



No. S-142908  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

**TREVOR LOKE**

PETITIONER

AND:

**MINISTER OF ADVANCED EDUCATION OF BRITISH COLUMBIA and  
TRINITY WESTERN UNIVERSITY**

RESPONDENTS

**RESPONSE TO PETITION**

**Filed by:** the Minister of Advanced Education of British Columbia (the “Minister”) and the Attorney General of British Columbia (the “AGBC”)

THIS IS A RESPONSE TO the amended petition filed June 2, 2014 (the “petition”).

**Part 1: ORDERS CONSENTED TO**

The Minister and AGBC do not consent to the granting of any relief or order sought in Part 1 of the petition.

**Part 2: ORDERS OPPOSED**

The Minister and AGBC oppose the granting of the orders set out all paragraphs of Part 1 of the petition.

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

Nil.

#### **Part 4: FACTUAL BASIS**

1. The Ministry of Advanced Education (the “Ministry”) has a mandate to ensure that British Columbia’s post-secondary education system is of high quality, relevant and responsive to the changing economic, technological and social forces in the province. To support this mandate, the *Degree Authorization Act*, SBC 2002 c. 24 (the “*DAA*”), which governs degree approval at private post-secondary institutions such as the respondent, Trinity Western University (“*TWU*”), requires that institutions apply for and obtain consent from the Minister of Advanced Education (the “*Minister*”) before offering a new degree program. This is known as the degree program approval process.

2. Since the *DAA* was brought into force in 2003, the Minister has granted consent to several new degrees at *TWU*, including a Master of Business Administration and a Master of Nursing Degree. On June 15, 2012, *TWU* submitted a proposal for a Juris Doctor law degree (“*JD*”). On December 17, 2013, after an 18-month review process, the Minister granted consent to the *JD* proposal, on certain terms and conditions.

3. On April 14, 2014, the petitioner, Trevor Loke (the “*petitioner*”), filed a petition for judicial review challenging the Minister’s decision.

#### **A. The Statutory Framework**

4. The *DAA* was introduced in the legislature on April 11, 2002 and brought into force on November 7, 2003. The *DAA* applies to all private and out-of-province public post-secondary institutions, but does not apply to British Columbia public post-secondary institutions. Section 3(1) of the *DAA* provides that Ministerial consent is required before an institution can grant or confer a degree.

5. Section 4(1) of the *DAA* grants the Minister discretion to give consent to an applicant if the Minister is satisfied that the applicant has undergone a quality assessment process and been found to meet certain criteria that the statute requires the Minister to establish and publish.

6. The *DAA* provides that the Minister must not give consent unless satisfied that the applicant has given financial security to protect students’ interests (if security is prescribed for

that applicant) and has made adequate arrangements regarding protection of and access to transcripts. In addition, the Minister has the authority to attach terms and conditions to any consent that is given, including a termination date after which the consent ceases to be effective unless renewed. The Minister may suspend or revoke consent, or modify terms and conditions of consent, if an institution that has been granted consent does not comply with the *DAA*, the regulations or the terms and conditions.

7. The *DAA* also contains provisions which grandfathered degree programs that were already being offered by private and out-of-province public post-secondary institutions in British Columbia as of April 2002, when the *DAA* was introduced. TWU is one of two private institutions explicitly named as being grandfathered under the *DAA*.

**B. The Degree Quality Assessment Board**

8. To fulfill the statutory requirement under the *DAA* for a quality assessment process, the Minister established and appointed the Degree Quality Assessment Board (the "Board"), an independent advisory board responsible for conducting quality assessment reviews for new program proposals and determining whether applicants meet the criteria established by the Minister. The Board also makes recommendations to the Minister to support the Minister's statutory powers to consent to new degree programs both at public post-secondary institutions and those authorized under the *DAA*.

9. The goal of the quality assessment process is to ensure that a consistently high standard is maintained across all degree programs offered in the province. The Board is guided by the related public policy objectives of increasing learner choice, ensuring quality education in degree programs, promoting a coherent and integrated post-secondary system, and promoting the protection of learners' interests and ensuring appropriate use of publicly funded student financial assistance.

