COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Trinity Western University v. The Law Society of British Columbia,* 2016 BCCA 423

Date: 20161101
Docket: CA43367

Between:

Trinity Western University and Brayden Volkenant

Respondents
(Petitioners)

And

The Law Society of British Columbia

Appellant
(Respondent)

And

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, Roman Catholic Archdiocese of Vancouver, Catholic Civil Rights League, Faith and Freedom Alliance, Seventh-Day Adventist Church in Canada, West Coast Women's Legal Education and Action Fund, Canadian Secular Alliance, British Columbia Humanist Association, The Advocates' Society, Outlaws UBC, Outlaws UVic, Outlaws TRU and QMUNITY

Intervenors

Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Willcock
The Honourable Madam Justice Fenlon

On appeal from: An order of the Supreme Court of British Columbia, dated December 10, 2015 (*Trinity Western University v. The Law Society of British Columbia*, 2015 BCSC 2326, Vancouver Docket No. 149837).

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Place and Date of Hearing:	Vancouver, British Columbia June 1, 2, and 3, 2016

Written Submissions Received	July 18, 25, and 29, 2016
Place and Date of Judgment:	Vancouver, British Columbia November 1, 2016

Written Reasons of the Court

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Summary:

The Law Society decided not to approve a law school at TWU because students attending TWU must sign a Community Covenant which does not recognize same-sex marriage. TWU sought judicial review. The decision was set aside by the chambers judge. The Law Society appealed. Held: Appeal dismissed.

The issue on appeal is whether the Law Society met its statutory duty to reasonably balance the conflicting Charter rights engaged by its decision: the sexual orientation equality rights of LGBTQ persons and the religious freedom and rights of association of evangelical Christians. The Benchers initially voted to approve TWU's law school. That decision was met with a backlash from members of the Law Society who viewed it as endorsement of discrimination against LGBTQ persons. The Benchers decided to hold a referendum and to be bound by the outcome. A majority of lawyers voted against approval. The Benchers then reversed their earlier position and passed a resolution not to approve TWU's law school.

In doing so, the Benchers abdicated their responsibility to make the decision entrusted to them by the Legislature. They also failed to weigh the impact of the decision on the rights engaged. It was not open to the Benchers to simply adopt the decision preferred by the majority. The impact on Charter rights must be assessed concretely, based on evidence and not perception.

The evidence before the Law Society demonstrated that while LGBTQ students would be unlikely to access the 60 additional law school places at TWU's law school if it were approved, the overall impact on access to legal education and hence to the profession would be minimal. Some students who would otherwise have occupied the remaining 2,500 law school seats would choose to attend TWU, resulting in more options for all students. Further, denying approval would not enhance access to law school for LGBTQ students.

In contrast, a decision not to approve TWU's law school would have a severe impact on TWU's rights. The qualifications of students graduating from TWU's law program would not be recognized and graduates would not be able to apply to practise law in British Columbia. The practical effect of non-approval is that TWU cannot operate a law school and cannot therefore exercise fundamental religious and associative rights that would otherwise be guaranteed under s. 2 of the Charter.

In a diverse and pluralistic society, government regulatory approval of entities with differing beliefs is a reflection of state neutrality. It is not an endorsement of a group's beliefs.

The Law Society's decision not to approve TWU's law school is unreasonable because it limits the right to freedom of religion in a disproportionate way — significantly more than is reasonably necessary to meet the Law Society's public interest objective.

Reasons for Judgment of the Court:

I. INTRODUCTION

[1] This case raises important issues about tolerance and respect for differences in a diverse and pluralistic society. Trinity Western University (TWU) wishes to operate a law school. The Law Society of British Columbia (the Law Society) refused to approve TWU's proposed law school because TWU's Community Covenant does not recognize same-sex marriage.

[2] The question before the Court is whether the Law Society's decision was reasonable. Answering that question requires us to consider conflicting and strongly-held views, and to reconcile competing rights. On one side are the rights, freedoms and aspirations of lesbian, gay, bisexual, transgendered and queer (LGBTQ) persons and their place in a progressive and tolerant society; on the other are the religious freedom and rights of association of evangelical Christians who sincerely hold the beliefs described in the Covenant and nurtured by TWU.

[3] In a speech given in 2002, Chief Justice McLachlin spoke of the "clash of commitments" in our country between the "prevailing ethos" of the rule of law and the claims of religion ("Freedom of Religion and the Rule of Law" (René Cassin Lecture, McGill University, 11 October 2002), published in Douglas Farrow, ed., *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (McGill-Queen's University Press, 2004). The Chief Justice called this a "dialectic of normative commitments" at 21-22:

> What is good, true and just in religion will not always comport with the law's view of the matter, nor will society at large always properly respect conscientious adherence to alternate authorities and divergent normative, or ethical, commitments. Where this is so, two comprehensive worldviews collide. It is at this point that the question of law's treatment of religion becomes truly exigent. The authority of each is internally unassailable. What is more, both lay some claim to the whole of human experience. To which system should the subject adhere? How can the rule of law accommodate a worldview and ethos that asserts its own superior authority and unbounded scope? There seems to be no way in which to reconcile this clash; yet these clashes do occur in a society dedicated to protecting religion, and a liberal state must find some way of reconciling these competing commitments.

[4] For reasons explained in greater detail below, we have determined that the Law Society's decision not to approve TWU's law school was unreasonable.

II. BACKGROUND

1. The TWU Initiative

[5] TWU is a private, evangelical Christian, postsecondary institution incorporated by act of the Provincial Legislature in 1969: *An Act Respecting Trinity Western University*, S.B.C. 1969, c. 44 (as amended). It is the successor to a postsecondary institution that has been in existence since 1962.

[6] In June 2012 TWU submitted a proposal to establish a law school with a Juris Doctor degree program to the Federation of Law Societies of Canada (the Federation) and to the British Columbia Ministry of Advanced Education for their approval. The proposal contemplated the enrolment of 60 students in the school's first year of operation, which was then contemplated to be the 2016-17 academic year, increasing to a full complement of 170 students over three years. TWU also advised the Canadian Council of Law Deans, the British Columbia law deans and the Law Society of its proposal.

[7] The Federation established a special advisory committee to provide it with advice on one issue — TWU's requirement that students enter into a community covenant (the Covenant) regulating their conduct as a condition of admission. After considering submissions, that committee concluded there was no valid public interest reason to refuse approval of the TWU proposal.

[8] On December 16, 2013 the Federation granted "preliminary approval" of the proposal and the establishment of TWU's law school. The Federation concluded that the proposal was "comprehensive and is designed to ensure the students acquire each competency included in the national requirement". The Federation expressly considered whether the religious policy underlying the Covenant would constrain appropriate teaching. In approving the proposal the Federation took into account TWU's statements that it was committed to fully and properly addressing ethics and professionalism; that it recognized and acknowledged its duty to teach equality and

meet its public obligations with respect to promulgating non-discriminatory principles in its teaching of substantive law, ethics and professionalism; and that it acknowledged that human rights laws and s. 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* protect against discrimination on the basis of sexual orientation.

[9] The Minister of Advanced Education comprehensively reviewed the TWU proposal pursuant to the *Degree Authorization Act*, S.B.C. 2002, c. 24. The proposal was submitted to the Degree Quality Assessment Board and reviewed by an expert panel consisting of academics including former deans of the law faculties of the University of Alberta, Queen's, UBC and Windsor. On April 17, 2013 the expert review panel provided a report to the Ministry and, in confidence, to TWU. On December 17, 2013 the Minister granted approval to the TWU Juris Doctor program.

2. The April 11, 2014 Benchers' Resolution

[10] Upon being advised that the Federation had granted preliminary approval of TWU's proposal, and upon taking legal advice, the Benchers of the Law Society gave notice to the profession on January 24, 2014 of their intention to consider the following resolution at their April 11, 2014 meeting:

> 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 of Trinity Western University is not an approved faculty of law.

[11] Rule 2-27(4.1) (now Rule 2-54(3)) was in that part of the Law Society Rules that addresses admission to the practice of law:

> 2-54 (1) An applicant may apply for enrolment in the admission program at any time by delivering to the Executive Director the following:
>
> > (a) a completed application for enrolment in a form approved by the Credentials Committee, including a written consent for the release of relevant information to the Society;
> >
> > (b) proof of academic qualification under subrule (2);
> >
> > (c) an articling agreement stating a proposed enrolment start date not less than 30 days from the date that the application is received by the Executive Director;

> (d) other documents or information that the Credentials Committee may reasonably require;
>
> (e) the application fee specified in Schedule 1.
>
> (2) Each of the following constitutes academic qualification under this rule:
>
> (a) successful completion of the requirements for a bachelor of laws or the equivalent degree from an approved common law faculty of law in a Canadian university;
>
> (b) a Certificate of Qualification issued under the authority of the Federation of Law Societies of Canada;
>
> (c) approval by the Credentials Committee of the qualifications of a full-time lecturer at the faculty of law of a university in British Columbia.
>
> (3) 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.
>
> [Emphasis added.]

[12] Prior to its consideration of that resolution, the Law Society received from TWU a consolidated proposal for the establishment of the law school, a brochure containing information about TWU, and a complete copy of the Covenant.

[13] The Covenant is a five-page document which includes the following relevant provisions:

> Trinity Western University (TWU) is a Christian University of the liberal arts, sciences and professional studies with a vision for developing people of high competence and exemplary character who distinguish themselves as leaders in the marketplaces of life.
>
> …
>
> The University's mission, core values, curriculum and community life are formed by a firm commitment to the person and work of Jesus Christ as declared in the Bible. This identity and allegiance shapes an educational community in which members pursue truth and excellence with grace and diligence, treat people and ideas with charity and respect, think critically and constructively about complex issues, and willingly respond to the world's most profound needs and greatest opportunities.
>
> …
>
> The community covenant is a solemn pledge in which members place themselves under obligations on the part of the institution to its members, the members to the institution, and the members to one another. In making this pledge, members enter into a contractual agreement and a relational bond. By doing so, members accept reciprocal benefits and mutual responsibilities, and strive to achieve respectful and purposeful unity that aims for the

advancement of all, recognizing the diversity of viewpoints, life journeys, stages of maturity, and roles within the TWU community. It is vital that each person who accepts the invitation to become a member of the TWU community carefully considers and sincerely embraces this community covenant.

…

The TWU community covenant involves a commitment on the part of all members to embody attitudes and to practise actions identified in the Bible as virtues, and to avoid those portrayed as destructive. Members of the TWU community, therefore, commit themselves to:

- cultivate Christian virtues, such as love, joy, peace, patience, kindness, goodness, faithfulness, gentleness, self-control, compassion, humility, forgiveness, peacemaking, mercy and justice
- live exemplary lives characterized by honesty, civility, truthfulness, generosity and integrity

  …
- treat all persons with respect and dignity, and uphold their God-given worth from conception to death

  …
- observe modesty, purity and appropriate intimacy in all relationships, reserve sexual expressions of intimacy for marriage, and within marriage take every reasonable step to resolve conflict and avoid divorce
- exercise careful judgment in all lifestyle choices, and take responsibility for personal choices and their impact on others

  …

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

  …
- sexual intimacy that violates the sacredness of marriage between a man and a woman

  …

People face significant challenges in practicing biblical sexual health within a highly sexualized culture. A biblical view of sexuality holds that a person's decisions regarding his or her body are physically, spiritually and emotionally inseparable. Such decisions affect a person's ability to live out God's intention for wholeness in relationship to God, to one's (future) spouse, to others in the community, and to oneself. Further, according to the Bible, sexual intimacy is reserved for marriage between one man and one woman, and within that marriage bond it is God's intention that it be enjoyed as a means for marital intimacy and procreation. Honouring and upholding these principles, members of the TWU community strive for purity of thought and

> relationship, respectful modesty, personal responsibility for actions taken, and avoidance of contexts where temptation to compromise would be particularly strong.
>
> [Footnotes omitted.]

[14] In support of the provisions relating to sexual behaviour, the Covenant refers in footnotes to passages from the Bible in support of the drafters' conception of virtuous and destructive practices.

[15] We note that it is the Covenant's definition of marriage "between a man and a woman" that is in issue in these proceedings. The Covenant prohibits all expressions of sexual intimacy outside of marriage, regardless of sexual orientation; in that respect, all students are treated equally. However, the Covenant recognizes the marriage of heterosexual couples only; expressions of sexual intimacy between same-sex married couples remain prohibited. It is in this respect that LGBTQ persons are treated unequally.

