve a law school that would create a dedicated pool of scarce law schools spots reserved for a single faith group, while excluding others on the basis of various prohibited grounds of discrimination, is in fact a violation of the equality rights of those seeking to deprive others of equal access to the legal profession. With respect, this defies logic and basic principles of equality.

609. Evangelical Christians currently have an equal opportunity to access every law school spot in the country. The effect of the Resolution does not deprive them of this equal opportunity. It does not even deprive them of the special privilege of attending a law school dedicated to their own religion. It imposes no disadvantage, and does not have the intention or effect of discriminating against evangelical Christians.

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[340] See *TWU v. LSUC*, *supra* at para 122 ("Nevertheless, it remains the fact that the record before this court fails to reveal any evidence that any secular law school treats its students, who are evangelical Christians, in such a manner that attendance at those law schools is threatening to their beliefs or erodes those beliefs or that makes attendance so unpleasant or uncomfortable that that route for obtaining a legal education is essentially precluded to them. A single affidavit filed by TWU from an evangelical Christian student who says that she felt "uncomfortable" at the University of Toronto law school fails, by a wide margin, to constitute such evidence.")

[341] *Taypotat*, *supra* at para 17.

610. Rather, the Resolution declines to grant Law Society approval to TWU's proposed law school, through which evangelical Christians would obtain preferential and privileged access to legal education and to the legal profession, thereby depriving others of an equal opportunity evangelical Christians currently enjoy.

g) Conclusion: Balancing Charter Rights and Values with the Statutory Objective

611. It is worth reemphasizing that the members of the TWU religious community undoubtedly have the freedom to hold and proclaim and manifest their religious beliefs, including the belief that same-sex intimacy is sinful or immoral, alone or in concert. They may currently hold and abide by these beliefs at any law school in the country. If TWU ever obtains the approval of the Government, they may even do so at TWU, with or without the approval of the Law Society, and with or without a discriminatory admissions Covenant. Their freedom to do so is in no way imperiled by the Law Society's Resolution.

612. To repeat, the Law Society has no jurisdiction or coercive power over TWU or its adherents. The Law Society has no interest in policing the religious beliefs of TWU or its community, much less its ability to express those beliefs, or to associate for that purpose, and the Resolution does not have that effect.

613. The Resolution constitutes a decision by the Law Society to not approve or facilitate the discriminatory admission policies of TWU's proposed law school, because doing so would be both contrary to the public interest in the administration of justice and would not properly balance *Charter* rights and values.

614. The religious, expressive and associational freedoms of TWU and its religious community, if they are engaged at all by the Law Society's Resolution, are only minimally affected.

615. Any marginal impact on the *Charter* interests of TWU or its membership is outweighed in these circumstances by the serious breach of the equality rights and the injury to the human dignity of LGBTQ people and others that would result from TWU's discriminatory admission policy.

616. In applying the *Doré* analysis, the court is tasked with reviewing the reasonableness of an administrative decision which implicates *Charter* values. This involves weighing the statutory objectives with the *Charter* values at issue.

617. The statutory objectives sought to be achieved by the Resolution and *Charter* values, far from requiring 'balancing' or reconciliation, are in fact consistent with the same conclusion. As such, the decision to adopt the Resolution is not only plainly reasonable under the *Doré* analysis, but also correct.

h) <u>There Were No Additional Legal Barriers to Adopting the Resolution</u>

618. Finally, TWU says that the Resolution is contrary to the Law Society's obligations under the *Labour Mobility Act*, S.B.C. 2009, c. 20, *Agreement on Internal Trade Implementation Act*, S.C. 1996, c.17, Inter-Jurisdictional Practice Protocol, the National Mobility Agreement, and the Territorial Mobility Agreement.

619. It remains to be seen whether and how these Acts and Protocols will apply in this situation. As matters now stand, there can be no graduates from TWU to be admitted to any bar. Only if it is affirmatively decided that the consent of the British Columbia Government can and must be given to TWU to grant law degrees, does this issue arise. If consent is granted, it will then have to be determined whether compliance with these Acts and Protocols is consistent with *Charter* rights and values in this particular case.

620. Nor does the Resolution run afoul of the B.C. *Human Rights Code*, RSBC 1996, c 210 (the "***HRC***"). Evangelical Christians do not suffer adverse treatment regarding admission to the Law Society. As described above, the Law Society does not inquire into or regulate the religious beliefs of its members or applicants. Evangelical Christians are welcome as members of the Law Society, without question or exception, and make a valuable contribution to the legal profession.

621. The Resolution of the Law Society was not based on the prohibited ground of religion. It was based solely on the discriminatory admission policy of the proposed TWU law school. Attempting to prevent discrimination by TWU against LGBTQ people is not a breach of the *HRC*.

622. Finally, while the Petitioners assert that the prohibitions on discrimination in the *HRC* do not apply to TWU's proposed law school, this is not the case. The exemption provision relied upon by TWU, section 41(1), permits those institutions which have as "a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized" by, *inter alia*, a common religion, to give "preference" to members of that religion.

623. The primary purpose of TWU's proposed law school is to issue secular law degrees and train law students. The fact that TWU may seek to issue those degrees within an evangelical Christian environment, does not make the degrees theological or religious.[342] They are seeking to train legal professionals for participation in the broader legal community, not for the seminary interacting only with believers.

624. TWU expressly states that its proposed law school is open to everyone regardless of their personal beliefs.[343] As stated in the *TWU Act*, TWU has the object of providing an education to young people of any race, colour or creed. Therefore, TWU's proposed law school does not fall within the exemption contained in s. 41(1) of the *HRC*.

F. Conclusion

625. In its Resolution, the Law Society is telling the Government, TWU, prospective students at TWU, and the public that the Law Society does not condone or accept TWU's discriminatory admissions policy, and, therefore, in furtherance of the public interest in the administration of justice, it does not approve the proposed law school.

626. The Resolution was considered necessary by the Law Society to uphold and protect the public interest in the administration of justice by preserving and protecting the rights and freedoms of all persons and ensuring the integrity and honour of lawyers, as the Law Society is statutorily required to do in the exercise of its powers under the *Legal Profession Act*.

[342] TWU Written Submission, at para 52.
[343] TWU Written Submission, at para 39-40.

627. The Law Society has not taken any action to prevent evangelical Christians from practicing law, or from attending law school, even a law school that trains lawyers from the perspective of their evangelical Christian beliefs.

628. The Law Society has simply said that it does not approve TWU's proposed law school, as long as it does not protect and preserve the rights and freedoms of everyone in its admissions policies.

629. A law school is different than other Christian or religious organizations and activities, including other educational organizations and activities, in that it plays a very important gatekeeper function in in terms of entry to the legal profession.

630. As with the other pillars of our legal system, including the Law Society, administrative decision-makers and the judiciary, law schools are expected to uphold the values and principles around which our legal system is built – which at their core is the protection and preservation of the rights and freedoms of everyone.

631. The Law Society has the statutory duty to protect those values and principles.

632. The issue in this case is whether the Law Society is required to give its approval to the law school if it reasonably, and indeed correctly, believes that because of the imposition of the Covenant as an admissions requirement, TWU's effective denial of equal access to the legal profession would be contrary to the public interest in the administration of justice to do so.

633. For the reasons provided above, the Law Society respectfully submits that the answer to this question is no.

634. Therefore, the Petition should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: August 4, 2015

Peter A. Gall, Q.C.
Lawyer for Law Society of British Columbia