10. The Board is composed of up to 11 voting members appointed by the Minister based on their expertise and experience in post-secondary education. The Board receives administrative support from a Secretariat comprised of seven Ministry staff.

11. As required under the *DAA*, the Minister has established and published criteria that apply for the purposes of giving or refusing consent, or attaching terms and conditions to consent. Those criteria are in the form of the Degree Program Review Criteria and Guidelines. The Degree Program Review Criteria and Guidelines set out in detail the required format for degree program proposals, and the elements that must be covered in the proposal, as well as the standards and criteria against which the proposal will be evaluated. In particular, a proposal must address at least the following areas:

- a. Degree Level Standard;
- b. Credential Recognition and Nomenclature
- c. Curriculum/Program Content;
- d. Learning Methodologies/Program Delivery;
- e. Admission and Transfer/Residency;
- f. Faculty;
- g. Program Resources;
- h. Program Consultation; and
- i. Program Review and Assessment.

12. The Guidelines include the following “standard” for credential recognition:

*The institution must demonstrate that the program’s learning outcomes and standards are sufficiently clear and at a level that will facilitate recognition of the credential by other post-secondary institutional, professional and licensing bodies and employers... (page 24)*

13. The criteria to be used in assessing credential recognition include:

*Evidence that employers, relevant occupational and professional groups, regulatory bodies and other post-secondary institutions will recognize the credential and their assessment of whether the credential will contribute to the professional advancement of the graduate. (page 24)*

14. To apply for approval for a new degree program, a post-secondary institution must submit a program proposal online through the Ministry’s Post-Secondary Institution Proposal System. Following a preliminary screening process by the Board secretariat staff, the program proposal is displayed on the Degree Authorization website for a period of 30 days to allow the general public (including academic experts and peer institutions) to review the program proposal

and provide comments. Comments on the proposal are sent to the submitting institution, which has an opportunity to respond.

15. After the 30-day review period has expired, the proposal and any comments and responses received, are forwarded to the Board for an initial review. At that point, the Board determines whether an organization or program review by external experts is required or whether prior accreditation materials can be recognized as satisfying all or part of British Columbia's criteria.

16. Once the experts have been selected, the institution is advised of the review and notified of the applicable costs. The Board then determines whether a site visit by the external experts will be required, or whether the proposal can be reviewed on the basis of the submission materials alone – which is considered a desk audit.

17. Following the review, the external experts provide a report to the Board, which is also made available to the submitting institution for response or comment. The Board then reviews the degree proposal, any public comments, the external experts' report and any response by the submitting institution, before making a recommendation to the Minister on whether the degree proposal should be authorized, authorized with conditions, or not authorized. With respect to conditions, the Board may simply recommend the standard terms and conditions that have been established, or may recommend that additional special terms and conditions be added to the consent.

18. The Minister will review the Board's recommendation before granting or not granting ministerial consent. Once the Minister has decided whether or not to grant consent, the institution is notified of the Minister's decision. The Minister's decision and a synopsis of the quality assessment process, including the Board's recommendation and rationale for it, are then posted on the Ministry's website, along with the final program proposal.

19. The Minister has also created a process under which institutions with proven track records and appropriate governance mechanisms in place may apply for "exempt status" at a specific degree level (i.e. baccalaureate, masters). If an institution is granted "exempt status" at a certain degree level, the institution must still apply for ministerial consent, but a proposal for

new degree programs at that level will generally go directly to the Minister for approval after the 30-day public review process has been completed, and will not be submitted to the Board for review. However, even if an institution has been granted exempt status, the Minister retains discretion to refer a degree proposal from that institution to the quality assessment process if the Minister has concerns about the proposal, such as when a proposed program represents a significant departure from programs historically offered by an institution.

**C. History of Degree Authorization at TWU**

20. TWU is a private university that was first established in 1962 as Trinity Junior College. In 1979, TWU was granted the statutory authority to issue a baccalaureate degree, and in 1985 the further authority to grant graduate degrees. The latter change was implemented through *An Act to Amend the Trinity Western College Act, 1985*.

