IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Trinity Western University v. The Law Society of British Columbia,* 2015 BCSC 2326

Date: 20151210
Docket: 149837
Registry: Vancouver

Between:

Trinity Western University and Brayden Volkenant

Petitioners

And

The Law Society of British Columbia

Respondent

And

Attorney General of Canada, The Association For Reformed Political Action (ARPA) Canada, Canadian Council of Christian Charities, Christian Legal Fellowship, Evangelical Fellowship of Canada, Christian Higher Education Canada, Justice Centre For Constitutional Freedoms, The Roman Catholic Archdiocese of Vancouver, The Catholic Civil Rights League, The Faith and Freedom Alliance, Seventh-Day Adventist Church in Canada, West Coast Women's Legal Education and Action Fund, Outlaws UBC, Outlaws UVIC, Outlaws TRU and Qmunity

Interveners

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for Petitioners:	K.L. Boonstra, J.B. Maryniuk and K. Sawatsky
Counsel for Respondent:	P. Gall, Q.C., D.R. Munroe, Q.C. B. Oliphant and S. Gryawali
Counsel for Intervener, Attorney General of Canada:	D. Roberts, Q.C.

Counsel for Intervener, Association for the Reformed Political Action (ARPA) Canada:	E.L. Vandergriendt, A.M. Schutten
Counsel for Intervener, The Roman Catholic Archdiocese of Vancouver, The Catholic Civil Rights League, The Faith and Freedom Alliance:	G. Allison
Counsel for Intervener, West Coast Women's Legal Education and Action Fund:	J. Winteringham, Q.C. and R. Trask
Counsel for Intervener, Justice Centre For Constitutional Freedoms	J. Cameron
Place and Date of Trial/Hearing:	Vancouver, B.C. August 24–26, 2015
Place and Date of Judgment:	Vancouver, B.C. December 10, 2015

TABLE OF CONTENTS

Introduction

[1] The petitioners seek judicial review of the respondent's decision that the proposed law school at Trinity Western University is not an approved faculty of law for the purpose of the respondent's admissions program.

The Parties

[2] Trinity Western University ("TWU") is a private religious educational community with an evangelical Christian mission. It was founded to be, and remains, an educational arm of the Evangelical Christian Church. Its mission statement is:

> 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.

[3] In 1962, the predecessor to TWU was created as a junior college under the *Societies Act*, R.S.B.C. 1960, c. 362. It was continued by the British Columbia Legislature as Trinity Junior College in 1969, under the *Trinity Junior College Act*, S.B.C. 1969, c. 44. In 1984, the predecessor to TWU was accepted as a member of the Association of Universities and Colleges of Canada. In 1985, the Legislature passed *An Act to Amend the Trinity Western College Act*, S.B.C. 1985, c. 63, which changed the name of the institution, and authorized it to grant graduate degrees.

[4] TWU is the largest privately-funded Christian University in Canada, with approximately 4,000 students attending per year and over 24,000 alumni.

[5] The petitioner, Brayden Volkenant ("Mr. Volkenant") has deposed that he is a committed evangelical Christian and that his "identity is entirely defined" by his relationship with Jesus Christ. He also deposed that his Christian faith is the "foundation" for his life, and that he tries to do "everything" in light of his "faith and [his] Christian identity". He graduated from TWU in 2012 with "Great Distinction", receiving a Bachelor of Arts (Business Administration) degree with a cumulative grade point average of 3.77.

[6] The respondent Law Society of British Columbia ("LSBC") is a self-governing body created and authorized by the *Legal Profession Act*, S.B.C. 1998, c. 9 [*LPA*]. The Benchers are the governing council of the LSBC, and the *LPA* provides for the election of 25 Benchers by the LSBC's members and for the appointment of five "lay Benchers".

[7] The object and duty of the LSBC is set out in s. 3 of the *LPA*:

> 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.

The Interveners

[8] The Attorney General of Canada has intervened in these proceedings pursuant to the *Constitutional Question Act*, R.S.B.C. 1996, c. 68. The Attorney General of Canada argues that the LSBC's decision, which declares that the proposed law school at TWU is not an approved faculty of law for the purposes of the LSBC's admission program, is *ultra vires* the authority conferred to the LSBC under the *LPA*, and is unconstitutional because it unjustifiably infringes s. 2(a) of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [*Charter*].

[9] The following parties supporting the petitioners were granted intervener standing in these proceedings, and permitted to file written submissions:

- Attorney General of Canada;

- The Association For Reformed Political Action (“ARPA”) Canada;
- Canadian Council of Christian Charities;
- Christian Legal Fellowship;
- Evangelical Fellowship of Canada;
- Christian Higher Education Canada;
- Justice Centre For Constitutional Freedoms;
- The Roman Catholic Archdiocese of Vancouver;
- The Catholic Civil Rights League;
- The Faith and Freedom Alliance; and
- Seventh-Day Adventist Church in Canada.

[10] ARPA Canada is a not-for-profit and non-partisan organization devoted to educating, equipping, and assisting members of Canada's Reformed Churches (“Reformed Christians") and the broader Christian community as they seek to participate in the public square. Reformed Christians are a distinct subset of the broader evangelical Christian community.

[11] The Canadian Council of Christian Charities is an umbrella organization of some 3,300 religious charities and organizations that are engaged in a wide variety of activities such as operating local churches, denominational offices, schools, universities, food banks, and shelters. Its entities operate within an environment that is governed by the religious beliefs and practises of their respective constituencies. Religious codes of conduct are a commonly adhered to by its members in carrying out their work.

[12] The Christian Legal Fellowship is a national non-profit association of lawyers, law students, professors, retired judges, friends and other professionals who share a commitment to the Christian faith. The Christian Legal Fellowship was founded in the mid-1970s and incorporated in 1978, and has nearly 600 members representing more than 30 Christian denominations. The Christian Legal Fellowship represents that it seeks to “encourage and facilitate among Christians in the vocation of law the integration of a biblical faith with contemporary legal, moral, social and political

issues", inform the Christian community about legal issues that affect it, and advocate a Christian world view of law and justice in the public sphere.

[13] The Evangelical Fellowship of Canada is a national association that represents protestant evangelical Christians from affiliates of 40 protestant denominations and over 100 other organizations and 36 Christian post-secondary education institutions.

[14] Christian Higher Education Canada is a national association of 34 Christian accredited degree-granting universities, seminaries, graduate schools, bible colleges and Christian liberal arts colleges, which together serve over 14,000 undergraduate students and 3,500 graduate students. Christian Higher Education Canada's mission is to advance the efficiency and effectiveness of Christian higher education at member schools and to raise public awareness of the value of Christian higher education in Canada.

[15] The Justice Centre for Constitutional Freedoms is an independent, non-partisan, registered charity that advocates for *Charter* rights and freedoms, particularly the freedoms granted by s. 2 of the *Charter*. The Justice Centre for Constitutional Freedoms was established as a non-profit corporation by way of letters patent issued in October 2010 under the *Canada Corporations Act*, R.S.C. 1970, c. C-32.

[16] The Roman Catholic Archdiocese of Vancouver ("RCAV") has been serving Catholics in British Columbia since 1908, with pastoral responsibility for 430,000 baptized Catholics. Within the boundaries of the RCAV are 50 Catholic schools, four hospitals, three colleges, a seminary and more than 80 organizations, associations, ministries and clubs. The RCAV has significant and deep roots in the public sphere in British Columbia.

[17] The RCAV is supported in its intervention by the Catholic Civil Rights League, which advocates for law and policy that supports the presence of Christian beliefs in the public sphere and a rich conception of multiculturalism and religious tolerance. The RCAV is also supported by the Freedom and Faith Alliance, which seeks to

promote a Gospel-inspired conception of freedom of religion, conscience and expression, under constitutional and human rights legislation across the country.