[16] Prior to their April 11, 2014 meeting, the Benchers provided TWU with a copy of the transcript of a February 28, 2014 Benchers' meeting and copies of input subsequently received from the profession and the public. TWU was invited to provide written submissions to the Benchers and to attend and be heard at the April 11, 2014 meeting.

[17] Before that meeting the Benchers sought the following information:

a) BC Human Rights Commission Annual Reports of complaints and its statistics on areas of discrimination;

b) the Law Society's Equity Ombudsperson's 2011 report on areas of discrimination;

c) information from Canadian law deans regarding "any trouble [that] they have had with Trinity Western graduates, in particular in the area of anti-gay activities";

d) information on the American Bar Association's anti-discrimination policy and details and background regarding exemptions for religious law schools;

e) details of Law Society discipline matters regarding anti-gay activity; and

f) information from TWU with respect to the number of people disciplined for engaging in prohibited activities and a breakdown and details of areas of discipline.

[18] In its written submission dated April 3, 2014, TWU advised the Benchers that in the ten years preceding the application there had been an average of fewer than three instances per year of sexual misconduct by students, including reports of unwelcome sexual advances. In two instances students had withdrawn from TWU, and there had been "occasional" suspensions of students or placement of students on probation. No case had resulted in expulsion from the University. Two faculty/staff had been disciplined for instances of sexual harassment.

[19] On April 8, 2014 the President of the Law Society asked the President of TWU, on behalf of a Bencher, whether TWU would consider an amendment to the Covenant with respect to sexual intimacy. In response TWU advised the Law Society:

> [The Covenant] is an expression of the religious beliefs of TWU and its community that is necessary for TWU to live out its purposes as a Christian university. It is critical for TWU, as a private religious educational community, to be able to define its important religious values consistent with its biblical beliefs. TWU is a Christian university that primarily serves the evangelical Christian community (and that may include others that are prepared to learn in an environment of which the Community Covenant is an important part).
>
> The religious beliefs about marriage and human sexuality are important enough to TWU's community to be included in the Community Covenant. It speaks of the sacredness of marriage, not for civic purposes but for religious purposes. …
>
> It should be beyond question that these beliefs were not created to communicate anything disparaging about members of the LGBTQ communities. The Community Covenant speaks to that most strongly in terms of treating all persons with "respect and dignity, and uphold their God-given worth". This is equally a fundamental aspect of TWU's religious beliefs.

> TWU's sincerely held religious beliefs about marriage and human sexuality may not be widely held by others in society. As a result, these beliefs may not be valued, or even seen as legitimate. This is precisely why s. 2(a) and s. 15 of the *Charter* shield TWU's community from interference. The *Charter* shields TWU and allows it to define its own religious beliefs and values.
>
> …
>
> TWU cannot simply disavow those beliefs in the hope or expectation of a positive result from the Benchers and should not be asked to do so.

[20] The transcript of the meeting of the Benchers on April 11, 2014 reflects a conscientious consideration of the motion before the Benchers and of legal opinions sought by the Law Society and the submissions of members of the Society, the public and TWU. Seven Benchers voted in favour of the resolution to declare that TWU was not an approved faculty of law. Twenty Benchers voted against the motion. The motion was therefore defeated.

3. The June 10, 2014 Members' Resolution

[21] Following the meeting of April 11, 2014 the Executive Director of the Law Society received a written request pursuant to what was then Rule 1-9(2) of the Law Society Rules. It required the Benchers to convene a special general meeting of the Law Society to consider a resolution in the following terms:

> WHEREAS:
>
> > -Section 28 of the *Legal Profession Act* permits the Benchers to take steps to promote and improve the standard of practice by lawyers, including by the establishment, maintenance and support of a system of legal education;
> >
> > -Trinity Western University requires students and faculty to enter into a covenant that prohibits "sexual intimacy that violates the sacredness of marriage between a man and woman";
> >
> > -The Barristers' and Solicitors' Oath requires Barristers and Solicitors to uphold the rights and freedoms of all persons according to the laws of Canada and of British Columbia;
> >
> > -There is no compelling evidence that the approval of a law school premised on principles of discrimination and intolerance will serve to promote and improve the standard of practice of lawyers as required by section 28 of the *Legal Profession Act*; and
> >
> > -The approval of Trinity Western University, while it maintains and promotes the discriminatory policy reflected in the covenant, would not serve to promote and improve the standard of practice by lawyers;

> THEREFORE:
>
> 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.

[22] Members of the Law Society received notice of a Special General Meeting and a message from the Benchers providing the following advice about their April 11, 2014 decision:

> The decision was made after a thoughtful and sometimes emotional expression of views and careful consideration of two Federation reports on the Trinity Western University application, nearly 800 pages of submissions from the public and the profession and a submission from TWU, and after thoroughly considering the judgment of the Supreme Court of Canada in *Trinity Western University v. British Columbia College of Teachers* 2001 SCC 31… and its applicability to the TWU application. In addition, the Benchers considered a memorandum from former Chief Justice Finch on the relevant considerations and additional legal opinions as follows:
>
> 1. Finch/Banks - Overview Brief re: Relevant Considerations for the Law Society in Relation to the Proposed Faculty of Law at TWU
> 2. Laskin Opinion on Applicability of SCC Decision in *TWU v. BCCT*
> 3. Gomery Opinion on Academic Qualifications
> 4. Gomery Opinion on Application of the Charter
> 5. Gomery Opinion on Scope of Law Society's Discretion under Rule 2-27 (4.1)
> 6. Thomas/Foy Opinion on Application of the *Labour Mobility Act* and the *Agreement on Internal Trade*.

Those materials were made available to members on the Law Society website.

[23] By notice to the profession dated June 2, 2014 the Benchers stated they would refrain from speaking to the resolution at the Special General Meeting because they had already considered the issue on April 11, 2014 and wished to have members' voices, "both for and against, fully heard."

[24] The Special General Meeting took place on June 10, 2014 at 16 locations across the province; 3,210 members of the Law Society voted for the resolution and 968 against.

4. The September 26, 2014 Benchers' Resolution

[25] The Benchers next scheduled a meeting for September 26, 2014 to consider the resolution of the members. TWU was notified that the Benchers intended to consider three motions:

a) a motion to implement the June 10, 2014 resolution of the members;

b) a motion to call for a referendum to consider a resolution that would be binding on the Benchers; and

c) a motion to postpone consideration of the approval of the TWU accreditation until after judgment in one of the then-pending cases before the superior courts of British Columbia, Ontario or Nova Scotia.

[26] In response, TWU took the position that there was no legal basis upon which the Benchers could adopt the members' June 10, 2014 resolution or call for a binding referendum, and that to do so would be a breach of the Benchers' statutory duties and an inappropriate delegation of their responsibilities.

[27] At their meeting of September 26, 2014 the Benchers resolved to be bound by a referendum on the following terms:

> BE IT RESOLVED THAT:
>
> 1. A referendum … be conducted of all members of the Law Society of British Columbia (the "Law Society") to vote on 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."
>
> 2. The Resolution will be binding and will be implemented by the Benchers if at least:
>
>   a) 1/3 of all members in good standing of the Law Society vote in the Referendum; and
>
>   b) 2/3 of those voting vote in favour of the Resolution.
>
> 3. The Benchers hereby determine that implementation of the Resolution does not constitute a breach of their statutory duties, regardless of the results of the Referendum.

> 4. The Referendum be conducted as soon as possible and that the results of the Referendum be provided to the members by no later than October 30, 2014.
>
> [Emphasis added.]

The other motions before the Benchers were defeated.

[28] Members of the Law Society were permitted to vote on the referendum until October 29, 2014. On October 30, 2014 TWU was advised of the referendum results: 5,951 lawyers were in favour of declaring that the proposed law school was not an approved faculty of law; 2,088 lawyers voted against the resolution. There were 8,039 valid ballots cast. A total of 13,350 practising, non-practising and retired lawyers had been entitled to vote.

5. The October 31, 2014 Benchers' Resolution

[29] The Benchers met on October 31, 2014 to consider the outcome of the referendum. A letter to the Law Society written by the President of TWU and additional affidavits were presented to the Benchers. The President of the Law Society confirmed that "subject to a request by a Bencher or Benchers for additional time to review and consider the TWU letter and attachments, a motion to implement the referendum result will be presented on behalf of the Executive Committee."

[30] A Bencher then moved for the adoption of a declaration that "pursuant to Law Society Rule 2-27 (4.1), Trinity Western University's proposed School of Law is not an approved faculty of law". The minutes of the Benchers' meeting following the motion read as follows:

> Mr. Crossin [David Crossin, Q.C., the 2nd Vice President of the Law Society] invited TWU President Robert Kuhn to address the Benchers. Mr. Kuhn declined the invitation. Mr. Crossin confirmed that the Benchers' duty is to determine the appropriate response of the Law Society to any issue that may arise, such that the public interest in the administration of justice is protected.
>
> Mr. Crossin also confirmed that the Law Society remains ready and willing to enter into discussion with TWU regarding amendment of TWU's community covenant.
>
> There being no further discussion, Ms. Lindsay called for a vote on the motion by show of hands.

The motion was carried with 25 Benchers in favour, one opposed and four abstaining.

6. Revocation of Ministerial Consent

[31] On December 11, 2014 the Minister of Advanced Education, having considered submissions of TWU, informed the President of TWU of the Minister's decision to revoke his consent to the proposed law program at TWU under the *Degree Authorization Act* (*DAA*). The Minister stated:

> Section 4(1) of the *DAA* requires me to be satisfied that an applicant meets the published criteria in granting consent. In this case, one of the published criteria (credential recognition) is no longer met given the decisions of provincial law societies not to approve the TWU law faculty. The objective of the *DAA* in protecting students through the quality assurance review would be defeated if I was unable to act on post-consent events that undermine the conditions of consent.
>
> …
>
> At this point in time, I am not making any final determination as to whether consent for the proposed law program at TWU should be forever refused because of the lack of regulatory body approval. Instead, I am making an interim determination that steps must be taken to protect the interests of prospective students until TWU's legal challenge to the decision of the Law Society of BC (as well as challenges to law societies in other provinces) have been resolved.…The merits of TWU's challenge are for the court to address; my concern is simply to protect the interests of prospective students while the challenge is being pursued.

7. Concurrent Consideration of TWU Accreditation

[32] As the Minister indicated, accreditation of the TWU law school has been considered in a number of jurisdictions concurrently with the proceedings in British Columbia.

[33] The Law Society of Alberta advised its members by newsletter in December 2013 that it had delegated to the Federation of Law Societies of Canada the authority to approve Canadian common law degrees and that the Federation had granted preliminary approval to the proposed TWU law program.

[34] At a meeting in February 2014 the Benchers of the Law Society of Saskatchewan, in response to the Federation's preliminary approval of the TWU law

school, considered an amendment to their rules which delegate approval of common law programs to the Federation. The proposed amendment would have permitted the Benchers to adopt a resolution declaring the law school was not or had ceased to be an approved faculty of law. That proposed resolution was defeated.

[35] At their April 10 and April 24, 2014 convocations, the Benchers of the Law Society of Upper Canada voted against the accreditation of the proposed TWU law school.

[36] On April 25, 2014 the Nova Scotia Barristers' Society adopted the following motion:

> Council accepts the Report of the Federation Approval Committee that, subject to the concerns and comments as noted, the TWU program will meet the national requirement;
>
> Council resolves that the Community Covenant is discriminatory and therefore Council does not approve the proposed law school at Trinity Western unless TWU either:
>
> i) exempts law students from signing the Community Covenant; or
>
> ii) amends the Community Covenant for law students in a way that ceases to discriminate.
>
> Council directs the Executive Director to consider any regulatory amendments that may be required to give effect to this resolution and to bring them to Council for consideration at a future meeting.

[37] In May 2014 the Benchers of the Law Society of Manitoba decided not to engage in a local approval process and to continue to delegate to the Federation the task of approving Canadian common law programs.

[38] In June 2014 the Benchers of the Law Society of Newfoundland and Labrador resolved to place in abeyance the question whether graduates of the TWU law school would be accepted for admission to that law society.