21. Between 1985 and April 11, 2002, TWU required approval by the Lieutenant Governor in Council to offer a graduate degree program, other than in theology. The following degree programs at TWU were approved by the Lieutenant Governor in Council in this period:

- a. Master of Arts in Counselling (approved February 19, 1992);
- b. Master of Arts in Administrative Leadership (approved July 10, 1997); and
- c. Master of Arts in Teaching English as a Second or Other Language (approved June 19, 2003)

22. After the *DAA* was enacted, TWU applied for and was granted exempt status from the requirement for Board review for new baccalaureate and master's degree programs. TWU was still required to post proposals for new programs on the Post-Secondary Institution Proposal System of the Ministry's website, but the proposals would go directly to the Minister for consideration after the 30-day notice of intent stage.

23. Aside from the proposed law program, the Minister has consented to 15 new programs at TWU since the *DAA* was enacted.

**D. Minister's Consent for a Law Program at TWU**

24. On June 15, 2012, TWU submitted an application to the Minister for approval of a law school at TWU to offer the Juris Doctor ("JD") degree, with an anticipated program start date of September 2015. The application was posted on the Post-Secondary Institution Proposal System of the Ministry's website on July 2, 2012. The 30-day public review period expired on August 2, 2012. No comments were received by the Ministry on the application in that period.

25. On December 18, 2012, the Minister decided to refer the TWU application to the Board to undergo a full quality assessment process review, despite TWU's exempt status. The Board appointed a five-person expert review panel to review the TWU proposal, which included three members of the expert panel that reviewed the JD program proposal submitted by Thompson Rivers University in 2011. The review process, leading to the Minister's consent, consisted of the following steps:

- i) On March 26, 2013, the expert panel conducted a site visit at TWU.
- ii) On April 3, 2013, following a request by the expert panel, TWU provided further financial information.
- iii) On April 17, 2013, the expert panel produced a report on the TWU proposal entitled "Degree Program Review, Quality Assessment Report Workbook".
- iv) On May 17, 2013, TWU produced a report entitled "Response to Degree Program Review".
- v) At a meeting on June 10, 2013, the Board recommended that the Minister grant consent to the JD program at TWU on the condition that TWU implement the conditions in the review panel's report, hire qualified faculty, and that TWU confirm the Law Society of BC's approval of the program prior to admitting students.
- vi) The Board's recommendation was referred to the Minister on July 23, 2013. The Minister declined to make a decision at that time because a decision had not yet been made by the Federation of Law Societies of Canada, which was undertaking a review to determine whether the proposed law program met national requirements.

- vii) On December 16, 2013, the Federation of Law Societies granted preliminary approval of the JD program at TWU.
- viii) On December 17, 2013, the Minister consented to the JD program under the *DAA*, subject to standard and special terms and conditions of consent. The original special terms and conditions of consent included the requirement that the law program receive approval of the Law Society of BC before admitting students.
- ix) On February 12, 2014, the special terms and conditions of consent were revised to replace the reference to Law Society of BC approval of the TWU law program with a reference to Federation of Law Societies of Canada approval.
- x) On February 19, 2014, TWU signed the Minister's standard and revised special terms and conditions of consent.
- xi) On February 20, 2014, the Minister's decision to grant consent to the TWU law program was posted to the Degree Authorization website.

26. The special terms and conditions of consent signed by TWU required that the Board be provided with a report on the status of faculty recruitment and regulatory body approval prior to launching the program.

## **Part 5:LEGAL BASIS**

### Standard of Review

1. The role of the court on judicial review is to supervise the jurisdiction exercised by a statutory decision-maker to ensure the decision-maker stays within the limits of statutory authority. In British Columbia, judicial review is governed by the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 ("*JRPA*"). At common law, statutory decisions are presumptively reviewed on a standard of reasonableness. Only a narrow category of issues are reviewable on a correctness standard.

2. At paragraphs 82 and 87 of the petition, the petitioner appears to concede that the standard of review for the Minister's decision is reasonableness. This is consistent with the existing jurisprudence and a standard of review analysis.