[18] The Seventh-day Adventist Church ("Adventists") operates the second largest education network in the world (7804 institutions) and has a worldwide membership of approximately 18 million adherents. In Canada, Adventists operate 46 Christian schools, from kindergarten and grade schools to a provincially-accredited university in Alberta. Adventists promote the dignity and value of every person and oppose discrimination under human rights legislation, the constitution or otherwise. Much of the theology of Adventists corresponds to evangelical Christian teachings, such as a belief in the trinity and the inspiration of scripture.

[19] The following parties supporting the respondent were granted intervener standing in these proceedings, and permitted to file written submissions:

- West Coast Women's Legal Education and Action Fund;
- OUTlaws UBC;
- OUTlaws UVIC;
- OUTlaws TRU; and
- Qmunity.

[20] West Coast Women's Legal Education and Action Fund ("West Coast LEAF") was created in 1985 and is an incorporated not-for-profit society in British Columbia. West Coast LEAF's mission is to achieve equality by changing historic patterns of systemic discrimination against women through three main program areas: equality rights litigation, law reform, and public legal education.

[21] OUTlaws Canada describes itself as an organization of queer law student associations in Canada. There are OUTlaws chapters at 15 Canadian law schools, including at the University of British Columbia ("UBC"), the University of Victoria ("UVic"), and Thompson Rivers University ("TRU"). OUTlaws chapters hold events at law schools to promote a supportive community for lesbian, gay, bisexual, transgendered and queer ("LGBTQ") law students and awareness of LGBTQ issues.

[22] Qmunity was founded in 1979 and is a charitable, not-for-profit, community-based organization. Its mission is "to make queer lives better by proactively supporting [their] peers and strengthening [their] communities as [they] move equality forward.

[23] I determined that I would hear oral submissions from the Attorney General of Canada, ARPA Canada, the RCAV, the Justice Centre for Constitutional Freedoms and West Coast LEAF but would not hear oral submissions from the Canadian Council of Christian Charities, the Christian Legal Fellowship, the Evangelical Fellowship of Canada, the Adventists, the OUTlaws (UBC, UVic, and TRU) and Qmunity.

Background

[24] Evangelicalism is a distinct branch of Christianity within the protestant tradition and represents a minority religious subculture in Canada, with approximately 11–12% of the Canadian population being associated with communities reflecting evangelical Christian beliefs and practices. The limitation of sexual intimacy to opposite-sex marriage is considered by evangelical Christians to be a direct reflection of the moral boundaries delineated by their underlying religious beliefs.

[25] In an affidavit filed in support of the petition, Mr. William Taylor, the Executive Director of the Evangelical Free Church of Canada ("EFCC"), explained how the EFCC and TWU understand the content of an education that reflects a Christian philosophy and viewpoint:

> University education was historically intended to educate the whole person, including students' characters. The EFCC and TWU continue with this intention, in the context of TWU's Christian ethos. We view education as a holistic attempt to produce graduates who are well formed in character; good citizens who will take their area of study/expertise and apply that knowledge, through good character in a way that redemptively addresses the evil and injustice of this world, consistent with our understanding of biblical truth.

[26] Mr. Taylor also explained that the EFCC is closely affiliated with the Evangelical Free Church of America which in turn is associated with Trinity International University. This university has a law school in Santa Ana, California that is accredited by the Committee of Bar Examiners of the State Bar of California.

[27] TWU requires that those who attend a course of study at the University sign a "Community Covenant" which provides in part that:

> In keeping with biblical and TWU ideals, community members voluntarily abstain from the following actions:
>
> - communication that is destructive to TWU community life and inter-personal relationships, including gossip, slander, vulgar/obscene language, and prejudice [Colossians 3:8; Ephesians 4:31.]
> - harassment or any form of verbal or physical intimidation, including hazing
> - lying, cheating, or other forms of dishonesty including plagiarism
> - stealing, misusing or destroying property belonging to others [Exodus 20:15; Ephesians 4:28]
> - sexual intimacy that violates the sacredness of marriage between a man and a woman [Romans 1:26-27; Proverbs 6:23-35]
> - the use of materials that are degrading, dehumanizing, exploitive, hateful, or gratuitously violent, including, but not limited to pornography
> - drunkenness, under-age consumption of alcohol, the use or possession of illegal drugs, and the misuse or abuse of substances including prescribed drugs
> - the use or possession of alcohol on campus, or at any TWU sponsored event, and the use of tobacco on campus or at any TWU sponsored event.

[28] At least 20 years ago, TWU decided that it wished to establish a faculty of law and grant degrees to graduates of that faculty pursuant to the *Degree Authorization Act*, S.B.C. 2002, c. 24 [*DAA*]. TWU's proposed faculty of law would offer a three-year Juris Doctor ("*JD*") common law degree program equivalent to programs offered by the 20 publically-funded secular law schools that are already operating throughout Canada.

[29] In 2010, all Canadian Law Societies approved and adopted a uniform national requirement that gave the Approval Committee of the Federation of Law Societies of Canada ("FLS") responsibility for reviewing new law degree programs to ensure that they prepare law school graduates for law society admission programs. The LSBC agreed with all other Canadian law societies to change its requirements to accept the FLS's approval based on the national requirement. The national requirement is administered by the FLS.

[30] In order to obtain the approval of the Minister of Advanced Education ("Minister") to establish its proposed faculty of law and authorize it to grant degrees to its graduates, TWU was required by the Minister to first obtain the approval for the proposed faculty and its ability to grant the *JD* degrees from the FLS and from the LSBC.

[31] The LSBC's Rules[1] require that Canadian law school graduates complete its admissions program before being admitted to the practice of law in B.C. Enrollment in the program requires an applicant to demonstrate "academic qualification". Until the fall of 2013, "academic qualification" under the LSBC Rules included the "successful completion of the requirements for a bachelor of laws or the equivalent degree from a common law faculty of law in a Canadian university".

[32] In September 2013, Rule 2-27 was amended by the LSBC to require that common law degree programs come from an "approved" faculty of law. Under the amended Rule 2-27, a faculty of law was approved where it received approval from the FLS, unless the Benchers adopt a resolution declaring that it was not or had ceased to be approved.

[33] On December 16, 2013, the FLS's Approval Committee granted preliminary approval of the proposed *JD* program at TWU. The Special Advisory Committee of the FLS concluded there was no public interest bar to the approval of TWU's

[1] The LSBC's Rules were revised and consolidated and the new *Law Society Rules 2015* came into effect on July 1, 2015. In these reasons for judgment, references to the LSBC's Rules relate to the previous rules that were in effect until June 30, 2015.

proposed law school or to the admission of its future graduates to the bar admission programs of Canadian law societies.

[34] As a result of the FLS's preliminary approval, TWU's proposed law school became an approved faculty of law for the purposes of enrolment in the LSBC's admissions program, subject to any future resolution adopted by the Benchers under LSBC Rule 2-27(4.1). Therefore, on December 17, 2013, the Minister approved the establishment of TWU's proposed faculty of law and authorized TWU to grant *JD* degrees to its graduates.

[35] On February 28, 2014, the Benchers determined that they would vote at a meeting scheduled for April 11, 2014 on a motion (the "April Motion") stating:

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

[36] In preparation for the April 11, 2014 meeting, the LSBC sought and obtained an opinion on Rule 2-27(4.1) from Mr. Geoff Gomery, Q.C., a barrister and solicitor and member of the LSBC. In his opinion dated March 15, 2014, Mr. Gomery advised that "Rule 2-27(4.1) does not contemplate the Benchers disapproving a faculty of law... on a ground that is unrelated to the question of academic qualification".

[37] On April 11, 2014, the Benchers considered the April Motion, and ultimately voted to defeat the motion. Following the vote, the President of the LSBC stated that the LSBC had "decided to approve" the academic qualifications of TWU graduates.

[38] After the defeat of the April Motion, a Special General Meeting of LSBC members ("SGM") was requisitioned by some of the members of the LSBC pursuant to its Rule 1-9(2).

