CITATION: Trinity Western University v. The Law Society of Upper Canada, 2015 ONSC 4250
DIVISIONAL COURT FILE NO.: 250/14
DATE: 20150702

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MARROCCO A.C.J., THEN & NORDHEIMER JJ.

BETWEEN:	
TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT Applicants	*R. Staley, D. Bell & R. Agarwal*, for the applicants
– and –	
THE LAW SOCIETY OF UPPER CANADA Respondent	*G. Pratte, N. Effendi & D. Ault*, for the respondent
– and –	
THE ATTORNEY GENERAL OF CANADA, CHRISTIAN LEGAL FELLOWSHIP, JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS, EVANGELICAL FELLOWSHIP OF CANADA, CHRISTIAN HIGHER EDUCATION CANADA, OUT ON BAY STREET, OUTLAWS, CRIMINAL LAWYERS' ASSOCIATION and THE ADVOCATES' SOCIETY Interveners	*C. Rupar*, for the intervener, The Attorney General of Canada *P. Jervis & D. Ross*, for the intervener, Christian Legal Fellowship *D. Santoro*, for the intervener, Justice Centre for Constitutional Freedoms *A. Polizogopoulos & K. Barsoum Debs*, for the interveners, Association for Evangelical Fellowship of Canada and Christian Higher Education Canada *M. Edwardh, F. Mahon & P. Saguil*, for the interveners, Out on Bay Street and OUTlaws

) *J. Norris & B. Davies*, for the intervener,
) Criminal Lawyers' Association
)
) *C. Paliare & J. Radbord*, for the intervener,
) The Advocates' Society
)
)
) **HEARD at Toronto:** June 1, 2, 3 & 4, 2015

BY THE COURT:

[1] On April 24, 2014, the elected Benchers of the respondent, the Law Society of Upper Canada, voted to deny accreditation to the law school that the applicant, Trinity Western University ("TWU"), proposed to create. As a consequence of that decision, the applicants bring this application for judicial review by which they seek an order declaring that the respondent's decision was unauthorized and otherwise invalid and approving TWU's application for accreditation of its proposed law school or, in the alternative, an order setting aside the respondent's decision and remitting the matter back to the respondent to be re-heard by Convocation in accordance with this court's reasons.

[2] We should say at the outset that, notwithstanding the alternative relief formally sought in the Notice of Application for Judicial Review, the applicants were clear, during the course of their submissions, that they did not wish to have this matter remitted back to the respondent for a fresh decision. The applicants fairly expressed the view that, if they were successful, they much preferred this court to make the determination that the applicants say that the respondent should have made. In that way, there would be a measure of finality to the matter and the issue could move forward, either for TWU's plans or for any further appeal of the matter.

[3] With that said, we begin by setting out the factual background.

I: The factual background

Trinity Western University

[4] TWU is a private, post-secondary institution in Langley, British Columbia. It was established in 1962. In 1969, the British Columbia Legislature enacted the *Trinity Junior College Act*, S.B.C. 1969, c. 44. The *Trinity Junior College Act* states that TWU's education is to be provided with "an underlying philosophy and viewpoint that is Christian." TWU was recognized as a degree-granting institution by the government of British Columbia in 1979. In 1985, the British Columbia Legislature changed TWU's name to its current name and authorized TWU to offer graduate degrees.

[5] TWU's purpose is to provide a Christian post-secondary education. TWU offers over fifty undergraduate and graduate programs, including professional programs in nursing, education, business and counselling psychology. Approximately 4,000 undergraduate and graduate students attend TWU.

[6] TWU is, and has always been, an evangelical Christian community. TWU has the following Mission Statement:

> The mission of Trinity Western University, as an arm of the Church, is to develop godly Christian leaders: positive, goal-oriented university graduates with thoroughly Christian minds; growing disciples of Christ who glorify God through fulfilling the Great Commission, serving God and people in the various marketplaces of life.

[7] A high percentage of the students who enrol at TWU identify themselves as Christians. TWU says that it is committed to maintaining a campus environment in which students and faculty have the intellectual freedom to explore and discuss many contemporary social, political and religious issues. To ensure that TWU's campus environment remains conducive to the free exchange of ideas and open debate, TWU adheres to the Association of Universities and Colleges of Canada's policy on Academic Freedom.

[8] However, TWU is clear that it is an evangelical Christian university, teaching liberal arts, sciences, and professional studies, founded on religious principles. TWU's curriculum is

developed and taught in a manner consistent with this religious worldview. As expressed in its Mission Statement, TWU is an arm of the evangelical Free Church of Canada, which is a Protestant Christian denomination.