[39] In the spring of 2014 the Yukon Law Society accepted the Federation's decision regarding preliminary approval of the TWU law program.

[40] In June 2014 the Council of the New Brunswick Law Society voted to accredit TWU's proposed law school program.

8. Judicial Review Elsewhere

[41] The decisions taken by the Nova Scotia Barristers' Society and the Law Society of Upper Canada have been challenged.

8.1 Nova Scotia

[42] In *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25, Campbell J. of the Supreme Court of Nova Scotia held:

> 181 The NSBS did not act reasonably in interpreting *the Legal Profession Act* to grant it the statutory authority to refuse to accept a law degree from TWU unless TWU changed it[s] Community Covenant. It had no authority to pass the [impugned] resolution or the regulation.

and:

> 270 The NSBS resolution and regulation infringe on the freedom of religion of TWU and its students in a way that cannot be justified.

[43] On July 26, 2016 the Nova Scotia Court of Appeal, for reasons indexed at 2016 NSCA 59, dismissed the appeal of the Barristers' Society without commenting on *Charter* issues. The Court held the Barristers' Society did not have the statutory authority to enact a regulation permitting the Society to refuse to recognize law degrees granted by universities with discriminatory admission or enrollment policies, nor the authority to adopt a resolution disapproving the TWU program:

> [38] … [T]he Amended Regulation is *ultra vires* the *Legal Profession Act*. So the Amended Regulation, and the Resolution that depends on it, are invalid. That disposes of the matter. This Court will not comment on either (1) Trinity Western's claimed infringement of s. 2(a) of the *Charter* or (2) whether such an infringement, if it exists, would be either justified under s. 1 and *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, or proportionate under *Doré v. Barreau du Québec*, 2012 SCC 12 (CanLII), [2012] 1 S.C.R. 395 and *Loyola High School v. Québec (Attorney General)*, 2015 SCC 12 (CanLII), [2015] 1 S.C.R 613.

[44] The Council of the Barristers' Society was held to have "determined" that TWU "unlawfully discriminates" contrary to the *Charter* or Nova Scotia *Human Rights Act*. The Court found that in doing so the Council had employed a criterion "completely unrelated to the Council's regulation-making authority under the *Legal Profession Act*" (at para. 67).

8.2 Ontario

[45] The decision of the Benchers of the Law Society of Upper Canada of April 24, 2014 was challenged on a judicial review heard by the Divisional Court of the Superior Court of Justice of Ontario on June 1-4, 2015: *Trinity Western University v. The Law Society of Upper Canada*, 2015 ONSC 4250. The Divisional Court held the Law Society had the jurisdiction to make the challenged decision:

> [58] For all of these reasons, therefore, we conclude 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. Rather, they engage the respondent in a much broader spectrum of considerations with respect to the public interest when they are exercising their functions, duties and powers, including whether or not to accredit a law school.

It rejected TWU's *Charter* challenge:

> [123] Simply put, in balancing the interests of the applicants to freedom of religion, and of the respondent's members and future members to equal opportunity, in the course of the exercise of its statutory authority, the respondent arrived at a reasonable conclusion. It is not the only decision that could have been made, as the difference in the vote on the question reflects. But the fact that people may disagree, even strongly disagree, on the proper result, does not mean that the ultimate decision is unreasonable. It also does not mean that, just because more Benchers favoured one approach over the other, the result equates to the imposition of some form of "majoritarian tyranny" on the minority, as the applicants contend.
>
> [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.

[46] On June 29, 2016 the Ontario Court of Appeal dismissed TWU's appeal for reasons indexed at 2016 ONCA 518. MacPherson J.A., for the Court, held the Divisional Court had been correct in applying a reasonableness standard of review to the Law Society's decision. The Court noted at para. 68 that the Benchers of the

Law Society constitute a tribunal "entitled, indeed required, to take account of, and try to act consistently with, *Charter* values as they make decisions within their mandate". At para. 69, the Court held: "[The Law Society's] decision not to accredit TWU fell squarely within its statutory mandate to act in the public interest."

[47] In relation to the balancing exercise, the Court held at para. 129 that although the Benchers' accreditation decision would adversely impact TWU, it was "[c]learly" reasonable "within the parameters set by *Dunsmuir*, *Ryan* and *Doré".* The Court gave four reasons for that conclusion at paras. 130-141:

(i) the Law Society, together with law schools, is a gatekeeper to entry into the legal profession with an obligation to ensure equality of admissions into the profession;

(ii) in balancing the rights at issue, the Law Society could attach weight to its obligations under applicable human rights legislation;

(iii) TWU was considered by the Court to be seeking access to a public benefit — the accreditation of its law school — and the Law Society, in determining whether to confer that public benefit, must consider whether doing so would meet its statutory mandate to act in the public interest; and

(iv) the Law Society's balancing in its accreditation decision was faithful to international human rights law, and especially international treaties and other documents that bind Canada.

9. The Judgment of the Court Below

[48] The application for judicial review in this case came on for hearing before the Chief Justice of the Supreme Court of British Columbia on August 24-26, 2015. For reasons indexed at 2015 BCSC 2326 the petition for judicial review was successful and the decision not to approve TWU's law school was set aside.

[49] The Chief Justice found that the procedures followed by the Law Society in reaching its decision were improper. In particular, he found that the Benchers had

unlawfully delegated their decision-making powers to the members, and had fettered their discretion by agreeing to be bound by the results of the referendum. He also found that it was incumbent on the Benchers to engage in a process of balancing the statutory objectives of the *Legal Profession Act* against *Charter* values, and that they failed to do so. For those reasons, he quashed the decision of the Law Society. He concluded it was unnecessary "to resolve the issue of the collision of the relevant *Charter* rights" (at para. 153).

[50] Although it does not appear to have been the basis for his decision, the chambers judge was also of the view that TWU had not been given a fair opportunity to present its case during the referendum period, which he characterized as a denial of procedural fairness.

III. ISSUES ON APPEAL

[51] On appeal the parties raise four issues:

1. Did the Law Society have statutory authority to refuse to approve TWU's law school on the basis of an admissions policy?

2. Did the Benchers unlawfully sub-delegate or fetter their decision-making authority?

3. Was TWU denied procedural fairness?

4. Does the Law Society's decision reasonably balance the statutory objectives of the *Legal Profession Act* against the religious freedom rights of TWU?

IV. ANALYSIS

1. Did the Law Society have statutory authority to refuse to approve TWU's law school on the basis of an admissions policy?

[52] The first issue the chambers judge considered was whether the Law Society, in deciding whether to approve a law faculty, was limited to considering "academic qualifications". TWU argued that the Law Society's jurisdiction was limited to

determining whether the legal instruction that TWU proposed to provide was capable of producing graduates ready to become competent lawyers.

[53] The judge rejected that contention, holding that:

> [108] … [t]he LSBC has a broad statutory authority that includes the object and duty to preserve and protect the rights and freedoms of all persons. ... [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 [*Legal Profession Act*].

[54] The *Legal Profession Act* sets out the object and duty of the Law Society of British Columbia as follows:

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

[55] The power of the Benchers to establish the requirements for admission to the profession is set out in s. 21(1)(b):

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

[56] TWU concentrates on the phrase “academic requirements” in s. 21(1)(b) of the Act. As it did before the chambers judge, it argues that matters other than the adequacy of the academic program at a law faculty cannot be considered by the Benchers in deciding whether or not to approve it.

[57] We are of the view that the chambers judge made no error in finding that the Law Society's decision to approve or deny approval to a law faculty could be based on factors beyond the academic education that its graduates would receive.

[58] The Law Society's objectives, as set out in s. 3 of the Act, are very broad. While "ensuring the competence of lawyers" is an objective, there are many others, including "preserving and protecting the rights and freedoms of all persons". Nothing in s. 21(1)(b) prevents the Benchers from considering the general objectives of the Law Society in determining the requirements for admission to the profession.

[59] The chambers judge concluded his analysis of this issue by finding that the Law Society correctly interpreted its jurisdiction. We agree. In our view, the Benchers interpreted the Act in a reasonable manner (and, indeed, in a manner that would pass the standard of correctness) when they came to the view that a decision not to approve a law faculty could be made on bases other than just the adequacy of the faculty's academic program.

2. Did the Benchers unlawfully sub-delegate or fetter their decision-making authority?

[60] The chambers judge found that, in binding themselves to the results of the referendum, the Benchers unlawfully sub-delegated their powers to the membership of the Law Society and fettered their own discretion.

[61] The principles underlying the rule against sub-delegation and the rule against fettering of discretion overlap to a considerable degree, but sub-delegation and fettering are distinct concepts, and it is not helpful to blur them together.

2.1 Sub-Delegation

[62] The rule against sub-delegation is easily stated: where an enactment delegates rule-making or decision-making authority to a particular person, that person is entitled to exercise the power directly, but is generally not entitled to delegate its exercise to another. The maxim that a delegate is not entitled to re-delegate is a basic principle of administrative law. While there are exceptions (see the classic article by John Willis, "*Delegatus non potest delegare*" (1943) 21 Can.

Bar Rev. 257), sub-delegation is generally permitted only where a statute authorizes it expressly or by necessary implication (Donald Brown and John Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Carswell, 2013) (loose-leaf) §§ 13-15 and 13-16).

[63] Section 21(1)(b) of the *Legal Profession Act* clearly delegates to the Benchers the power to establish requirements for admission to the profession. They have exercised that rule-making power, enacting former Rule 2-27(4.1) and current Rule 2-54(3). Those rules specifically provide that a law faculty that has been approved by the Federation is an approved law faculty for the purpose of admission to the Law Society of British Columbia unless the Benchers pass a resolution to the contrary. Nothing in the Act or Rules suggests that the Benchers are entitled to sub-delegate the power to pass such a resolution.

[64] In the case before us, however, the resolution declaring TWU not to be an approved law faculty was a resolution passed by the Benchers. While the Benchers considered themselves bound to pass such a resolution as a result of the referendum vote, the actual exercise of the statutory power was undertaken by them. In the result, this is not a case of sub-delegation. The statutory power was exercised directly by the body empowered to exercise it.

2.2 Fettering

[65] The issue, then, is not whether the Law Society's resolution was made by the body with authority to make it, but whether that body properly exercised its discretion. It is evident that, after the referendum results were known, the Benchers did not consider themselves free to exercise their discretion in an unrestricted manner. Rather, they considered the referendum binding on them.

[66] It is not necessary to engage in any detailed analysis of the concept of fettering of discretion in these circumstances. It is readily apparent that the Benchers considered the referendum to have eliminated their discretion completely. The question here is not whether their discretion was fettered — it clearly was — but rather whether that fettering was authorized by law. That question can be answered

by determining whether the Benchers had statutory authority to conduct a binding referendum.

(a) The Power to Hold a Binding Referendum

[67] The *Legal Profession Act* includes a provision that allows the members of the Law Society to make resolutions that are binding on the Benchers in limited circumstances. The process is a complex one, starting with a resolution at a general meeting. The provision is as follows:

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

[68] Where the procedures set out in s. 13 have been followed, and the statutory requirements have been met, the members can adopt resolutions that fetter the discretion of the Benchers. There is, in principle, no reason that the s. 13 procedure could not be used, in appropriate circumstances, to require the Benchers to exercise their rule-making functions in a particular way.

[69] The October 2014 referendum was held without the full requirements of s. 13 having been met. A resolution was passed at the June 10, 2014 general meeting directing the Benchers to pass a resolution declaring TWU not to be an approved law faculty. Pursuant to s. 13(1) of the *Legal Profession Act*, that resolution was not binding on the Benchers.

[70] At their September 26, 2014 meeting, the Benchers considered their options and decided to hold a referendum, the results of which would be binding upon them if the results met the standards set out in s. 13(3) of the *Legal Profession Act*. The Benchers also purported to meet the requirements of s. 13(4) of the *Act* by making a determination that "implementation of the Resolution does not constitute a breach of their statutory duties, regardless of the results of the Referendum."

[71] It is not clear, on the face of the statute, that the Benchers had the power to circumvent the procedures set out in s. 13(2) of the *Act* and call a referendum without requiring a petition or a 12-month waiting period.