[39] LSBC members were asked to consider a resolution (the "SGM Resolution") on the basis that TWU's faculty of law would not "promote and improve the standard of practice by lawyers". The resolution was that:

> The Benchers are directed to declare, pursuant to Law Society Rule 2-27(4.1), that Trinity Western University is not an approved faculty of law.

[40] The LSBC sent a "Notice to the Profession" of the SGM to all of its members. Enclosed with that Notice was a letter dated April 23, 2014, from a proponent of the SGM Resolution. The letter stated:

> As you probably aware, there has been an application by Trinity Western University for approval by the Law Society of British Columbia for a new faculty of law.
>
> Trinity Western University requires students and faculty to enter into a covenant that includes a provision prohibiting "sexual intimacy that violates the sacredness of marriage between a man and a woman." Violation of this covenant can lead to discipline or expulsion from the university.
>
> Section 28 of the *Legal Profession Act* confers authority on the Law Society to promote and improve the standard of practice by lawyers by, amongst other things, establishing and maintaining a system of legal education. In furtherance of this, Law Society Rule 2-27(4.1) permits the Benchers to deny approval to a faculty of law even where it may have been found to meet basic academic requirements.
>
> On April 11, 2014, a majority of the Benchers of the Law Society voted to approve the application by Trinity Western University despite the covenant that discriminates on the basis of sexual orientation.
>
> The granting of approval to an institution founded on an offensive and discriminatory policy will not serve to promote or improve the standard of practice of lawyers in the province. A proper assessment as to what will serve to benefit the standard of practice of lawyers requires consideration of the long-term interests of the profession including its reputation and core values.
>
> The discriminatory principles reflected in the Trinity Western University covenant would appear to be inconsistent with one of the core principles reflected in the Barristers' and Solicitors' oath: that barristers and solicitors uphold the rights and freedoms of all persons according to the laws of Canada and British Columbia.
>
> Several of the Benchers who voted in favour of approval for Trinity Western University did so on the basis of the Supreme Court of Canada overturning the British Columbia College of Teachers (BCCT) with respect to the approval of the university to graduate teachers. See *Trinity Western University* v. *British Columbia College of Teachers* [2001] 1 S.C.R. 772. This case turned on the absence of evidence before the BCCT concerning the impact of the university's discriminatory practices.
>
> The *Legal Profession Act* does not require approval absent a conclusion that the proposed change to the system of legal education would promote or improve the standard of practice of lawyers. Accordingly, approval ought to be withheld absent an evidentiary basis to conclude that the approval of this

> university would have the effect of improving the standard of practice of lawyers in the province.
>
> Unfortunately the current decision of the Law Society countenances intolerance, will be detrimental to the profession, and firmly places us on the wrong side of an important issue of principle. Moreover, there does not seem to be a sufficient evidentiary basis to conclude that the approval of the university will meet the objectives of section 28 of the *Legal Profession Act.*
>
> This is one of the rare occasions when a decision of the Benchers requires reconsideration by the members of the Law Society.
>
> Pursuant to requests from in excess of 1,100 members, a special general meeting has now been called in order to deal with this issue.
>
> Please consider attending in order to participate and vote on the resolution.
>
> The outcome of the meeting will have an impact on the future of the profession and hopefully position it on the right side of the continuing difficult struggle against unacceptable discriminatory attitudes.

[41] The LSBC refused TWU's request to also enclose a letter from its spokesperson to LSBC members with the Notice to the Profession of the SGM.

[42] The SGM was held on June 10, 2014. Members were not required to be present during the member speeches in order to vote. The SGM Resolution passed on that date by a vote of 3,210 to 968.

[43] At their September 26, 2014 meeting (the "September Meeting"), the Benchers voted on two motions. The first motion was for the Benchers to implement the SGM Resolution and thereby reject TWU graduates. This motion was defeated by a vote of 21-9.

[44] The second motion (the "September Motion") resolved to hold a referendum of LSBC members, to be "conducted as soon as possible", on implementing the following resolution:

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

[45] The September Motion also stated the referendum results would be binding on and be implemented by the Benchers if at least one-third of LSBC members voted and two-thirds of members voted in favour of the resolution, and also stated that "[t]he Benchers hereby determine that implementation of the Resolution does not constitute a breach of their statutory duties, regardless of the results of the Referendum."

[46] The Benchers passed the September Motion by a vote of 20-1. A third motion that would have delayed further action until the courts had ruled on matters pertaining to the proposed faculty of law was then withdrawn.

[47] The referendum was then held among LSBC members pursuant to LSBC Rule 1-37 (the "October Referendum"). The October Referendum was conducted by mail-in ballot throughout the month of October. The LSBC released the results of the October Referendum on October 30, 2014. 5,951 (74%) members of the LSBC voted in favour of the Referendum Question and 2,088 (26%) voted against it.

[48] At a meeting held on October 31, 2014, without any substantive debate or discussion, the Benchers treated the October Referendum as binding and voted 25-1, with four abstentions, to implement the SGM Resolution based solely on the results of the October Referendum (the "Decision"), reversing their earlier approval of the law school and refusing to approve TWU's *JD* degrees pursuant to LSBC Rule 2-27(4.1).

[49] On December 11, 2014, the Minister withdrew his approval for the proposed faculty of law at TWU.

Relief Sought

[50] Mr. Volkenant aspires to practice law in British Columbia. It was his plan to attend TWU's proposed law school, but he has chosen not to do so because his *JD* degree from TWU would not be recognized by the LSBC, and he would thus not be considered qualified to be admitted to the LSBC and could not become a practicing lawyer in this province.

[51] Mr. Volkenant and TWU seek judicial review of LSBC's refusal to recognize *JD* degrees of graduates from TWU for the purpose of admission to the LSBC, pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996. c. 241. Specifically, the petitioners seek a declaration that the Decision is *ultra vires* the LSBC and invalid, and that it unjustifiably infringes on their *Charter* rights. They also seek orders in the nature of *certiorari*, *mandamus*, and prohibition.

[52] The petitioners seek an order declaring that TWU's proposed law school be considered "approved" for the purposes of the LSBC's Rule 2-27(4.1), and that such a declaration prohibits the LSBC from adopting a further resolution such as the Decision. In the alternative, if this Court quashes the Decision and remits it back to the Benchers, the petitioners seek an order prohibiting the LSBC from taking steps to implement a further resolution such as the Decision for any reason related to TWU's Community Covenant.

[53] The petitioners also seek their costs of this petition, to be assessed.

Other Litigation Respecting TWU's Community Covenant

a) British Columbia College of Teachers

[54] In 1985, TWU established a teacher education program, the final year of which was spent at another university. Students attending TWU, including those taking teacher training, were then required to sign a "Community Standards" document, the predecessor to TWU's present Community Covenant, that contained the following paragraph:

> REFRAIN FROM PRACTICES THAT ARE BIBLICALLY CONDEMNED. These include but are not limited to drunkenness (Eph. 5:18), swearing or use of profane language (Eph. 4:29, 5:4; Jas 3:1-12), harassment (Jn 13:34-35; Rom. 12:9-21; Eph. 4:31), all forms of dishonesty including cheating and stealing (Prov. 12:22; Col. 3:9; Eph. 4:28), abortion (Ex. 20:13; Ps. 139:13-16), involvement in the occult (Acts 19:19; Gal. 5:19), and sexual sins including premarital sex, adultery, homosexual behaviour, and viewing of pornography (I Cor. 6:12-20; Eph. 4:17-24; I Thess. 4:3-8; Rom. 2:26-27; I Tim. 1:9-10). Furthermore married members of the community agree to maintain the sanctity of marriage and to take every positive step possible to avoid divorce.

[55] In 1987, TWU applied to B.C.'s Minister of Education for permission to assume full responsibility for the teacher education program. In January of 1995, TWU applied to the British Columbia College of Teachers ("BCCT") for the approval of its education program.