3. The reasonableness standard requires the reviewing court to defer to the decision-maker. Reasonableness generally applies "automatically" where the question in issue is one of fact, discretion or policy, where legal and factual issues cannot be readily separated, or where the question relates to the interpretation of the tribunal's enabling statute: *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paras. 53-56 ("*Dunsmuir*"). The less deferential standard of correctness is restricted to decisions on jurisdiction (narrowly construed), constitutional issues, and questions of central importance to the legal system that are outside the decision-maker's area of expertise: *Dunsmuir*, at paras. 58, 60-61.

4. In the present case, the question for the Minister to decide was whether to grant consent to TWU's JD program under the *DAA*. Section 4(1) of the *DAA* says that the Minister "may" consent to a degree if the minister is satisfied the applicant has undergone a quality assessment process and has been found to meet criteria established under the *DAA*. Authorization is not a pure question of law or a true question of jurisdiction; there is no question that the Minister has the authority to consent to law degrees under the *DAA*. The issue of authorization is a question of mixed fact and law that requires application of the facts at issue to a specific statutory framework.

5. With respect to the expertise of the decision-maker, the Minister holds special expertise in matters of post-secondary education and the *DAA* is closely connected to his function as Minister. In fulfillment of section 4(1)'s requirement for a quality assessment process, the Minister's decision was also informed by the findings and recommendations of the Board and the expert panel.

6. In this instance, the question for the court is whether the decision of the Minister to consent to TWU's JD program falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. Discretion must be exercised within the context of the statute on the basis of relevant considerations and not for an improper purpose: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 53.

### The Record of Decision

7. In light of the court's role, judicial review is based on the "record of proceedings" before the statutory decision-maker. To permit a review other than on the record would be to embark on a *de novo* hearing that usurps the role delegated to the statutory decision-maker by the legislature: *Actton Transport Ltd. v. British Columbia (Employment Standards)*, 2010 BCCA 272 at paras. 19, 23 ("*Actton*"); *Kinexus Bioinformatics Corporations v. Asad*, 2010 BCSC 33 ("*Kinexus*") at para. 17.

8. The "record of proceeding" is a defined term under s. 1 of the *JRPA*. In general terms, the record consists of material that was before the decision-maker or material that emanated from the decision-maker, such as reasons for a decision. Evidence which is extrinsic to the record is generally inadmissible on judicial review: *Kinexus*, at para. 17.

9. The petitioner has filed a large volume of affidavit material on this petition which is not properly admissible in this judicial review as it is extrinsic to the record of proceeding. It is evident from these materials that the petitioner seeks to transform the narrow judicial review exercise into a broader constitutional inquiry focussing on TWU's community covenant. The AGBC submits that consideration of this body of evidence would result in an improper *de novo* hearing that would usurp the proper role of the decision-maker: *Actton*, para. 22.

### Charter Values

10. Administrative decision-makers must act consistently with the values underlying their grant of discretion, and must consider *Charter* values within their scope of expertise: *Doré v. Barreau du Québec*, 2012 SCC 12, at para. 35 ("*Doré*"). The petitioner challenges the Minister's decision on the basis that it does not accord with *Charter* values.

11. In *Doré*, the Court addressed how the *Charter* should influence administrative decision-making. The Court concluded that a flexible administrative approach to balancing *Charter* values based on *Dunsmuir* was consistent with the nature of discretionary decision-making, and preferable to a strict application of the *Oakes* test. Even where *Charter* issues are engaged, deference is still justified on the basis of the decision-maker's expertise and its proximity to the

facts of the case. A constitutional dimension to a question does not transform a reasonableness review into a correctness review: *Doré*, paras. 37, 54.

12. 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”. In this *Charter* balancing exercise, the proportionality test and reasonableness standard will be satisfied if the decision “falls within a range of reasonable alternatives”: *Doré*, paras. 56, 57

13. At paragraph 77 of the petition, the petitioner refers to the *Oakes* test under s. 1 of the *Charter* and contends that the Minister’s decision cannot be reasonably justified in a free and democratic society. The *Oakes* test is not the proper evaluative framework for judicial review of an administrative decision that engages the *Charter*.