[72] The Law Society relies on former Rule 1-37 (now Rule 1-41) as authority for the Benchers to call a referendum:

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

[73] The Benchers say it was open to them to call the referendum under Rule 1-37, and that they did not have to await action by the members under s. 13(2) of the *Legal Profession Act*. TWU, on the other hand, sees s. 13 of the *Legal Profession Act* as a complete code governing the making of binding resolutions by the members of the Law Society.

[74] We have not heard argument on the question of whether the Law Society had jurisdiction to enact Rule 1-37; nor have the parties made full submissions on the scope of the rule. It is not apparent that any provision, apart from s. 13 of the *Legal Profession Act*, gives the Law Society the ability to exercise its powers by referendum. Our tentative view, then, is that Rule 1-37, at least insofar as it deals with resolutions binding on the Benchers, is ancillary to s. 13 of the statute, and not a stand-alone procedure. It cannot, itself, obviate the requirements of s. 13(2).

[75] It might be argued, however, that in setting out circumstances in which a referendum must be held, s. 13(2) does not prevent the Benchers from holding referendums in other situations. To some degree, practical considerations favour an interpretation of s. 13 that allows the Benchers to hold referendums without insisting on the filing of petitions or the lapse of 12 months. Those statutory requirements are in place to ensure that referendums will not be held where only a small number of members feel strongly about an issue, or where the Benchers simply need time to study an issue before dealing with it. Where the Benchers are convinced that the requirements of s. 13(2) will inevitably be met in the future, and where they favour an abbreviated process, there does not appear to be any rationale for insisting that the referendum be delayed until the technical statutory conditions are fulfilled.

[76] We note, as well, that the Benchers are entitled to a margin of appreciation in interpreting their home statute. As long as their interpretation is not unreasonable, it will be respected by the courts.

[77] As we are of the view that the Benchers' decision to adopt the results of the referendum was improper for other reasons, we need not come to any final conclusion on whether the requirements set out in s. 13(2) are conditions precedent to the holding of a binding referendum. For the purposes of this case, we are prepared to assume, without deciding, that the Benchers had the authority to call a binding referendum to consider the resolution passed at the June 10, 2014 meeting despite the absence of a petition, and despite the fact that 12 months had not passed from the date of the meeting.

(b) Consistency with Statutory Duties

[78] We are not, however, convinced that the Benchers acted properly in passing a resolution to the effect that, regardless of the results of the referendum, following those results would be consistent with their statutory duties.

[79] The Benchers were cognizant of the fact that *Charter* values were implicated in the decision as to whether TWU should be an approved law faculty. They had, in the course of their own debates, become fully aware that the decision required them

to consider TWU's concerns for religious freedom, as well as opponents' concerns for equality on the basis of sexual orientation.

[80] Where *Charter* values are implicated in an administrative decision, and the decision might infringe a person's *Charter* rights, the administrative decision-maker is required to balance, or weigh, the potential *Charter* infringement against the objectives of the administrative regime. In *Doré v. Barreau du Québec*, 2012 SCC 12, the Supreme Court of Canada held that where an administrative tribunal undertakes such a balancing, it is entitled to deference.

[81] The rationale for such deference is that the tribunal will have a special appreciation for the statutory regime under which it operates, and a nuanced understanding of the facts of an individual case. In *Doré*, Abella J., for the Court, said:

> [47] An 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. As the Court explained in *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, adopting the observations of Prof. Danielle Pinard:
>
> > [translation] … administrative tribunals have the skills, expertise and knowledge in a particular area which can with advantage be used to ensure the primacy of the Constitution. Their privileged situation as regards the appreciation of the relevant facts enables them to develop a functional approach to rights and freedoms as well as to general constitutional precepts.
> >
> > (p. 605, citing "Le pouvoir des tribunaux administratifs québécois de refuser de donner effet à des textes qu'ils jugent inconstitutionnels" (1987-88), *McGill L.J.* 170, at pp. 173-74.)

[82] We would observe, however, that many tribunals have limited contact with the *Charter* and may have considerable difficulty interpreting it. There is also a real possibility that a tribunal's preoccupation with its own statutory regime will lead it to value the statutory objectives of that regime too highly against *Charter* values. As well, it is important to recognize that administrative tribunals do not enjoy the same independence that judges do. An elected tribunal or a statutory decision-maker with a renewable term of appointment may be vulnerable to public or governmental

pressure, and may find it difficult to give the *Charter* rights of unpopular persons or groups sufficient weight when balancing them against statutory objectives.

[83] While *Doré* requires a court to grant tribunals a "margin of appreciation" in determining whether they have properly balanced matters, the tribunal's decision will, in all cases, have to fall within the bounds of reasonableness. Where a tribunal has failed to appreciate the significance of a *Charter* value in the balancing, its decision will be found to be unreasonable — see, for example, *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12.

[84] A very significant aspect of *Doré* is its discussion of the procedure to be adopted by a tribunal in balancing statutory objectives against *Charter* values:

> [55] How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. In *Lake*, for instance, the importance of Canada's international obligations, its relationships with foreign governments, and the investigation, prosecution and suppression of international crime justified the *prima facie* infringement of mobility rights under s. 6(1) (para. 27). In *Pinet*, the twin goals of public safety and fair treatment grounded the assessment of whether an infringement of an individual's liberty interest was justified (para. 19).
>
> [56] Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the *Oakes* context. As this Court recognized in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160, "courts must accord some leeway to the legislator" in the *Charter* balancing exercise, and the proportionality test will be satisfied if the measure "falls within a range of reasonable alternatives". The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of *Dunsmuir*, "falls within a range of possible, acceptable outcomes" (para. 47).

[85] In making their October 31, 2014 declaration, the Benchers did not engage in any exploration of how the *Charter* values at issue in this case could best be protected in view of the objectives of the *Legal Profession Act*. They made no decision at all, instead deferring to the vote of the majority in the referendum.

[86] Counsel for the Law Society contends that the Benchers decided that either of the possible results of the referendum would fall within the range of reasonable outcomes of the required balancing exercise, and that their decision should be upheld. In our view, that contention confuses the role to be played by an administrative tribunal and the role of the courts.

[87] Administrative tribunals are called upon to make decisions under particular statutory regimes. They are considered to have expertise and a privileged position in making such decisions. As such, where a tribunal has made what it considers to be the right decision, the courts will defer to that decision if it is not unreasonable. The reasonableness standard on judicial review does not alter the tribunal's role, which is to make the right decision. Rather, it is a recognition that, within a particular statutory regime, the tribunal will generally be in a better position to assess whether a decision is "right" than a court will be.

[88] A tribunal's function, in other words, is always to make the decision that it considers correct. The "reasonableness" standard is not one to be applied by the tribunal, but by a court on judicial review.

[89] In the case before us, it was up to the Benchers to weigh the statutory objectives of the *Legal Profession Act* against *Charter* values, and to arrive at the decision that, in their view, best protected *Charter* values without sacrificing important statutory objectives. They could not fulfill their statutory duties without undertaking this balancing process.

[90] In deciding that either result on the referendum would meet the reasonableness standard, and therefore be acceptable, the Benchers were conflating the role of the courts with their own role.

[91] As the chambers judge found, the Benchers failed to fulfill their function when they chose not to come to any conclusion as to how statutory objectives should be weighed against *Charter* values. In reaching the decision by binding referendum, the Benchers fettered their discretion in a manner inconsistent with their statutory duties.

As a result, this Court is not in a position to defer to their decision to declare the TWU law school not to be approved.

3. Was TWU denied procedural fairness?

[92] The chambers judge found that TWU had not been accorded procedural fairness in this case. That determination appears to have stemmed, in part, from a misapprehension of the evidence. The judge understood the evidence to be that the Law Society delivered material to its members that was skewed against TWU's position. Counsel agree that that did not occur.

[93] The finding also appears to have been based on the judge's understanding that fettering is an issue going to procedural fairness. In our view, fettering issues are better described as engaging substantive administrative review rather than review for procedural fairness. Issues of procedural fairness are concerned with the fairness of the hearing, not with the factors that the decision-maker takes into account in arriving at a disposition.

[94] In the context of a referendum, where a very public debate was waged by the protagonists for each side, the neutral stance taken by the Benchers was consistent with procedural fairness. TWU was clearly aware of the issues in the referendum, and of the case that it had to meet. We would not endorse the chambers judge's finding that TWU was denied procedural fairness in the context of the referendum.

[95] In summary, we reach the following conclusions on the administrative law issues:

1. The Law Society has jurisdiction to consider factors other than the adequacy of a faculty's academic program in deciding whether to deny the faculty approval.

2. This is not a case of improper sub-delegation of decision-making authority. The resolution in issue here was adopted by the Benchers, who are the body statutorily authorized to make the decision.

3. The Benchers fettered their discretion by declaring themselves bound to follow the results of the referendum. However, if authorized by the statute, such fettering would not be objectionable.

4. The *Legal Profession Act* provides for binding referendums. While some of the conditions that must exist in order for members to force a referendum were not present in this case, we are prepared to assume, without deciding, that it was open to the Benchers to hold a binding referendum.

5. The Benchers were required to satisfy themselves that adopting the results of the referendum was consistent with their duty to balance the Law Society's statutory objectives against *Charter* values. They failed to fulfill this function, and their decision is not, therefore, entitled to deference.

6. There was no failure by the Law Society to accord procedural fairness to TWU.

[96] The chambers judge concluded that the Benchers' resolution declaring TWU not to be an approved law faculty should be quashed, and ordered the result of the April 11, 2014 vote restored. We have a technical concern with this remedy. The resolution before the Benchers on April 11, 2014 not to approve TWU's faculty of law failed to pass. Upon that failure it became a legislative "nothing". There is thus nothing to "restore" as the chambers judge ordered. Rather, what is left is the approval of TWU's faculty of law by the Federation, which is legally effective in the absence of a resolution to the contrary.

[97] In any event, in our view the judge's decision to quash the Benchers' resolution cannot be reached on the administrative law issues alone. Although the decision of the Benchers is not entitled to deference, it can be upheld if the Court is able to find that it represented the only reasonable balancing of statutory objectives with *Charter* values. Accordingly, it is necessary for the Court to consider the substantive *Charter* arguments presented by the parties and intervenors. In addition,

the parties asked the Court to address the *Charter* issues in order to avoid the need for further litigation. We turn now to those issues.

4. Does the Law Society's decision reasonably balance the statutory objectives of the Legal Profession Act against the religious freedom rights of TWU?

4.1 *Charter* Rights Engaged

[98] The relevant provisions of the *Charter* are as follows:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> 2. 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.
>
> * * *
>
> 15. (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.

[99] The first issue is whether freedom of religion is implicated. The Supreme Court of Canada has grappled with the nature of freedom of religion and conscience (which are usually considered in tandem, given the overlap between them), both alone and in the context of a free and democratic society. In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, one of the earliest judgments dealing with the topic, Dickson J. (as he then was) for the majority described the historical evolution of this right in the religious struggles of post-Reformation Europe. (See also chapter one of Margaret H. Ogilvie, *Religious Institutions and the Law in Canada* (3d ed., 2010)). Eventually, these struggles led to the perception, during the Commonwealth period, that "belief itself was not amenable to compulsion" (*Big M Drug Mart Ltd.* at 345). Dickson J. continued at 346-347:

> … an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen

> to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self‑government. It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*.
>
> Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the *Charter*. Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice. It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion. For the present case it is sufficient in my opinion to say that whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose. I leave to another case the degree, if any, to which the government may, to achieve a vital interest or objective, engage in coercive action which s. 2(*a*) might otherwise prohibit.
>
> [Emphasis added.]

[100] Subsequent cases have developed the themes that freedom of religion also includes freedom *from* religion (see *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7 at para. 32) and that the government should remain neutral in religious matters, especially as the multicultural nature of modern Canadian society evolves (see *S.L*. at paras. 17-21, 32, and 54). We note parenthetically that there is one constitutional exception to this principle: s. 29 of the *Charter* protects against any derogation or abrogation of "privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools." The Constitution, in s. 93 of the *Constitution Act, 1867*, in turn prohibits any provincial legislature from "prejudicially affecting" any right or privilege belonging by law to a denominational school at the time of Union. Thus an exception is made by the *Charter* itself for the protection of the benefits (e.g., public funding) enjoyed by such

schools that were in existence in 1867 (or in the case of British Columbia, 1871) notwithstanding other *Charter* rights (e.g., equality) that could otherwise form the basis of legal challenge (see generally *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148; Ogilvie, *supra* at 120-131). Section 93 was extended to British Columbia (see Order in Council Admitting British Columbia into the Union, dated 16 May, 1871); but since this province had no publicly-funded denominational schools in 1871, s. 29 has no application in this case.