[56] The object of the BCCT is set out in s. 4 of the *Teaching Profession Act*, R.S.B.C. 1996, c. 449 [*TPA*]:

> It is the object of the college to establish, having regard to the public interest, standards for the education, professional responsibility and competence of its members, persons who hold certificates of qualification and applicants for membership and, consistent with that object, to encourage the professional interest of its members in those matters.
>
> [Emphasis added.]

[57] On May 17, 1996, the Council of the BCCT denied TWU's application on two grounds: TWU did not meet the criteria stated in the BCCT bylaws and policies; and approval would not be in the public interest because of the "discriminatory practices" of the institution, referring to the "requirement for students to sign the contract of 'Responsibilities of Membership in the Trinity Western University Community"' and the effect that signing the Community Standards document had on lesbian, gay and bisexual students.

[58] TWU applied for a reconsideration of its application. After obtaining a legal opinion on the issue, the BCCT confirmed its denial of the application on June 29, 1996.

[59] Mr. Justice Davies heard TWU's application for judicial review of the BCCT's decision and in reasons reported at (1997), 41 B.C.L.R. (3d) 158, found that it was not within the BCCT's jurisdiction to consider whether the program followed discriminatory practices under the public interest component of the *TPA*, and concluded that there was no reasonable foundation to support the decision of the BCCT with regard to discrimination. Davies J. made an order in the nature of *mandamus* that the BCCT approve TWU's teacher training program. His decision was affirmed by a majority of the Court of Appeal ((1998), 59 B.C.L.R. (3d) 241).

[60] On further appeal to the Supreme Court of Canada, indexed at *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 at para. 8 [*TWU v. BCCT*], Mr. Justice Iacobucci and Mr. Justice Bastarache, for the majority, held that the question of whether the BCCT exceeded its jurisdiction when it denied approval to TWU's five-year B.Ed. program by taking into account TWU's discriminatory practices was a question of law, to which the standard of correctness applied. Iacobucci and Bastarache JJ. further held that if the BCCT was entitled to consider "discriminatory practices", the test was whether the BCCT's decision was patently unreasonable.

[61] Iacobucci and Bastarache JJ. determined that the power to establish standards provided for in s. 4 of the *TPA* had to be interpreted in light of the general purpose of the statute. In particular, they found that it would be incorrect to limit the scope of the section to a determination of skills and knowledge, and found that the BCCT had jurisdiction to consider discriminatory practices in dealing with TWU's application.

[62] Iacobucci and Bastarache JJ. accepted at para. 13 that "suitability for entrance into the profession of teaching [had to] take into account all features of the education program at TWU", referring to the earlier decision of the Court in *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, where it was accepted that teachers are a medium for the transmission of values, and that:

> [13] …the pluralistic nature of society and the extent of diversity in Canada are important elements that must be understood by future teachers because they are the fabric of the society within which teachers operate and the reason why there is a need to respect and promote minority rights.

[63] Iacobucci and Bastarache JJ. acknowledged at para. 25 that although the Community Standards were expressed as a code of conduct rather than an article of faith, "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". However, they determined that the admissions policy of TWU was not in itself sufficient to establish discrimination under s. 15 of the *Charter*. They noted that TWU is a private

institution to which the *Charter* does not apply and that is exempted, in part, from B.C.'s human rights legislation.

[64] Iacobucci and Bastarache JJ. went on to conclude that:

> [25] …[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.

However, they accepted that concerns about equality were appropriately considered by the BCCT under the public interest component of s. 4 of the *TPA*.

[65] At paras. 28, 29 and 31, Iacobucci and Bastarache JJ. held that the BCCT was required to consider issues of religious freedom:

> [28] …Section 15 of the *Charter* protects equally against "discrimination based on ... religion". Similarly, s. 2(a) of the *Charter* guarantees that "[e]veryone has the following fundamental freedoms: ... freedom of conscience and religion". British Columbia's human rights legislation accommodates religious freedoms by allowing religious institutions to discriminate in their admissions policies on the basis of religion. The importance of freedom of religion in Canadian society was elegantly stated by Dickson J., as he then was, writing for the majority in *Big M Drug Mart*, supra, at pp. 336-37:
>
> > A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.
> >
> > Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or

> refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.
>
> What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards religious minorities from the threat of "the tyranny of the majority".

It is interesting to note that this passage presages the very situation which has arisen in this appeal, namely, one where the religious freedom of one individual is claimed to interfere with the fundamental rights and freedoms of another. The issue at the heart of this appeal is how to reconcile the religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.'s public school system, concerns that may be shared with their parents and society generally.

[29] In our opinion, this is a case where any potential conflict should be resolved through the proper delineation of the rights and values involved. In essence, properly defining the scope of the rights avoids a conflict in this case. Neither freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute. As L'Heureux-Dubé J. stated in *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141, at p. 182, writing for the majority on this point:

> As the Court has reiterated many times, freedom of religion, like any freedom, is not absolute. It is inherently limited by the rights and freedoms of others. Whereas parents are free to choose and practise the religion of their choice, such activities can and must be restricted when they are against the child's best interests, without thereby infringing the parents' freedom of religion.
>
> …

[31] …the *Charter* must be read as a whole, so that one right is not privileged at the expense of another. As Lamer C.J. stated for the majority of this Court in *Dagenais v. Canadian Broadcasting Corp*., [1994] 3 S.C.R. 835, at p. 877:

> A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict ... *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.

[66] Iacobucci and Bastarache JJ. concluded that the BCCT erred by failing to weigh the rights involved in its assessment of the alleged discriminatory practices of TWU, because it did not take into account the impact of its decision on the right to freedom of religion of TWU's members. The BCCT's appeal was dismissed, and the Court upheld the *mandamus* order made by the trial judge.

b) Other Law Societies

[67] The Nova Scotia Barristers' Society ("NSBS") and the Law Society of Upper Canada ("LSUC") each determined that they would not recognize graduates of TWU's proposed faculty of law for the purposes of admission to the bars of Nova Scotia or Ontario. TWU sought judicial review of both law societies' decisions.

i) Nova Scotia

[68] Section 4(1) of the *Legal Profession Act*, S.N.S. 2004, c. 28 describes the purpose of the NSBS as follows:

> 4(1) The purpose of the Society is to uphold and protect the public interest in the practice of law.

[69] In reasons indexed at *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25 [*TWU v. NSBS*], Mr. Justice Campbell found that the NSBS did not have the authority to do what it did, and in the alternative, it did not exercise its authority in a way that reasonably considered TWU's concerns for religious freedom and liberty of conscience.

[70] Campbell J. reasoned at para. 166:

> [166] The purpose of the NSBS under the *Legal Profession Act* is to "uphold and protect the public interest in the practice of law. It is not an expansive mandate to oversee the public interest generally, or all things to which the law relates. It is a mandate to regulate lawyers and the practice of law as a profession within Nova Scotia. In order to have any authority over a subject matter, a person or an institution, that subject, matter, person or institution has to relate to or affect the practice of law. Both the federal income tax reporting requirements and the *Civil Procedure Rules* affect lawyers and the practice of law but they are not part of regulation of the profession. In order for the NSBS to take action pertaining to TWU, that institution must in some way affect the practice or the profession of law in Nova Scotia.

[71] At para. 270, Campbell J. concluded that the impact of the NSBS's refusal would have on religious freedom:

> [270] …would be to require it to be undertaken in a way that significantly diminishes its value. TWU's character as an Evangelical Christian University where behavioural standards are required to be observed by everyone would be changed. Replacing a mandatory code with a voluntary one would mean that students who wanted to be assured that they could study in a strictly Evangelical Christian environment would have to look elsewhere if they want to practice in Nova Scotia. That impact is direct. The NSBS resolution and regulation infringe on the freedom of religion of TWU and its students in a way that cannot be justified. The rights, *Charter* values and regulatory objectives were not reasonably balanced within a margin of appreciation.