14. Paragraph 53 of the petition contends that the Minister’s decision violates the s. 2(a) and s. 15(1) *Charter* rights of the petitioner. The petition does not reference competing *Charter* rights or values. In *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, the majority of the Supreme Court of Canada framed its decision approving of TWU’s education program as a case about reconciling the “competing rights” of religious freedom and equality (para. 34). The Court concluded that “[t]o state that the voluntary adoption of a code of conduct based on a person’s own religious beliefs, in a private institution, is sufficient to engage s. 15 would be inconsistent with freedom of conscience and religion, which co-exist with the right to equality” (para. 25).

15. The petition does not take issue with the jurisdiction of the Minister to consent to law degree programs. The contention is that the Minister should have exercised his discretion in a different way. The petitioner submits that the only option available to the Minister was to refuse consent as no discretionary decision under the *DAA* could justifiably result in consenting to the TWU JD proposal (petition, para. 82). The petitioner’s recommended approach to the Minister’s decision is essentially judicial review on a correctness standard.

### Fettering of Discretion

16. The petitioner alleges that the Minister fettered his discretion in “considering himself bound by the analysis provided by the [Board] and the Federation of Law Societies” (paras. 40(f), 55A, and 88). This assertion is not borne out in the record.

17. Section 4(1) of the *DAA* provides that before granting consent, the Minister must be satisfied that the applicant has undergone a quality assessment process and has been found to meet published criteria. The published criteria include, *inter alia*, that regulatory and professional bodies will recognize the degree which the applicant proposes to grant.

18. The Federation of Law Societies determines whether a proposed law program meets national requirements. The Benchers of the Law Society of BC retain authority to refuse to approve a law program notwithstanding the approval of the Federation of Law Societies. The Minister’s consent under the *DAA* was subject to approval of the Federation of Law Societies.

19. This does not constitute a fettering of discretion. The published criteria for quality assessment require that consideration be given to whether regulatory and professional bodies will recognize the degree. The Minister declined to consent to the law program until such time as the decision of the Federation of Law Societies was known. The Minister has not fettered his discretion in deeming consent to be conditional on regulatory and professional approval - rather he has considered and applied a factor relevant to the quality assessment process. The quality of a proposed program of professional study may be affected if its graduates cannot practice their profession.

### Remedy

20. In Part 1 of the petition, the petitioner seeks various forms of relief including a declaration that the Minister’s decision is unconstitutional, an order in the nature of *certiorari* setting aside the decision and remitting it back to the Minister for reconsideration, an order quashing the decision, and an order for costs.

21. The petitioner seeks the declaration and quashing order under s. 24(1) of the *Charter*. A declaration and a quashing are both administrative remedies. Where administrative remedies are

available in an application for judicial review, the Court should not bypass the administrative process in favour of constitutional remedies.

22. If the Court were to be persuaded that the Minister's decision was unreasonable, the usual remedy is an order in the nature of *certiorari* setting aside the decision and remitting the matter back to the decision-maker to be reconsidered in accordance with the Court's reasons. It is only in "rare" and "exceptional" circumstances that the Court will assume the role assigned to the administrative decision-maker by the legislature and make the decision in their stead: *British Columbia (Worker's Compensation Appeal Tribunal) v. Hill*, 2011 BCCA 49, at para. 54; *Dennis v. British Columbia (Superintendent of Motor Vehicles)*, 2000 BCCA 653, at paras. 21-27.

23. In exercising his discretion under the *DAA*, the Minister exercised a "statutory power of decision", as defined in the *JRPA*. In a judicial review of a statutory power of decision, section 2(2) of the *JRPA* only permits relief in the nature of mandamus, prohibition, and certiorari. Declaratory and injunctive relief are available only for judicial reviews of "statutory powers", as defined in the *JRPA*.

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

24. Affidavit #2 of Dorothy Rogers, sworn June 27, 2014.

The Minister and AGBC estimate that the application will take 5 days.

**Date:** June 30, 2014.



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