[101] The Supreme Court has formulated a methodology to be followed in cases involving allegations of infringement of freedom of religion or conscience. The first step is for the plaintiff or complainant to "establish the sincerity of his or her belief in a religious doctrine, practice or obligation". The second step is for the court to determine whether a significant infringement of the belief has occurred as a result of governmental action: see *S.L.* at para. 49; *Hutterian Brethren Colony v. Alberta*, 2009 SCC 37 at para. 32.

[102] There is little doubt that freedom of religion and conscience of at least TWU's faculty and students was implicated by the Law Society's decision not to approve its Faculty of Law — indeed the Law Society did not argue otherwise.

[103] The evidence overwhelmingly supports the view that the Covenant is an integral and important part of the religious beliefs and way of life advocated by TWU and its community of evangelical Christians. According to Dr. Jeffrey P. Greenman, a Professor of Theology at Regent College and an affiant on behalf of TWU, the Covenant reflects the core teachings of evangelical Christian theology; nothing in it is marginal to evangelical moral concerns:

> It attempts to do nothing more than organize the Bible's directions about how to live as a Christian with regard to many aspects of daily life as individuals and as members of a shared community.

[104] The evidence before the Law Society confirms that evangelicals comprise a distinct religious subculture. According to Dr. Samuel H. Reimer, Professor of Sociology at Crandall University in Moncton, New Brunswick, the evangelicals' faith, like any moral code, is not limited to their private lives. They carry their beliefs and

moral values into the public sphere, including work, education and politics. Codes of conduct are commonly established by evangelical Christians as distinctive moral codes that "strengthen commitment to the subculture, and thus strengthen the subculture".

[105] Dr. Gerald Longjohn Jr. swore an affidavit in these proceedings. He is the Vice-President for Student Development at Cornerstone University in Michigan. His area of expertise lies in the application of student conduct codes at North American Christian universities. He deposed that codes of conduct serve to establish a community that is conducive to moral and spiritual growth; such codes can foster spiritual growth, encourage students toward a life of wisdom and foster an atmosphere that is conducive to the integration of faith and learning. The Covenant is "very similar in tone and content to other codes of conduct at Christian colleges and universities". The Covenant, in his view, is a commitment of members of the community to encourage and support other members of the community in their pursuit of their values and ideals.

[106] Intervenors in support of TWU's position in this litigation included the Roman Catholic Archdiocese of Vancouver and allied groups, the Christian Legal Fellowship, the Evangelical Fellowship of Canada, the Seventh-Day Adventist Church in Canada, the Justice Centre for Constitutional Freedoms and the Canadian Council of Christian Charities, among others. These intervenors voiced a common theme. They asserted that a secular state supports pluralism and that a democratic society requires that differing groups have space to hold and act on their beliefs. In their view, freedom of religion requires the disciplined exercise of genuine state neutrality to prevent the use of coercive state power in the enforcement of majority beliefs or practices.

[107] It is clear, then, that rights of religion and conscience are engaged in this case. These freedoms belong at least to the faculty and students of TWU, and perhaps to TWU itself: see *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at para. 33 (*per* Abella J. for the majority) and at para. 100 (*per* McLachlin C.J.C. and Moldaver J. for the minority).

[108] The conflicting *Charter* right implicated by the Law Society's decision is the equality right of LGBTQ persons under the law, guaranteed by s. 15 of the *Charter*. As is well-known, sexual orientation has been found to constitute an analogous ground under s. 15, such that the equal benefit and protection of the law may not be denied on that basis. In *Vriend v. Alberta*, [1998] 1 S.C.R. 493, the majority of the Supreme Court described the effects of discrimination on the basis of sexual orientation in the context of the appellant's termination of his employment because of his homosexuality. The majority wrote:

> [101] The exclusion [in the *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2] sends a message to all Albertans that it is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation. The effect of that message on gays and lesbians is one whose significance cannot be underestimated. As a practical matter, it tells them that they have no protection from discrimination on the basis of their sexual orientation. Deprived of any legal redress they must accept and live in constant fear of discrimination. These are burdens which are not imposed on heterosexuals.
>
> [102] Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetrates the view that gays and lesbians are less worthy of protection as individuals in Canada's society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination.
>
> [103] Even if the discrimination is experienced at the hands of private individuals, it is the state that denies protection from that discrimination. Thus the adverse effects are particularly invidious. This was recognized in the following statement from *Egan* [*Egan v. Canada*, [1995] 2 S.C.R. 513] (at para. 161):
>
> > The law confers a significant benefit by providing state recognition of the legitimacy of a particular status. The denial of that recognition may have a serious detrimental effect upon the sense of self-worth and dignity of members of a group because it stigmatizes them … . Such legislation would clearly infringe s. 15(1) because its provisions would indicate that the excluded groups were inferior and less deserving of benefits.
>
> This reasoning applies *a fortiori* in a case such as this where the denial of recognition involves something as fundamental as the right to be free from discrimination.

[109] The Law Society led evidence from various experts touching on the impact of the Covenant on LGBTQ persons. Dr. Barry Adam is a Professor of Sociology, Anthropology and Criminology at the University of Windsor. His work looks at issues of subordination and empowerment and the social status of lesbian, bisexual and gay people. He deposes:

a) When gay, lesbian and bisexual people are identified with private sexual activity, and subject to penalty for the expression of intimacy, a special range of social limitations are thereby imposed on them (at para. 16). Exclusion from public affirmation of relationship is a form of withholding access to the full exercise of citizenship rights in the public sphere (at para. 17).

b) Lesbian, bisexual and gay people still live in social and economic contexts characterized by lack of family support, vulnerability to harassment, violence, negative social attitudes, and diminished opportunities (at para. 20).

c) Based on the extensive record of social science investigation, any implementation or enforcement of a policy of exclusion reproduces the conditions that lead to well demonstrated deleterious consequences for lesbian, gay and bisexual people (at para. 25).

[110] Dr. Ellen Faulkner is a Professor of Sociology and Criminology at the College of New Caledonia. She has conducted research in the field of discrimination and the harm caused by it. She considered the potential adverse effects on gay and lesbian students if they were to sign the Covenant. She fears that this would push gay and lesbian people “back into the closet” (at para. 11); because of limited law school spaces they might be “living a lie in order to obtain a degree” (at para. 12). Signing the Covenant would require self-censorship by gay and lesbian people — hiding relationships even though they are legally sanctioned in Canada (at para. 29); it would require gays and lesbians to isolate themselves (at para. 30); and it would be harmful because it potentially “re-pathologizes” homosexual identity and denies recognition of the harm of homophobia (at para. 38).

[111] Other experts reached similar conclusions. In their opinion, TWU's admissions policy and the Covenant perpetuate and exacerbate existing stigmatization and marginalization of LGBTQ persons.

[112] Unlike the College of Teachers in *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 [*TWU v. BCCT*], to which we will return, the Law Society did not contend that the potential "downstream" effect of the learning environment might foster intolerant attitudes on the part of TWU graduates once called to the Bar.

[113] The intervenors in support of the Law Society's position included the Canadian Secular Alliance, the British Columbia Humanist Association, the LGBTQ Coalition, West Coast Women's Legal Education and Action Fund and The Advocates' Society, among others. These intervenors raised many of the same concerns raised by the Law Society's experts. The Coalition submitted that religious freedom cannot be used as a basis to exclude LGBTQ persons from access to a law program when that program requires the approval of a public body; s. 15 guarantees LGBTQ persons the right to equal access to the 60 new law school spaces to be created by TWU and equal access to the profession of law generally. As well, it is said that the dignity and self-worth of LGBTQ persons would be affronted and that the Law Society would be perceived as endorsing the Covenant if it were to approve the proposed law school.

[114] It bears emphasizing at the outset that under the *Charter*, "[n]o right is absolute." Each must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises (*S.L*. at para. 25). Where freedom of religion is concerned, this fact distinguishes the *Charter* from the First Amendment to the U.S. Constitution, which expresses freedom of religion as an absolute right. As Professor Ogilvie observes, s. 15 of the *Charter* "reduces religion to one of many categories vying for 'equality'"; and s. 1 gives courts the right to qualify freedom of religion by "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (at 135). Thus, Ogilvie

writes, "[e]ffectively, the *Charter* reduces and relativizes religious freedom and gives courts the power to select and balance other countervailing claims" (at 135).

[115] Unlike many *Charter* cases, this case does not involve a direct contest between *Charter* rights. It does not involve, for example, an LGBTQ person who has been denied admission by TWU on the basis of his or her refusal to sign the Covenant. The law is clear that as a private institution, it would be open to TWU to accept only students who subscribe to its adopted religious views — a right also ensconced in this province's *Human Rights Code* at s. 41. Nor does this case involve a decision by the Law Society directly to deny evangelical Christians the right to practise law. Such a denial would obviously infringe at least s. 2 of the *Charter* and would have to be justified under s. 1.

[116] Instead, this case, like *TWU v. BCCT*, is one in which a statutory body has made a decision under its home statute that effectively bars from the practice of law evangelical Christians who choose to attend the TWU law school — in practical terms, prohibiting such a law school from opening (see para. 168 below). The focus of this appeal is therefore the decision of the Law Society as an administrative tribunal that is bound to uphold and protect the public interest in the administration of justice, as more particularly delineated by s. 3 of the *Legal Profession Act*.

4.2 The Decision-Maker's Exercise of Authority When *Charter* Rights and Values Are Engaged

[117] As we have earlier noted, how an administrative decision-maker is to exercise its delegated authority to decide an issue involving *Charter* rights and freedoms was addressed by the Supreme Court of Canada in two decisions that we will now discuss at some length — *Doré v. Barreau du Québec*, 2012 SCC 12; and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12.

(a) Doré

[118] In *Doré*, the disciplinary council of the Quebec bar was considering a conduct complaint involving a lawyer who wrote a private letter to a judge in which he disparaged the judge. The lawyer's freedom of expression was in clear tension with

the disciplinary council's mandate. The council reprimanded the lawyer, who sought judicial review.

[119] Justice Abella wrote the judgment for the Court. She addressed the "issue of how to protect *Charter* guarantees and the values they reflect in the context of adjudicated administrative decisions" (at para. 3). In particular, she considered whether the presence of a *Charter* issue requires the replacement of the reasonableness administrative law framework with the test set out in *Oakes* (*R. v. Oakes*, [1986] 1 S.C.R. 103), "the test traditionally used to determine whether the state has justified a law's violation of the *Charter* as a 'reasonable limit' under s. 1" (at para. 3). At para. 6, she stated:

> In assessing whether a law violates the *Charter*, we are balancing the government's pressing and substantial objectives against the extent to which they interfere with the *Charter* right at issue. If the law interferes with the right no more than is reasonably necessary to achieve the objectives, it will be found to be proportionate, and, therefore, a reasonable limit under s. 1. In assessing whether an adjudicated decision violates the *Charter*, however, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right. In both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited. [Emphasis added.]

[120] The key word is "proportionality"; the reviewing court must ensure that the discretionary administrative decision "interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives" (at para. 7). If the decision disproportionately impairs the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one.

[121] We repeat here Justice Abella's description of the procedure to be followed by the administrative decision-maker (at paras. 55-58):

> How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. In *Lake*, for instance, the importance of Canada's international obligations, its relationships with foreign governments, and the investigation, prosecution and suppression of international crime

> justified the *prima facie* infringement of mobility rights under s. 6(1) (para. 27). In *Pinet*, the twin goals of public safety and fair treatment grounded the assessment of whether an infringement of an individual's liberty interest was justified (para. 19).
>
> Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the *Oakes* context. As this Court recognized in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160, "courts must accord some leeway to the legislator" in the *Charter* balancing exercise, and the proportionality test will be satisfied if the measure "falls within a range of reasonable alternatives". The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of *Dunsmuir*, "falls within a range of possible, acceptable outcomes" (para. 47).
>
> 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.
>
> 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.
>
> [Emphasis added.]