[72] The decision of Campbell J. has been appealed to the Nova Scotia Court of Appeal, with the appeal set to be heard in April 2016: *Trinity Western University v. Nova Scotia Barristers' Society* (28 August 2015), Halifax 438894 (N.S.C.A.), per Bourgeois J.A.

ii) Ontario

[73] Ontario's *Law Society Act*, R.S.O. 1990, c. L.8 [*LSA*] vests control over licensing, education, admission, discipline and unauthorized practice of lawyers in the LSUC. Section 4.2 of the *LSA* states, in part that:

> In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:
>
> 1. The Society has a duty to maintain and advance the cause of justice and the rule of law.
>
> 2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.
>
> 3. The Society has a duty to protect the public interest.

[74] Before an applicant can take the required licensing examination or examinations set by the LSUC to obtain a Class LI licence to practice law in Ontario, he or she must have a bachelor of laws or *JD* degree from a law school in Canada that was, at the time the applicant graduated from the law school, a law school accredited by the LSUC, or a certificate of qualification issued by the National Committee on Accreditation appointed by the FLS and the Council of Law Deans.

[75] On April 24, 2014, the LSUC's Convocation voted to reject the accreditation of TWU's faculty of law. TWU sought judicial review of the decision. In *Trinity Western University v. The Law Society of Upper Canada*, 2015 ONSC 4250 [*TWU v. LSUC*], the Ontario Divisional Court upheld the LSUC's decision to refuse to recognize graduates of TWU's proposed faculty of law.

[76] TWU has sought leave to appeal the decision of the Divisional Court. Leave to appeal has been granted by the Court of Appeal for Ontario: *Trinity Western University v. The Law Society of Upper Canada* (11 September 2015), M45342 (Ont. C.A.).

Discussion

[77] While I accept and adopt some of the reasoning of the Divisional Court in *TWU v. LSUC,* I am unable to agree with all of that reasoning. For example, the Divisional Court found that there has been an evolution in human rights jurisprudence since the decision in *TWU v. BCCT*, and that this shift, among other factors, limits the application of *TWU v. BCCT* to its judicial review of the LSUC's decision. The Divisional Court observed that in *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 42, McLachlin C.J.C. said:

> [42] …Similarly, the matter may be revisited 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.

[78] I am not persuaded that the circumstances or the jurisprudence respecting human rights have so fundamentally shifted the parameters of the debate as to render the decision in *TWU v. BCCT* other than dispositive of many of the issues in this case.

a) Standards of Review

[79] The two standards for judicial review of administrative decision are reasonableness and correctness: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at

para. 34 [*Dunsmuir*].[2] In applying the former, the court gives the administrative body a measure of deference; in applying the latter, the court evaluates the decision without deference for the administrative body, and, if necessary, substitutes its own judgment in place of the original decision.

[80] The deference doctrine operates under a two-step framework for assessing whether a tribunal's decision is owed deference. The first step is to see whether the jurisprudence has already satisfactorily determined the standard of review with respect to a particular question. Where the first inquiry proves unfruitful, the court must proceed to the second step and consider the factors in *Dunsmuir* to identify the standard of review that should be applied.

[81] The Court in *Dunsmuir* described a review for reasonableness at para. 47:

> [47] …A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. 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.

[82] The Court's approach to applying the correctness standard was explained at para. 50:

> [50] …When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[83] The LSBC 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 *LPA* and its balancing of *Charter* rights in the exercise of its statutory duty.

---

[2] A third standard of review, patent unreasonableness, remains alive in British Columbia only through the application of certain provisions of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, which do not apply to the decision under review in this petition.

[84] TWU contends that the standard of review on the administrative law issues raised in the petition is correctness, because those issues engage the LSBC's "jurisdiction" to pass the Resolution.

[85] A reviewing court can apply different standards of review for different aspects of a decision that attract differing levels of scrutiny. I will therefore examine the appropriate standards of review for the various aspects of the decision under review.

i) Jurisdiction

[86] It is well established that where an administrative decision-maker is interpreting and applying its home statute, and *a fortiori* the rules passed thereunder, there is a strong presumption that the reasonableness standard of review applies: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 [*Alberta v. ATA*].

[87] In *TWU v. NSBS,* the Nova Scotia Supreme Court acknowledged that the question under review would previously have been considered a "jurisdictional" question and would have been subject to the correctness standard of review. However, at paras. 154 – 156, Campbell J. adopted the modern approach to judicial review and rejected TWU's argument that a correctness standard should apply because the issue was "jurisdictional".

[88] The Supreme Court of Canada has recently confirmed that the category of "true jurisdictional" questions is now very small. At para. 34 of *Alberta v. ATA* the Court observed:

> [34] … 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.

[89] As such, in *TWU v. NSBS*, Campbell J. found, like the Ontario Divisional Court later found in *TWU v. LSUC*, that the standard of reasonableness applies to the question of whether a law society had the statutory authority to refuse to accredit TWU.

[90] Despite the decisions of Campbell J. and the Divisional Court, I consider myself bound by *TWU v. BCCT* to apply the standard of correctness to the question of the LSBC's jurisdiction to disapprove of TWU's proposed faculty of law.

ii) Procedural Fairness

[91] The Supreme Court of Canada has long recognized that both the process and the outcome of an administrative decision must conform to the rationale of the statutory regime set up by the legislature. As Mr. Justice Le Dain wrote for the unanimous Court in *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at 653 [*Cardinal*], "there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges, or interests of an individual". Le Dain J.'s remarks in *Cardinal* were recently reaffirmed by a unanimous Court in *Mission Institution v. Khela*, 2014 SCC 24 at para. 82 [*Khela*].

[92] Once it has been established that a duty of procedural fairness is owed, the content and extent of that duty is determined through a consideration of the factors set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [*Baker*].

[93] The LSBC contends that it owed the petitioners little or no duty of procedural fairness because the Decision was "quasi-legislative in nature" and was discretionary, policy-oriented, and "involved broad considerations of public policy". The petitioners argue that the LSBC had a duty to act fairly because the decision was administrative and affected the petitioner's rights, privileges and interests.

[94] As will be discussed further, I do not accept that the Decision was quasi-legislative, and that therefore no duty of fairness was owed by the LSBC.

Furthermore, the Decision had a direct impact on the petitioners' rights, privileges, and interests. As the Court said in *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11 at para. 75 [*Moreau-Bérubé*], "[t]he duty to comply with the rules of natural justice and to follow rules of procedural fairness extends to all administrative bodies acting under statutory authority."

[95] The breach of a duty of procedural fairness is an error in law: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 22.

[96] I find that the standard of review for determining whether a decision-maker complied with its duty of procedural fairness is correctness: *Khela* at para. 79. Thus, no deference is owed to the administrative decision-maker in this stage of the analysis: *Moreau-Bérubé* at para. 74. Therefore, in my view, the issue of whether the LSBC complied with its duty of procedural fairness is to be reviewed on the standard of correctness.

iii) Sub-delegation and the Fettering of Discretion

[97] Fettering of discretion occurs when, rather than exercising its discretion to decide the individual matter before it, an administrative body binds itself to policy or to the views of others: *Hospital Employees Union, Local 180 v. Peace Arch District Hospital* (1989), 35 B.C.L.R. (2d) 64 (C.A.). Although an administrative decision-maker may properly be influenced by policy considerations and other factors, he or she must put his or her mind to the specific circumstances of the case and not focus blindly on a particular policy to the exclusion of other relevant factors: *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 129 B.C.A.C. 32 at para. 62 [*Halfway River*].

[98] An allegation that an administrative body has improperly fettered its discretion is reviewable on a standard of correctness: *Okomaniuk v. Canada (Citizenship and Immigration)*, 2013 FC 473 at para. 20; *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198 at para. 33, leave to appeal to SCC ref'd [2007] S.C.C.A. No. 394.

[99] As Mr. Justice Finch (as he then was) explained in *Halfway River* at para. 58, the fettering of discretion is an issue of procedural fairness, which is an area where the court owes an administrative decision-maker no deference:

> [58] The learned chambers judge held that the process followed by the District Manager offended the rules of procedural fairness in four respects: he fettered his discretion by applying government policy…[.] These are all matters of procedural fairness, and do not go to the substance or merits of the District Manager's decision. There is, therefore, no element of curial deference owed to that decision by either the chambers judge or by this Court.

[100] Mr. Justice Smith explained the relationship between fettering and improper delegation in *B.C. College of Optics Inc. v. The College of Opticians of B.C.*, 2014 BCSC 1853 at para. 24:

> [24] Improper delegation and fettering of discretion are separate concepts, but in many cases have the same practical result. In either case the discretion is not in fact exercised by the decision maker the legislation has designated…

[101] In my view, sub-delegation is also an issue of process that subsumes the fettering of discretion and is reviewable on the standard of correctness.

b) Application of the Appropriate Standards of Review

i) Jurisdiction

[102] The petitioners do not challenge the LSBC's Rules. They argue that in making the Decision, the Benchers acted outside of their jurisdiction and erred within their jurisdiction. They contend that the Decision should be set aside on all of the following grounds:

> (a) The Benchers acted outside of their authority in making the Decision:
>
> The Law Society has no jurisdiction over universities and the Benchers have no authority to sub-delegate their decision under Rule 2-27(4.1) to the members of the Law Society;
>
> The Benchers fettered their discretion and allowed the members of the Law Society to dictate the outcome of the exercise of discretion afforded to the Benchers under Rule 2-27(4.1); and

> The Law Society failed to in its duty to provide procedural fairness.
>
> (b) The Decision, even if made within the Benchers' authority, was incorrect and unreasonable and must be set aside:
>
> (i) It is arbitrary, inconsistent, unjustifiable, non-transparent, made without evidence, and falls outside the range of acceptable outcomes defensible on the facts and law; and
>
> (ii) The Benchers completely failed to balance the statutory objectives of the *LPA* with the impacted *Charter* rights, including the freedom of religion, freedom of expression, freedom of association and equality rights.

[103] In *TWU v. LSUC*, the Divisional Court explored the jurisdiction of the LSUC to consider more than whether TWU's proposed law school would graduate competent lawyers and concluded at para. 58 that "the principles that are set out in s. 4.2, and that are to govern the respondent's exercise of its functions, duties and powers under the *Law Society Act*, are not restricted simply to standards of competence." The Divisional Court held that those functions, duties and powers "engage the respondent in a much broader spectrum of considerations with respect to the public interest, including whether or not to accredit a law school."

[104] On that reasoning, at para. 129, the Divisional Court declined to follow the decision of Campbell J., in part, on the basis that there were:

> [129] … important differences between the case that had to be decided in Nova Scotia and the one that falls to be determined here. The most significant of those differences is the fact that the NSBS did not have the broad statutory authority, under its governing statute, that the respondent has here. In particular, the NSBS did not have an express mandate "to maintain and advance the cause of justice and the rule of law". The NSBS also did not have the degree of control over legal education requirements for admission to the Bar that the respondent has historically exercised in Ontario.

[105] The relevant provisions of LSBC Rules 2-27(3)(b), 2-27(4) and 2-27(4.1) provide:

> (3) An applicant [for Articles] 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;
>
> …
>
> (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.

[106] The LSBC asserts that it 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.

[107] In its written argument, the LSBC confirmed that the Decision was not based on concerns that TWU's graduates would not be competent to practice law or would engage in discriminatory conduct in the future:

> The [Decision] is not premised upon an assertion, and indeed the [LSBC] 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.

[108] I find that, like the LSUC, the LSBC has a broad statutory authority that includes the object and duty to preserve and protect the rights and freedoms of all persons. I also find that a decision to refuse to approve a proposed faculty of law on the basis of an admissions policy is directly related to the statutory mandate of the LSBC and its duties and obligations under the *LPA*. I conclude that the LSBC correctly found that it has the jurisdiction to use its discretion to disapprove the academic qualifications of a common law faculty of law in a Canadian university, so long as it follows the appropriate procedures and employs the correct analytical framework in doing so.

ii) Procedural Fairness

a) Lack of Reasons for the Decision

[109] While it might have been useful for the purposes of the petition to have had reasons from the LSBC for its disapproval of TWU's proposed faculty of law, I accept that the LSBC was not obliged to provide such reasons.

[110] I adopt the view of the Divisional Court in *TWU v. LSUC*, at para. 49 that:

> [49] In the absence of reasons, what is important, when considering the appropriate standard of review, is whether it is possible for this court, on a review, to understand the basis upon which the decision was reached, and the analysis that was undertaken in the process of reaching that decision. We have no difficulty in concluding that this court can achieve that understanding on the record that is before us.

[111] Like the Divisional Court, I have no difficulty in concluding that I can achieve the required understanding of the Decision on the record before me.

b) Sub-delegation and the Fettering of Discretion

[112] The petitioners submit that, in reaching the Decision, the Benchers improperly delegated their authority to the members of the LSBC, thus fettering their discretion.

[113] In contrast, the LSBC contends that the Benchers were informed by the views of the membership, but exercised their independent judgment to reach the Decision.

[114] As discussed in the standard of review analysis above, fettering of discretion occurs when a decision-maker does not genuinely exercise independent judgment in a matter. This can occur, for example, if the decision-maker binds itself to a particular policy or another person's opinion. If a decision-maker fetters its discretion by policy, contract, or plebiscite, this can also amount to an abuse of discretion. Similarly, it is an abuse of discretion for a decision-maker to permit others to dictate its judgment. As Mr. Justice Gonthier said for the Court in *Therrien (Re)*, 2001 SCC 35 at para. 93:

> [93] It is settled law that a body to which a power is assigned under its enabling legislation must exercise that power itself and may not delegate it to one of its members or to a minority of those members without the express or

> implicit authority of the legislation, in accordance with the maxim hallowed by long use in the courts, *delegatus non potest delegare*: *Peralta v. Ontario*, [1988] 2 S.C.R. 1045, aff'g (1985), 49 O.R. (2d) 705…

[115] While Gonthier J. referred to a minority of the members of a body, I see no reason not to apply the same reasoning even to a majority of the members of a body like the LSBC whose elected or appointed representatives are assigned a power that requires the weighing of factors that the majority have not weighed.

[116] The September Motion stated that the October Referendum would be binding on the Benchers in the event that (a) 1/3 of all members in good standing of the LSBC voted on the Referendum Question; and (b) 2/3 of those voting voted in favour of implementing the SGM 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".

[117] In *Oil Sands Hotel (1975) Ltd. v. Alberta (Gaming and Liquor Commission)*, 1999 ABQB 218 at paras. 36 – 37, Madam Justice Sulyma considered the circumstances where a statutory decision-maker acted upon a plebiscite:

> [36] The second issue, then, is whether the Commission, in terminating the Retailer Agreements, has acted outside its jurisdiction. The cases and texts are replete with caution governing the exercise of discretionary powers. In *Roncarelli v. Duplessis* (*supra*), Mr. Justice Martland determined that although the commission in question had the discretion to cancel a permit, that its cancellation must be related to the administration and enforcement of the statute. He stated at p. 742:
>
> > The appellant further contends that, in exercising this discretion, the rules of natural justice must be observed and points out that no notice of the intention of the Commission to cancel his permit was ever given to the appellant, nor was he given a chance to be heard by the Commission before the permit was cancelled.
> >
> > With respect to this latter point, it would appear to be somewhat doubtful whether the appellant had a right to a personal hearing ... However, regardless of this, it is my view that the discretionary power to cancel a permit given to the Commission by the *Alcoholic Liquor Act* must be related to the administration and enforcement of that statute. <u>It is not proper to exercise the power of cancellation for reasons which are</u>

> unrelated to the carrying into effect of the intent and purpose of the *Act*. The association of the appellant with the Witnesses of Jehovah and his furnishing of bail for members of that sect, which were admitted to be the reasons for the cancellation of his permit and which were entirely lawful, had no relationship to the intent and purposes of the *Alcoholic Liquor Act*.
>
> [Emphasis by Sulyma J.]
>
> [37] I further note a summary of the general principles governing the exercise of discretionary powers is contained in J. M. Evans, DeSmith's, *Judicial Review of Administrative Action* (Stevens & Sons Limited, London 4th Ed., 1980) at p. 285:
>
> > In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it; it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act and (it) must not act arbitrarily or capriciously.