(b) Loyola High School

[122] This brings us to the decision in *Loyola High School*. It is highly relevant to the case before this Court because it involved a contest between the religious freedom of a private Catholic high school and the statutory objectives of Quebec's Program on Ethics and Religious Culture (ERC).

[123] Briefly, ERC was designed to teach about the beliefs and ethics of different world religions from a neutral and objective perspective. Since Loyola High School initially wanted to teach the program from a wholly Catholic perspective, it applied

under s. 22 of the regulation to provide an alternative but "equivalent" program. This required the approval of the responsible minister. The Minister decided not to grant the exemption. Loyola sought judicial review. Applying a correctness standard, the motions judge concluded that the school's right to religious freedom was unjustifiably violated. The Quebec Court of Appeal, applying a reasonableness standard to the review of the Minister's balancing of the *Charter* rights at stake, overturned the lower court's decision.

[124] On appeal to the Supreme Court of Canada, the appeal was allowed and the matter was remitted back to the Minister for reconsideration. By the time the case reached the Supreme Court, Loyola had altered its position (at para. 31):

> Loyola had previously asserted that the *entire* orientation of the ERC Program represented an impairment of religious freedom on the basis that discussing any religion through a neutral lens would be incompatible with Catholic beliefs. Its revised position before us was that it did not object to teaching *other* world religions objectively in the first component which focuses on "understanding religious culture". But it still wanted to be able to teach the *ethics* of other religious traditions from the perspective of the Catholic religion rather than in an objective and neutral way. Moreover, it continued to assert the right to teach Catholic doctrine and ethics from a Catholic perspective. Loyola took no position on the perspective from which it would seek to teach the dialogue component, which would be integrated with the other two components of its proposed alternative program. The position of the Minister before this Court, however, remained the same as it had been in the prior proceedings, namely, that in no aspect of the ERC Program would Loyola be permitted to teach from a Catholic perspective. [Emphasis in original.]

[125] Justice Abella wrote for herself and Justices LeBel, Cromwell and Karakatsanis. Chief Justice McLachlin and Justice Moldaver wrote separately, with Justice Rothstein concurring. The majority did not find it necessary to decide whether Loyola itself, as a corporation, enjoyed s. 2(a) rights,

> … since the Minister is bound in any event to exercise her discretion in a way that respects the values underlying the grant of her decision-making authority, including the *Charter*-protected religious freedom of the members of the Loyola community who seek to offer and wish to receive a Catholic education: *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, at para. 71. [At para. 34.]

[126] The minority went further in defining the beneficiaries of the right to religious freedom under s. 2(a) of the *Charter* to include Loyola itself (at para. 91):

> In our view, Loyola may rely on the guarantee of freedom of religion found in s. 2(*a*) of the *Canadian Charter*. The communal character of religion means that protecting the religious freedom of individuals requires protecting the religious freedom of religious organizations, including religious educational bodies such as Loyola. Canadian and international jurisprudence supports this conclusion.

[127] Justice Abella proceeded to assess the Minister's decision from the perspective of proportionality. She discussed how that decision necessarily engaged religious freedom and, at para. 58, repeated the words of Dickson J. (as he then was) in *Big M Drug Mart Ltd.* at 336-37 (the emphasis is that of Abella J.):

> 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. … 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".

[128] In Justice Abella's view, the "collective aspects of religious freedom — in this case, the collective manifestation and transmission of Catholic beliefs through a private denominational school — were a critical part of Loyola's claim" (para. 61) and distinguished that claim from the public school context of *S.L.* She concluded that the Minister's decision had a "serious impact" on religious freedom in the case of Loyola. Going further the judge said (at para. 67):

> Ultimately, measures which undermine the character of lawful religious institutions and disrupt the vitality of religious communities represent a profound interference with religious freedom.

[129] On the "core issue" of whether the Minister's insistence on a purely secular program of study to qualify for an exemption was a limit no more than reasonably necessary to achieve the ERC Program's goals, the majority concluded that it was not. The Minister's decision was based "on the flawed determination that only a cultural and non-denominational approach could serve as equivalent" (para. 149). It led to "a substantial infringement on the religious freedom of Loyola" (para. 151). The minority went on to consider the appropriate scope of an equivalent program and defined it. On remedy the minority cited *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 and concluded (at para. 165):

> We find it neither necessary nor just to send this matter back to the Minister for reconsideration, further delaying the relief Loyola has sought for nearly seven years. Based on the application judge's findings of fact, and considering the record and the submissions of the parties, we conclude that the only constitutional response to Loyola's application for an exemption would be to grant it. Accordingly, we would order the Minister to grant an exemption to Loyola, as contemplated under s. 22 of the regulation at issue, to offer an equivalent course to the ERC Program in line with Loyola's proposal and the guidelines we have outlined. [Emphasis added.]

[130] It is instructive to note that even in the case of a standard of review calibrated at "reasonableness", the range of "reasonable" outcomes can be exceedingly narrow indeed, effectively amounting to one correct answer.

[131] While the parallel between *Loyola* and the present case is not exact, in that the state's accommodation of religious freedom in *Loyola* did not have a direct detrimental impact on the equality rights of others, the requirement of minimal infringement and proportionality pertains. In addition, the context of the decision made in *Loyola* is similar: "how to balance robust protection for the values underlying religious freedom with the values of a secular state" (at paras. 43-46):

Part of secularism, however, is respect for religious differences. A secular state does not — and cannot — interfere with the beliefs or practices of a religious group unless they conflict with or harm overriding public interests. Nor can a secular state support or prefer the practices of one group over those of another: Richard Moon, "Freedom of Religion Under the *Charter of Rights*: The Limits of State Neutrality" (2012), 45 *U.B.C. L. Rev.* 497, at pp. 498-99. The pursuit of secular values means respecting the right to hold and manifest different religious beliefs. A secular state respects religious differences, it does not seek to extinguish them.

Through this form of neutrality, the state affirms and recognizes the religious freedom of individuals and their communities. As Prof. Moon noted:

> Underlying the [state] neutrality requirement, and the insulation of religious beliefs and practices from political decision making, is a conception of religious belief or commitment as deeply rooted, as an element of the individual's identity, rather than simply a choice or judgment she or he has made. Religious belief lies at the core of the individual's worldview. It orients the individual in the world, shapes his or her perception of the social and natural orders, and provides a moral framework for his or her actions. Moreover, religious belief ties the individual to a community of believers and is often the central or defining association in her or his life. The individual believer participates in a shared system of practices and values that may, in some cases, be described as "a way of life". If religion is an aspect of the individual's identity, then when the state treats his or her religious practices or beliefs as less important or less true than the practices of others, or when it marginalizes her or his religious community in some way, it is not simply rejecting the individual's views and values, it is denying her or his equal worth. [Footnote omitted; p. 507.]

Because it allows communities with different values and practices to peacefully co-exist, a secular state also supports pluralism. The European Court of Human Rights recognized the relationship between religious freedom, secularism and pluralism in *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A No. 260-A, a case about a Jehovah's Witness who had been repeatedly arrested for violating Greece's ban on proselytism. Concluding that the claimant's Article 9 rights to religious freedom had been violated, the court wrote:

> As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. [p. 17]

See also *Metropolitan Church of Bessarabia v. Moldova*, No. 45701/99, ECHR 2001-XII.

This does not mean that religious differences trump core national values. On the contrary, as this Court observed in *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607:

> Not all differences are compatible with Canada's fundamental values and, accordingly, not all barriers to their expression are arbitrary. Determining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright-line application. It is, at the same time, a delicate necessity for protecting the evolutionary integrity of both multiculturalism and public confidence in its importance. [para. 2]

Or, as the Bouchard-Taylor report observed:

> A democratic, liberal State cannot be indifferent to certain core values, especially basic human rights, the equality of all citizens before the law, and popular sovereignty. These are the constituent values of our political system and they provide its foundation.
>
> (Gérard Bouchard and Charles Taylor, Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles, *Building the Future: A Time for Reconciliation* (2008), at p. 134.)

[Emphasis added.]

[132] We have quoted at length here because in our view state neutrality and pluralism lie at the heart of this case.

[133] The balancing exercise that *Doré* and *Loyola* call for in the case before us can be expressed this way: did the decision of the Law Society not to approve TWU's faculty of law interfere with freedom of religion of at least the faculty and students of that institution no more than is necessary given the statutory objectives of the Law Society?

[134] As we have reviewed at some length, *Doré* and *Loyola* clearly charted the course for the Law Society; the question is: did the Law Society navigate it?

4.3 The Law Society Did Not Balance *Charter* Rights

[135] We touched on this question in our discussion of the administrative law issues. We expand upon that discussion here.

[136] We have earlier outlined the procedural history of the treatment of TWU's application by the Benchers. It was preceded by consideration and conclusions of the Federation, the body to whom the Law Society has delegated primary approving authority under rule 2-54(3).

[137] We have also described the Law Society's consideration and rejection of a resolution to "not approve" TWU's faculty of law at its meeting of April 11, 2014. We have described at paragraphs 12-20 the due diligence carried out by the Law Society prior to that meeting. Finally, we have noted the notice to the profession published by the Law Society before the Special General Meeting of June 2014. We repeat that notice as it neatly describes the process adopted by the Law Society before its initial consideration of the "not to approve" resolution in April 2014:

> The decision was made after a thoughtful and sometimes emotional expression of views and careful consideration of two Federation reports on the Trinity Western University application, nearly 800 pages of submissions from the public and the profession and a submission from TWU, and after thoroughly considering the judgment of the Supreme Court of Canada in *Trinity Western University v. British Columbia College of Teachers* 2001 SCC 31 … and its applicability to the TWU application. In addition, the Benchers considered a memorandum from former Chief Justice Finch on the relevant considerations and additional legal opinions as follows:
>
> 1. Finch/Banks - Overview Brief re: Relevant Considerations for the Law Society in Relation to the Proposed Faculty of Law at TWU
> 2. Laskin Opinion on Applicability of SCC Decision in *TWU v. BCCT*
> 3. Gomery Opinion on Academic Qualifications
> 4. Gomery Opinion on Application of the Charter
> 5. Gomery Opinion on Scope of Law Society's Discretion under Rule 2-27(4.1)
> 6. Thomas/Foy Opinion on Application of the *Labour Mobility Act* and the *Agreement on Internal Trade*

[138] A number of the opinions the Law Society considered are important because they demonstrate that the Law Society at and before its April 2014 meeting was very much alive to the *Charter* issues presented by the case and the proper legal approach to the Law Society's consideration of a decision exercising its administrative discretion not to approve TWU's law school.

[139] The discussion at the Benchers meeting of April 11, 2014 makes it clear that some Benchers considered the issue in the context of the balancing exercise mandated by *Doré* (decided the previous month) and *Loyola* (yet to be decided). Others viewed *TWU v. BCCT* as dispositive.

[140] Some members of the Law Society did not accept the Benchers' April 2014 disposition. As we have related, they sought a Special General Meeting of the Society to consider a resolution directing the Benchers to declare TWU's faculty of law "not approved".

[141] The recitals to that proposed resolution are informative. At one point in oral submissions before us, counsel for the Law Society suggested that in effect the scheme under the *Legal Profession Act* and the Law Society rules constituted the membership at large as the "tribunal" undertaking the balancing exercise mandated by *Doré* et al. That position was soon modified in argument with counsel maintaining that it was always the Benchers undertaking that task. Still, to the extent that it is suggested that the membership balanced the competing rights in issue, that is not reflected in the recitals to the resolution, which are the best evidence of the "reasons" of the membership. We repeat them:

> WHEREAS:
>
> -Section 28 of the *Legal Profession Act* permits the Benchers to take steps to promote and improve the standard of practice by lawyers, including by the establishment, maintenance and support of a system of legal education;
>
> -Trinity Western University requires students and faculty to enter into a covenant that prohibits "sexual intimacy that violates the sacredness of marriage between a man and a woman";
>
> -The Barristers' and Solicitors' Oath requires Barristers and Solicitors to uphold the rights and freedoms of all persons according to the laws of Canada and of British Columbia;
>
> -There is no compelling evidence that the approval of a law school premised on principles of discrimination and intolerance will serve to promote and improve the standard of practice of lawyers as required by section 28 of the *Legal Profession Act,* and
>
> -The approval of Trinity Western University, while it maintains and promotes the discriminatory policy reflected in the covenant, would not serve to promote and improve the standard of practice by lawyers;

[142] These recitals suggest that what motivated the resolution adopted at the Special General Meeting was a concern that a law school "premised on principles of discrimination and intolerance" would not promote and improve the standard of practice by lawyers. No mention is made of the concerns with equality of access to TWU's faculty of law now advanced by the Law Society and its allied intervenors as

more particularly discussed above. More importantly, no reference is made to freedom of religion.