[118] In its written submissions, the LSBC contended that:

> 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.
>
> …
>
> 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.
>
> [Emphasis added.]

[119] I am unable to accept the LSBC's submissions that the Benchers were informed by the views of the members but ultimately exercised their individual judgment in reaching the Decision. The evidence is clear, both from the wording of the September Motion and from the nearly unanimous vote on the Decision (which was reached without substantive discussion despite the fact that it was a complete

reversal of the Benchers' vote just six months prior), that the Benchers allowed the members to dictate the outcome of the matter.

[120] I conclude that the Benchers permitted a non-binding vote of the LSBC membership to supplant their judgment. In so doing, the Benchers disabled their discretion under the *LPA* by binding themselves to a fixed blanket policy set by LSBC members. The Benchers thereby wrongfully fettered their discretion.

[121] I decline to draw the inference urged upon me by the LSBC that the Benchers in favour of the September Motion had collectively determined that both approving TWU and refusing to accredit would be consistent with their statutory duties, in that both decisions would be a reasonable exercise of the LSBC's powers under the *LPA.* To do so would ignore the Benchers' obligation to apply the proportionate balancing of the *Charter* protections at play, to be discussed in greater detail below.

c) Required Procedure

[122] The LSBC contends that in the Decision it 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. It contends that in the result its process was quasi-legislative, attracting little or no duty of procedural fairness. The LSBC submits that even if it had some duty of procedural fairness to the petitioners, TWU was kept informed throughout the process, allowed to have its representatives attended the Benchers' meetings, and given considerable and extensive participatory rights throughout, including at least three opportunities to make written submissions: prior to the April 11, 2014 meeting, which it did; following the SGM; and following the September 26th motion. The LSBC asserts that these accommodations more than met any duty of fairness it may have owed.

[123] I am unable to accept this contention. The degree to which a person affected by a decision may participate depends on the circumstances. The more important the decision is to the interested parties, the more stringent the procedural protections that will be mandated. High procedural fairness is owed when a decision affects one's ability to practice their profession: *Baker* at para. 25; or their religion:

Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village), 2004 SCC 48 at para. 30.

[124] At the heart of the doctrine of procedural fairness is the aim of ensuring that a party with a legitimate interest in proceedings has a reasonable opportunity to present its case, *with the assurance that the evidence will be considered fairly and fully by the decision-maker*: *Baker* at paras. 22 & 28.

[125] I accept the assertion of the petitioners that they were entitled to, and find that they were deprived of, a meaningful opportunity to present their case fully and fairly to those who had the jurisdiction to determine whether the *JD* degrees of the proposed law school's graduates would be recognized by the LSBC.

c) Consideration of the Charter

[126] The LSBC is required to exercise its statutory discretion in accordance with the *Charter*: *Doré v. Barreau du Québec*, 2012 SCC 12 [*Doré*].

[127] Section 2 of the *Charter* provides that:

> Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly; and
>
> (d) freedom of association.

[128] Section 15 of the *Charter* provides that:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[129] In *Doré*, the Court reviewed a decision rendered by the Disciplinary Council of the Barreau du Québec and commented at para. 47 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". The approach courts should take reviewing such decisions was explained at para. 56 – 57 as follows:

> [56] … 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).
>
> [57] 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.

[130] This approach was further refined by the Court in *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at para. 37:

> [37] 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] 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*.

[131] The relevance of *Charter* considerations in this type of case was emphasized by the Court in *TWU v. BCCT*, which recognized that TWU is still associated with the EFCC and that "it can reasonably be inferred that the BC legislature did not consider that training with a Christian philosophy was in itself against the public interest since it passed five bills in favour of TWU between 1969 and 1985".

[132] The BC legislature expressly mandated TWU to teach from a Christian perspective under the *Trinity Junior College Act*, S.B.C. 1969, c. 44, s. 3(2):

> The objects of the University shall be to provide for young people of any race, colour, or creed, university education in the arts and sciences with an underlying philosophy and viewpoint that is Christian.

[133] The LSBC operates under a statutory framework that is similar to the BCCT's framework under the *TPA*, as discussed in *TWU v. BCCT.* As with any administrative authority, the LSBC is obliged to conduct its procedures fairly and within its statutory framework.

[134] In *TWU v. LSUC,* the Divisional Court reasoned that the issue raised before it and the issue raised before the Court in *TWU v. BCCT* involved different facts, a different statutory regime, and a fundamentally different question, and that the evidence in *TWU v. BCCT* did not show that any person had been denied admission to TWU's teachers' program because of a refusal to sign the Community Standards document.

[135] While it is true that Iacobucci and Bastarache JJ. did not find that homosexual students would be refused admission to TWU's proposed faculty of education, they did conclude, as discussed above, that homosexual students would be strongly deterred from applying for admission to TWU, and that such students could only sign the Community Standards document at a considerable personal cost.

[136] However, Iacobucci and Bastarache JJ. also accepted that under what was then s. 19 of the *Human Rights Act*, S.B.C. 1984, c. 22, a religious institution was not considered to breach the *Act* where it preferred adherents of its religious constituency, and that it could not be reasonably concluded that private institutions

are protected but that their graduates are *de facto* considered unworthy of fully participating in public activities. At paras. 35 – 36 they wrote:

> [35] … In this particular case, it can reasonably be inferred that the B.C. legislature did not consider that training with a Christian philosophy was in itself against the public interest since it passed five bills in favour of TWU between 1969 and 1985. While homosexuals may be discouraged from attending TWU, a private institution based on particular religious beliefs, they will not be prevented from becoming teachers. In addition, there is nothing in the TWU Community Standards that indicates that graduates of TWU will not treat homosexuals fairly and respectfully. Indeed, the evidence to date is that graduates from the joint TWU-SFU teacher education program have become competent public school teachers, and there is no evidence before this Court of discriminatory conduct by any graduate. Although this evidence is not conclusive, given that no students have yet graduated from a teacher education program taught exclusively at TWU, it is instructive. Students attending TWU are free to adopt personal rules of conduct based on their religious beliefs provided they do not interfere with the rights of others. Their freedom of religion is not accommodated if the consequence of its exercise is the denial of the right of full participation in society. Clearly, the restriction on freedom of religion must be justified by evidence that the exercise of this freedom of religion will, in the circumstances of this case, have a detrimental impact on the school system.
>
> [36] Instead, the proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them. Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected. The BCCT, rightfully, does not require public universities with teacher education programs to screen out applicants who hold sexist, racist or homophobic beliefs. For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society.

[137] In *TWU v. LSUC*, the Divisional Court accepted that the decision of Convocation implicated two *Charter* rights that the Court described as the religious freedom of TWU and Mr. Volkenant on the one hand, and on the other hand, the rights of both current and future members of the LSUC to equal access, on a merit basis, to membership that the LSUC had a duty to protect. Clearly those two *Charter* rights are equally implicated before me.

[138] Although the LSBC contends that the Decision does not infringe TWU's right to freedom of religion, the evidence in this case and the relevant precedents conclusively establish that the Decision does infringe the petitioners' *Charter* right to

freedom of religion: *TWU v BCCT* at para. 32, *TWU v. LSUC* at para. 81, *TWU v. NSBS* at para. 237.

[139] The petitioners and several of the interveners argue that the Decision infringes not just the petitioners' *Charter* right to freedom of religion, but also their rights to freedom of association, freedom of expression, and equality under s. 15.