[143] We do not wish to make too much of this point. Ascertaining the motives in the minds of individual decision-makers is not generally a simple or useful task and, in any event, the members did not have the authority to make the decision. But it does serve to belie the suggestion, if it is still maintained, that the membership was providing their considered views on how best to accommodate the competing values implicated by the decision "not to approve". And to the extent it has been demonstrated that concerns with the "standard of practice by lawyers" motivated the membership, it raises parallels with the downstream concerns with TWU teachers in future classrooms that were found to be unsupported by any evidentiary basis in *TWU v. BCCT*.

[144] This brings us again to the important meeting of the Benchers on September 26, 2014 and the resolution adopted at that meeting. That resolution called for a referendum to vote on implementation of the Special General Meeting resolution, with the referendum to be binding on the Benchers.

[145] For the reasons we have developed in our discussion of the administrative law issues, we conclude that the Benchers improperly fettered their discretion by binding themselves to adopt the decision of the majority of members on whether "not to approve". It appears they did so altruistically in the sense of letting "democracy" dictate the result, and letting the members have their say. But in so doing, the Benchers abdicated their duty as an administrative decision-maker to properly balance the objectives of the *Legal Profession Act* with the *Charter* rights at stake.

[146] If there was any doubt that this was the case, one need only look to the Law Society's written submissions before Chief Justice Hinkson. We note these paragraphs:

> 332. The motion adopted by the Benchers stated that the referendum would be binding on the Benchers in the event that (a) 1/3 of all members in good standing of the Law Society vote in the Referendum; and (b) 2/3 of those voting vote in favour of the Resolution. It also included the statement that the "Benchers hereby determine that *implementation of the Resolution does not constitute a breach of their statutory duties, regardless of the results of the Referendum*".
>
> 333. The clear implication of the motion is that the Benchers in favour of the September resolution calling for a referendum had collectively determined that *both* approving TWU and refusing to accredit would be consistent with the Law Society's statutory duties, in that both decisions would be a reasonable exercise of the Law Society's powers under the *Legal Profession Act*.
>
> 334. Having reached that conclusion, the Benchers decided that the best and most legitimate way to resolve the matter would be for the Law Society to adopt the views of the membership as a whole on this important decision impacting the public interest in the administration of justice and the honour and integrity of the profession.
>
> [Underline emphasis added.]

[147] As stated earlier, although the decision of the Law Society not to approve TWU's law school is therefore not entitled to deference, we must decide whether it nonetheless represents a reasonable balancing of statutory objectives and *Charter* rights. We begin by considering whether *TWU v. BCCT* is dispositive of the issue.

(a) Is Trinity Western University v. British Columbia College of Teachers Dispositive?

[148] Many Benchers at the April 14, 2014 meeting considered *TWU v. BCCT* to be dispositive of the issues before them. Whether that is so has vexed the parties, the Federation and other courts considering TWU's applications. That case concerns the same university and effectively the same covenant. In issue was the decision of the British Columbia College of Teachers not to approve TWU's teacher training program.

[149] We agree with the Ontario Court of Appeal in *Trinity Western University v. The Law Society of Upper Canada* that *TWU v. BCCT* is not dispositive. That case concerned the "downstream" effect of the Covenant on students in public school classrooms, in particular whether TWU's Community Covenant and learning environment might foster intolerant attitudes on the part of its graduate teachers.

The issue of access by LGBTQ individuals to the faculty of education was not raised directly. However, we also agree with the Ontario Court of Appeal that the principles in *TWU v. BCCT* are highly relevant to the present case in that it involves balancing freedom of religion against the Law Society's public interest in considering the impact of its decision on other *Charter* values, including sexual orientation equality (paras. 57 and 58).

[150] One such principle is the limited reach of the *Charter* (s. 32). It applies to government, and to the Law Society as a statutory delegate of government, but it does not apply to private persons and institutions. As the majority in *TWU v. BCCT* concluded, TWU as a private institution is exempted in part from human rights legislation and the *Charter* does not apply to it:

> [25] Although the Community Standards are expressed in terms of a code of conduct rather than an article of faith, we conclude that a homosexual student would not be tempted to apply for admission, and could only sign the so-called student contract at a considerable personal cost. TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions. That said, the admissions policy of TWU alone is not in itself sufficient to establish discrimination as it is understood in our s. 15 jurisprudence. It is important to note that this is a private institution that is exempted, in part, from the British Columbia human rights legislation and to which the *Charter* does not apply. To 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. [Emphasis added.]

[151] These are important considerations. TWU's admissions policy does not amount to a breach of the *Charter* — it is not "unlawful discrimination". That is not to say that it does not have an impact on LGBTQ individuals that must be considered, but the lawfulness of TWU's policy is significant to the balancing exercise.

[152] Another principle is that equality guarantees under the *Charter* and provincial human rights legislation, including protection against discrimination based on sexual orientation, are a proper consideration when a statutory decision-maker acts in the public interest (at para. 27):

> While the BCCT was not directly applying either the *Charter* or the province's human rights legislation when making its decision, it was entitled to look to these instruments to determine whether it would be in the public interest to allow public school teachers to be trained at TWU.

[153] The majority in *TWU v. BCCT* also underscored the obligation (at para. 28) to consider issues of religious freedom, quoting Justice Dickson's elegant statement from *Big M Drug Mart Ltd.* which we reproduced earlier. It ends thus:

> 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".

The majority in *TWU v. BCCT* continued (at para. 28):

> 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. [Emphasis added.]

[154] Although the discrimination alleged in *TWU v. BCCT* was not unequal access to teacher training spots for LGBTQ individuals, the majority expressly addressed that question and recognized that the reconciliation of competing rights must take into account the context of private religious institutions (at para. 34):

> Consideration of human rights values in these circumstances encompasses consideration of the place of private institutions in our society and the reconciling of competing rights and values. Freedom of religion, conscience and association coexist with the right to be free of discrimination based on sexual orientation. Even though the requirement that students and faculty adopt the Community Standards creates unfavourable differential treatment since it would probably prevent homosexual students and faculty from applying, one must consider the true nature of the undertaking and the context in which this occurs. Many Canadian universities, including St. Francis Xavier University, Queen's University, McGill University and Concordia University College of Alberta, have traditions of religious affiliations. Furthermore, s. 93 of the *Constitution Act, 1867* enshrined religious public education rights into our Constitution, as part of the historic compromise which made Confederation possible. [Emphasis added.]

[155] The majority then addressed the difficult question of where to draw the line, concluding (at para. 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. [Emphasis added.]

[156] *TWU v. BCCT* thus determined that in balancing competing *Charter* rights and values, the impact of an administrative decision must be assessed on the basis of "concrete evidence", not conjecture. Since there was no specific evidence of harm arising out of the beliefs buttressed by the Community Standards, the restriction on freedom of religion worked by the decision of the B.C. College of Teachers could not be justified. In supporting the order of *mandamus* directing accreditation of TWU's program, the majority noted that the "only reason for denial of certification was the consideration of discriminatory practices" (para. 43):

> In considering the religious precepts of TWU instead of the actual impact of these beliefs on the school environment, the BCCT acted on the basis of irrelevant considerations. It therefore acted unfairly.

[157] It was argued before us that *TWU v. BCCT* should not be followed today. It was said that lower courts may reconsider a decision where, in the words of the Supreme Court of Canada in *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 42:

> … 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.

[158] The last decade has seen an evolutionary advance of the law in the protection of the rights and freedoms of LGBTQ persons as full participants in our society and its institutions, but the essential legal analysis posited in *TWU v. BCCT* has not changed appreciably with respect to the obligation to balance statutory objectives and the *Charter* rights affected by an administrative decision. To the contrary, that balancing exercise has been confirmed and developed in *Doré* and *Loyola*.

[159] The decision of the Supreme Court of Canada in *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 is relevant here. That decision was considered by John B. Laskin, who provided an opinion to the Federation during its consideration of TWU's application. We reproduce and adopt this portion of that opinion (which in general supported the applicability of *TWU v. BCCT* to today's context):

> In *Whatcott*, the Court addressed the constitutional validity of the prohibition of hate speech in Saskatchewan human rights legislation. It was alleged that certain flyers distributed by Whatcott infringed the prohibition by promoting hatred on the basis of sexual orientation; Whatcott maintained that the flyers constituted the exercise of his freedom of expression and freedom of religion. The Court saw the case as requiring it
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> > to balance the fundamental values underlying freedom of expression (and, later, freedom of religion) in the context in which they are invoked, with competing *Charter* rights and other values essential to a free and democratic society, in this case, a commitment to equality and respect for group identity and the inherent dignity owed to all human beings.
>
> In striking this balance, which resulted in its severing certain portions of the prohibition but upholding the remainder, and finding the conclusion that there was a contravention of the legislation unreasonable for two of the four flyers in issue and reasonable for the other two, the Court stated that "the protection provided under s. 2(a) [the freedom of religion guarantee] should extend broadly," and that "[w]hen reconciling *Charter* rights and values, freedom of religion and the right to equality accorded all residents of Saskatchewan must co-exist." It also referred to the "mistaken propensity to focus on the nature of the ideas expressed, rather than on the likely effects of the expression."
>
> Just as in *BCCT*, the Supreme Court in *Whatcott* found the proper balance point between equality and freedom of religion values to be the point at which conduct linked to the exercise of freedom of religion resulted in actual harm. Absent evidence of actual harm, it held in both cases, freedom of religion values must be given effect. [Emphasis added; footnotes omitted.]

[160] In its argument before the chambers judge, the Law Society submitted that the legal landscape had changed so much in this area of the law that the Supreme Court of Canada in *Whatcott* unanimously adopted the following portion of L'Heureux-Dubé J.'s dissent in *TWU v. BCCT* (para. 69):

> I am dismayed that at various points in the history of this case the argument has been made that one can separate condemnation of the "sexual sin" of "homosexual behaviour" from intolerance of those with homosexual or bisexual orientations. This position alleges that one can love the sinner, but condemn the sin. ... The status/conduct or identity/practice distinction for homosexuals and bisexuals should be soundly rejected, as *per* Madam

> Justice Rowles: "Human rights law states that certain practices cannot be separated from identity, such that condemnation of the practice is a condemnation of the person" (para. 228). She added that "the kind of tolerance that is required [by equality] is not so impoverished as to include a general acceptance of all people but condemnation of the traits of certain people" (para. 230). This is not to suggest that engaging in homosexual behaviour automatically defines a person as homosexual or bisexual, but rather is meant to challenge the idea that it is possible to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood.

[161] However, when adopting this portion of Justice L'Heureux-Dubé's judgment, the court in *Whatcott* noted that she was not in dissent on this point. We conclude that the law in this regard has not changed since these views were expressed in 2001.

[162] In summary, while *TWU v. BCCT* is not dispositive of the issues before us, the principles enunciated in that decision provide significant guidance in the present case.

(b) The Balancing Exercise

[163] We turn now to the balancing exercise, and begin with a review of some basic principles.

[164] First, while the rights identified by the Law Society and its allied intervenors are significant and deserve protection and encouragement to flourish in a progressive society, respectfully, the starting premise cannot be that they trump the fundamental religious freedom rights advanced by TWU. The *Charter* does not create a hierarchy of rights with some to be treated as more important than others: *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 15 at para. 26.

[165] Second, the *Charter* rights we have described must be considered and balanced against the statutory objectives of the Law Society, here the "public interest in the administration of justice" and "preserving and protecting the rights and freedoms of all persons": s. 3(a) of the *Legal Profession Act*. Acting in "the public interest" does not mean making a decision with which most members of the profession or public would agree.

[166] Third, the balancing exercise goes beyond simply considering the competing rights engaged and choosing to give greater effect to one or the other, with either course of action being equally reasonable. Rather, the nature and degree of the detrimental impact of the statutory decision on the rights engaged must be considered. The robust proportionality test called for in *Doré* requires no less.

(i) Impact of the decision on religious freedom

[167] As Justice Abella made clear in *Loyola*, the *Charter* right to freedom of religion recognizes and protects the "embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions", including private educational institutions (at para. 60).

[168] In our view, the detrimental impact of the Law Society decision on TWU's right to religious freedom is severe. The legal education of TWU graduates would not be recognized by the Law Society and they could not apply to practise law in this province. TWU's religious freedom rights as an institution are also significantly impacted by the decision. While the Ontario Court of Appeal assumed TWU could continue to operate a law school even if the LSUC refused to recognize the qualifications of its graduates, the effect of non-approval by the Law Society is not so limited. The immediate result of the October resolution "not to approve" was the government's revocation of TWU's ministerial consent under the *Degree Authorization Act*, R.S.B.C. 2002, c. 24. While this revocation may not be irreversible, it represents at this time a complete bar to TWU operating a law school.

[169] We are unable to accept the argument that TWU's freedom of religion is not infringed because it remains free to operate a private law school, even if it is unable to grant degrees that are recognized or accredited by the Law Society. Such a contention fails to recognize that the main function of a faculty of law is to train lawyers.

(ii) Impact of the decision on sexual orientation equality rights

[170] We turn next to consider the impact of the decision on the equality rights of LGBTQ individuals. The Law Society and related intervenors identified two such

impacts, which we have noted earlier. First, they contend there would be fewer law school seats available to LGBTQ students; and second, there would be harm to the dignity and personhood of LGBTQ individuals from the Law Society endorsing a law school with a code of conduct that is offensive to the vast majority of LGBTQ persons because it denies the validity of same-sex marriage. We will consider each impact in turn.

Inequality of access to law school

[171] We accept that if TWU's law school is approved, there is a potential detrimental effect on LGBTQ equality rights. While on the evidence there are LGBTQ students who have voluntarily signed the Covenant and embraced the TWU community's values, it is indisputable that the vast majority of LGBTQ law students could not sign the Covenant.

[172] We have described the adverse effects on LGBTQ persons that would ensue if they were to sign the Community Covenant to gain access to TWU: they would have to either "live a lie to obtain a degree" and sacrifice important and deeply personal aspects of their lives, or face the prospect of disciplinary action including expulsion.

[173] However, as the majority noted in *TWU v. BCCT*, this impact must be considered in context and concretely. Is there evidence that the existence of a law school at TWU would impede access to law school and hence the profession for LGBTQ students?

[174] That precise question was thoroughly considered by the Special Committee of the Federation, the decision-maker with first responsibility for deciding whether the approval of a law school for TWU was in the public interest:

> As a starting point, we are not aware of any evidence that TWU limits or bans the admission to the university of LGBT individuals. A number of those who made submissions to the Federation noted that there are LGBT students at TWU. It is reasonable to conclude that the requirement to adhere to the Community Covenant would make TWU an un welcoming [*sic*] place for LGBT individuals and would likely discourage most from applying to a law school at the university, but it may also be that a faith-based law school would be an attractive option for some prospective law students, whatever

> their sexual orientation. It is also clear that approval of the TWU law school would not result in any fewer choices for LGBT students than they have currently. Indeed, an overall increase in law school places in Canada seems certain to expand the choices for all students. [Emphasis added.]

These findings are entitled to deference; they were based on numerous submissions to the Federation, including legal advice sought by the Federation.

[175] In assessing whether the decision of the Law Society met its public interest objective of ensuring access to the practice of law for LGBTQ individuals, it is incontrovertible that refusing to recognize the TWU faculty will not enhance accessibility. The Law Society does not control where law school seats will be created; it is not a matter, then, of this refusal resulting in the opening up of 60 places in a public "equal access" law school.

[176] Further, it must be recognized that it is the Covenant's refusal to recognize same-sex marriage that is in issue here. The Law Society was prepared to approve the law school if TWU agreed to remove the offending portions of the Covenant requiring students to abstain from "sexual intimacy that violates the sacredness of marriage between a man and a woman". However, even without that term, TWU's faculty of law would be part of an evangelical Christian community that does not accept same-sex marriage and other expressions of LGBTQ sexuality. If we are to assess the detrimental impact of the decision concretely and in context, in reality very few LGBTQ students would wish to apply to study in such an environment, even without the Covenant.

[177] This is not a cynical observation. It was effectively made by the Supreme Court of Canada in *TWU v. BCCT* (at para. 25):

> … we conclude that a homosexual student would not be tempted to apply for admission, and could only sign the so-called student contract at a considerable personal cost. TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions.

[178] TWU is a relatively small community of like-minded persons bound together by their religious principles. It is not for everyone. For those who do not share TWU's beliefs, there are many other options. It has been suggested in argument that TWU

is, in effect, a segregated community, and that the accreditation of its law program would amount to the endorsement of a "separate but equal" doctrine. We are not persuaded that that is a fair characterization. The long discredited "separate but equal" doctrine was offensive because it forced segregation on an oppressed minority. In the context of this case, the members of the TWU community constitute a minority. A clear majority of Canadians support the marriage rights of the LGBTQ community, and those rights enjoy constitutional protection. The majority must not, however, be allowed to subvert the rights of the minority TWU community to pursue its own values. Members of that community are entitled to establish a space in which to exercise their religious freedom.

[179] Thus, while we accept that approval of TWU's law school has in principle a detrimental impact on LGBTQ equality rights because the number of law school places would not be equally open to all students, the impact on applications made, and hence access to, law schools by LGBTQ students would be insignificant in real terms. TWU's law school would add 60 seats to a total class of about 2,500 places in common law schools in Canada. The admission standards for TWU are not anticipated to be lower than those of other law schools; some number of TWU's students would likely be diverted from other faculties of law. As a result, as the Federation concluded, the increase in the number of seats overall is likely to result in an enhancement of opportunities for all students.

[180] Further, as we have noted earlier, the decision not to approve will not increase accessibility to law school for LGBTQ students. The number of seats would remain the same.

Law Society endorsement of the Covenant

[181] As for the public interest objective of the Law Society as a state actor not being seen to endorse the discriminatory aspects of the Covenant by giving TWU the benefit of accreditation, we suggest that this premise is misconceived.

[182] We note parenthetically that TWU is not seeking a financial public benefit from this state actor. This is not the tax break sought in *Bob Jones University v.*

United States, 461 U.S. 574 (1983), a monetary benefit to which Bob Jones University was not otherwise entitled. Accreditation is not a "benefit" granted in the exercise of the largesse of the state; it is a regulatory requirement to conduct a lawful "business" which TWU would otherwise be free to conduct in the absence of regulation. While there is a practical benefit to TWU flowing from the regulatory approval, it is not a funding benefit and the reliance on the comments of a single concurring justice in the *Bob Jones* case is misplaced. Nor do we see *Bob Jones University* as supporting a general principle that discretionary decision-makers should deny public benefits to private applicants.

[183] We return then to the submission that the approval of TWU's law school would amount to endorsing discrimination against LGBTQ individuals. It is significant that the Law Society was prepared to accredit TWU's law school if the Covenant was amended to remove the offending reference to marriage. It is not argued that regulatory approval would then amount to endorsing the continued substantive belief of this evangelical Christian university's views on marriage. In our view, this example underscores the weakness of the premise that regulatory approval amounts to endorsement of the applicant's beliefs.

[184] In a diverse and pluralistic society, this argument must be treated with considerable caution. If regulatory approval is to be denied based on the state's fear of being seen to endorse the beliefs of the institution or individual seeking a license, permit or accreditation, no religious faculty of any kind could be approved. Licensing of religious care facilities and hospitals would also fall into question.

[185] State neutrality is essential in a secular, pluralistic society. Canadian society is made up of diverse communities with disparate beliefs that cannot and need not be reconciled. While the state must adopt laws on some matters of social policy with which religious and other communities and individuals may disagree (such as enacting legislation recognizing same-sex marriage), it does so in the context of making room for diverse communities to hold and act on their beliefs. This approach is evident in the *Civil Marriage Act*, S.C. 2005, c. 33 itself, which expressly

recognizes that "it is not against the public interest to hold and publicly express diverse views on marriage".

[186] That there will be conflicting views and beliefs is inevitable, but as Professor William Galston observes in "Religion and the Limits of Liberal Democracy" (in Douglas Farrow, ed., *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (McGill-Queen's University Press, 2004) at 47 and 49):

> … [P]luralists refuse to resolve these problems by allowing public authorities to determine the substance and scope of allowable belief (Hobbes) or by reducing faith to civil religion and elevating devotion to the common civic good as the highest human value (Rousseau). Fundamental tensions rooted in the deep structure of human existence cannot be abolished in a stroke but must rather be acknowledged, negotiated, and adjudicated with due regard to the contours of specific cases and controversies.
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> …
>
> This does not mean that all religiously motivated practices are equally deserving of accommodation or protection. Some clearly are not. Religious associations cannot be permitted to … endanger the basic interests of children by withholding medical treatment in life-threatening situations. But there is a distinction between basic human goods, which the state must defend, and diverse conceptions of flourishing above that base-line, which the state should accommodate to the maximum extent possible. There is room for reasonable disagreement as to where that line should be drawn. But an account of liberal democracy built on a foundation of political pluralism should make us very cautious about expanding the scope of state power in ways that mandate uniformity.

[187] As the Court noted in *Loyola* at para. 43, "a secular state does not — and cannot — interfere with the beliefs or practices of a religious group unless they conflict with or harm overriding public interests".

[188] We address here the submission, made by the Law Society intervenors and accepted by the Ontario Court of Appeal, that the Community Covenant "is deeply discriminatory, and it hurts". The balancing of conflicting *Charter* rights requires a statutory decision-maker to assess the degree of infringement of a decision on a *Charter* right. While there is no doubt that the Covenant's refusal to accept LGBTQ expressions of sexuality is deeply offensive and hurtful to the LGBTQ community, and we do not in any way wish to minimize that effect, there is no *Charter* or other

legal right to be free from views that offend and contradict an individual's strongly held beliefs, absent the kind of "hate speech" described in *Whatcott* that could incite harm against others (see paras. 82, 89-90 and 111). Disagreement and discomfort with the views of others is unavoidable in a free and democratic society.

[189] Indeed, it was evident in the case before us that the language of "offense and hurt" is not helpful in balancing competing rights. The beliefs expressed by some Benchers and members of the Law Society that the evangelical Christian community's view of marriage is "abhorrent", "archaic" and "hypocritical" would no doubt be deeply offensive and hurtful to members of that community.

4.4 Conclusion on *Charter* Balancing

[190] The TWU community has a right to hold and act on its beliefs, absent evidence of actual harm. To do so is an expression of its right to freedom of religion. The Law Society's decision not to approve TWU's faculty of law denies these evangelical Christians the ability to exercise fundamental religious and associative rights which would otherwise be assured to them under s. 2 of the *Charter.*

[191] In light of the severe impact of non-approval on the religious freedom rights at stake and the minimal impact of approval on the access of LGBTQ persons to law school and the legal profession, and bearing in mind the *Doré* obligation to ensure that *Charter* rights are limited "no more than is necessary" (para. 7), we conclude that a decision to declare TWU not to be an approved law faculty would be unreasonable.

[192] In our view, while the standard of review for decisions involving the *Doré*/*Loyola* analysis is reasonableness and there may in many cases be a range of acceptable outcomes, here (as was the case for the minority in *Loyola*) there can be only one answer to the question: the adoption of a resolution not to approve TWU's faculty of law would limit the engaged rights to freedom of religion in a significantly disproportionate way — significantly more than is reasonably necessary to meet the Law Society's public interest objectives.

[193] A society that does not admit of and accommodate differences cannot be a free and democratic society — one in which its citizens are free to think, to disagree, to debate and to challenge the accepted view without fear of reprisal. This case demonstrates that a well-intentioned majority acting in the name of tolerance and liberalism, can, if unchecked, impose its views on the minority in a manner that is in itself intolerant and illiberal.

V. CONCLUSION

[194] The appeal is dismissed.

"The Honourable Chief Justice Bauman"

"The Honourable Madam Justice Newbury"

"The Honourable Mr. Justice Groberman"

"The Honourable Mr. Justice Willcock"

"The Honourable Madam Justice Fenlon"