[140] In contrast, the LSBC and West Coast LEAF contend that because the Community Covenant includes an obligation to uphold the "God-given worth" of all persons "from conception to death", the Community Covenant has the effect of prohibiting women from accessing safe and legal abortion services, which have been held to be constitutionally protected.

[141] I have not been referred to any evidence of statements made by or before the April 11, 2014 meeting concerning what have been described as abortion rights, but I see no indication that this issue was considered by either the LSBC's membership when they voted on the Referendum Question or by the Benchers when they voted on the Decision. If the Benchers did consider the issue on April 11, 2014, then it would have been weighed in the decision of that date. If not, I find that it is not an issue that should be considered at first instance by me on the hearing of this petition. For the same reason, I decline to consider the infringements of freedom of association, freedom of expression, and equality alleged by the petitioners.

[142] In *TWU v. LSUC*, after accepting that the decision of Convocation engaged both rights, the Divisional Court proceeded to apply the proportionate balancing of the *Charter* protections at play as set out by the Court in *Doré* at para. 58:

> [58] If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.

[143] Importantly, the Divisional Court rejected the argument that the applicants' religious rights were "ignored" by Convocation in reaching its decision, finding that a fair reading of the speeches made by the Benchers during the course of the Convocation held to consider the issue made it clear that the applicants' freedom of

religion was one of the concerns with which the Benchers were wrestling. The Court found that the rights of TWU and Mr. Volkenant to religious freedom had been infringed by the decision of the Law Society, but that TWU's Community Covenant was contrary to the equality rights of its future members, who include members from two historically disadvantaged minorities (LGBTQ persons and women), and was thus discriminatory.

[144] At para. 124, the Divisional Court wrote:

> [124] We conclude that the respondent did engage in a proportionate balancing of the Charter rights that were engaged by its decision and its decision cannot, therefore, be found to be unreasonable. We reach that conclusion based on a review of the record undertaken in accordance with the procedure set out in Newfoundland Nurses. In so doing, we have considered the speeches given at Convocation by the Benchers as a whole - not in isolation, one from the other. In determining whether a proportionate balancing was undertaken, it is only fair, in our view, to consider the interchange between the Benchers, not whether the individual speeches of each Bencher reflect that balance. In that regard, it is important to remember that the Benchers were speaking in reaction to what others had said, including what TWU itself had said. They were not speaking in a vacuum.

[145] Given the competing *Charter* rights involved in reaching the Decision, I find that the LSBC had the constitutional obligation to consider and balance those interests.

[146] On the evidence before me, it appears that before and during the April 11, 2014 meeting, the discussions of the Benchers canvassed a wide variety of legal and policy-based arguments for and against giving the LSBC's approval to TWU's proposed faculty of law, including the *Charter* rights in issue before me.

[147] For example, Bencher David Crossin, Q.C. stated at the April meeting:

> It is no doubt true that some or many or most find the goals of TWU in the exercise of this fundamental right to be out of step and offensive... but... that does not justify a response that sidesteps that fundamental Canadian freedom in order to either punish TWU for its value system or force it to replace it. In my view, to do so would risk undermining freedom of religion for all and to do so would be a dangerous over-extension of institutional power.

[148] As noted above, the goal of procedural fairness is to ensure that affected parties have the opportunity to present their case to the ultimate decision-maker, with the assurance that the evidence presented will be considered fully and fairly: *Baker* at para. 28. By refusing to allow TWU to present its case to the members of the LSBC on the same footing as the case against it was presented, the LSBC deprived TWU of the procedural fairness to which it was entitled.

[149] The fact that a democratic process was followed in the October Referendum proceedings does not protect the Decision from scrutiny. As Bastarache J. explained in his concurring judgment in *M. v. H.*, [1999] 2 S.C.R. at para. 315:

> [315] Another helpful criterion which is used in determining the proper attitude of deference is the source of the rule. Although I would be reluctant to place significant weight on this factor alone, it can be used as a helpful indicator of the quality of the decision. Rules that are the product of common law development, or which are made by unelected decision-makers, ought to be accorded less deference in the absence of other factors. Delegated decision-makers are presumptively less likely to have ensured that their decisions have taken into account the legitimate concerns of the excluded group, while a legislative expression of will presumptively indicates that all interests have been adequately weighted (see M. Jackman, "Protecting Rights and Promoting Democracy: Judicial Review Under Section 1 of the Charter" (1996), 34 *Osgoode Hall L.J.* 661, at pp. 668-69). If, as Professor J. H. Ely (*Democracy and Distrust* (1980)) and Professor R. Dworkin (*Freedom's Law* (1996)) suggest, one of our principal preoccupations in the equality guarantee is to ensure that the rights of all have been taken into account in the decision-making process, then processes which are more procedurally careful and open deserve greater deference. That presumption will certainly not immunize legislation from review. The specific refusal by the Alberta legislature to include sexual orientation as a prohibited ground of discrimination of the *Individual's Rights Protection Act* did not prevent this Court from finding that distinction to be a violation of the equality guarantee (*Vriend*, *supra*, at para. 115; see also *Romer v. Evans*, 116 S.Ct. 1620 (1996), where even an amendment by plebiscite was struck down as a patent infringement on the right to equality). In those cases, despite the democratic nature of the processes, there was no significant justification for the distinction given in the course of the deliberations. Rather than a guarantee that equal consideration has been given, a democratic procedure merely gives greater weight to the facts, and the interpretation of facts, upon which the legislator has relied and that are open to reasonable disagreement.
>
> [Emphasis added.]

[150] There is no basis upon which a conclusion could be drawn on any evidence from the SGM or the October Referendum proceedings that the LSBC's membership

considered, let alone balanced, the petitioners' *Charter* rights against the competing rights of the LGBTQ community. While TWU's submissions were reviewed and considered by the Benchers prior to their April 11, 2014 decision, posted online, and available to the LSBC membership, I find that the material, while available on its website, was unlikely to have been read by many of the LSBC's members. I find that it is less likely that as many members of the LSBC read TWU's submissions as read the letter from the proponent of the SGM Resolution, which was included within the Notice to the Profession inviting members to vote on the Referendum Question, and advocated strongly for the adoption of the SGM Resolution without any mention of freedom of religion.

[151] While the Benchers clearly weighed the competing *Charter* rights of freedom of religion and equality before voting on the April Motion, the record does not permit such a conclusion to be reached with respect to the Benchers' vote of October 31, 2014. As the respondent had bound itself to accept the referendum results of its members, I am unable to find that the vote of the LSBC's members or the impugned decision considered, let alone balanced, the two implicated *Charter* rights. Further support for this conclusion comes from the fact that opposite results were reached by the Benchers' votes of April 11 and October 31, 2014, despite the October 31, 2014 vote being conducted without any substantive discussion or debate.

[152] In summary, I find that the Benchers improperly fettered their discretion and acted outside their authority in delegating to the LSBC's members the question of whether TWU's proposed faculty of law should be approved for the purposes of the admissions program. Even if I am wrong, and the Benchers had the authority to delegate the Decision to the members, I find that the Decision was made without proper consideration and balancing of the *Charter* rights at issue, and therefore cannot stand.

[153] Given my decision with respect to the invalidity of the Decision, it is unnecessary for me to resolve the issue of the collision of the relevant *Charter* rights.

Remedy

[154] The Petitioners seek a declaration that the Decision is *ultra vires* and invalid and that it unjustifiably infringes on their *Charter* rights. Although I have concluded that the LSBC inappropriately fettered its discretion, because the October Referendum did not attempt to resolve the collision of the competing *Charter* interests, I am not prepared to make such a declaration.

[155] For the same reason, I also decline to grant the orders in the nature of *certiorari*, *mandamus* and prohibition sought by the petitioners.

[156] I find that given inappropriate fettering of its discretion by the LSBC and its failure to attempt to resolve the collision of the competing *Charter* interests in the October Referendum or the Decision, the appropriate remedy is to quash the Decision and restore the results of the April 11, 2014 vote, and I so order.

"The Honourable Chief Justice Hinkson"