[9] At the same time, TWU says that its students may hold and express diverse opinions on moral, ethical, and religious issues. TWU students are not subject to discipline or censure for holding or expressing opinions that diverge from TWU's stated position on moral, ethical, or religious questions. In particular, students are free to hold and express diverse viewpoints on the legal, religious, and social issues arising in relation to homosexuality and same-sex relationships, even if they are contrary to TWU's religious beliefs and positions. TWU says that students are encouraged to discuss and debate all sorts of different viewpoints inside and outside of class in the spirit of a classic liberal arts university education. TWU, as a Christian organization and Christian community, may not agree with such opinions expressed, but it says that its students are free to hold and express them, and such views are freely and respectfully debated and discussed.

[10] Evangelical Christians are a religious subculture in Canada. A subculture is a group within a larger society that is distinctive in beliefs, behaviours, customs, language or other factors. Evangelical Christians hold distinctive beliefs, including the authority of the Bible, the unique salvific work of Jesus Christ, the importance of the conversion experience and the importance of active faith expressed through church attendance, Bible reading, prayer and evangelism.

[11] Evangelicalism is a trans-denominational movement within Protestant Christianity. Evangelicals believe in the doctrine of salvation by grace through faith in Jesus Christ's atonement. Evangelical Christians believe in the centrality of the conversion experience in receiving salvation, believe in the authority of the Bible as God's revelation to humanity, and have a commitment to evangelism or sharing the Christian message with others. Evangelical Christians commonly establish and hold codes of conduct. Sexual moral purity is a behavioural expectation and includes abstaining from sexual intimacy outside of traditional marriage, and certain behaviours thought to lead to sexual impurity.

[12] Of central importance to the issues raised by this application is the Community Covenant. The background to the Community Covenant involves TWU's affirmation that the Bible is the authoritative and divinely inspired word of God, and that people reach their fullest potential by participating in a community mutually committed to the observation of Biblical ethics and morality. This belief is foundational to TWU's approach to community development and finds its expression in the Community Covenant.

[13] All TWU students read, understand and agree to the terms of the Community Covenant. The Community Covenant is a code of conduct which embodies TWU's evangelical Christian religious values. Those values are derived from the Bible and traditional evangelical Christian beliefs on human dignity and moral conduct. These religious beliefs give rise to a code of conduct that encourages behaviour that evangelical Christians believe is in accordance with Biblical teaching and discourages behaviour that evangelical Christians believe contradicts Biblical morality. Although the focus of the various proceedings involving TWU's proposed law school has focused on issues of sexual morality, TWU says that the Community Covenant is much more than that. For example, students and faculty commit themselves to virtues such as love, joy, peace, patience, kindness, goodness, faithfulness, gentleness, self-control, compassion, humility, forgiveness, peacemaking, mercy and justice. The Community Covenant prohibits, amongst other things, harassment (including harassment or discrimination towards LGBTQ individuals), plagiarism, stealing and under-age alcohol consumption, none of which, according to TWU, would be atypical compared to codes of conduct at other university campuses.

[14] One of the central issues that arises from the Community Covenant is the prohibition in the Community Covenant against "sexual intimacy that violates the sacredness of marriage between a man and a woman". Marriage within the evangelical Christian tradition has been defined as an exclusive, lifelong, covenantal union of male and female. Portions of the Bible are interpreted as the foundation for that belief. Because evangelical Christians understand marriage as divinely instituted, it takes a central position in the theological understanding of the good Christian life for human beings. Consequently, those who are unmarried are expected to abstain from sexual relations, living chaste and celibate lives. Same sex intercourse is believed to be

contrary to biblical teaching and therefore morally unacceptable. These teachings about sexual morality are integral to evangelical Christian faith.

[15] TWU does not overtly ban or prohibit admission to lesbian, gay, bisexual or transgendered students or faculty or encourage discrimination of any kind against LGBTQ individuals. TWU says that its community offers an environment in which sexual minorities are supported, loved, and respected. This is required by evangelical beliefs that each human being is created by God and therefore has intrinsic dignity that demands respect. Every evangelical Christian has an obligation to love their neighbor as themselves. Any form of harassment or prejudicial treatment is contrary to the Community Covenant and to TWU's evangelical Christian beliefs. Consistent with evangelical Christianity, members of the TWU community are required and accountable to "treat people and ideas with charity and respect" and "demonstrate concern for the well-being of others". Harassment, shaming, ostracizing, contempt, humiliation, intimidation or insults are intolerable at TWU. Homophobic, disrespectful or discriminatory remarks or behaviour is strictly unacceptable.

[16] TWU points out that codes of conduct, such as the one in place at TWU through the Community Covenant, are common within Christian universities and colleges. These codes address a range of issues from health, safety and legal issues to weapons on campus, verbal, sexual and physical harassment, and privacy and security issues. Policies also address things like plagiarism and academic dishonesty. Codes of conduct in the context of Christian schools also relate to moral standards and behavioural expectations.

[17] TWU also points out that the Community Covenant is periodically reviewed. Staff, faculty, and students have provided input in prior reviews of the Community Covenant. Because of these reviews, the Community Covenant reflects the dominant religious views of the evangelical Christian community represented and served by TWU. TWU expects that individuals who choose to become members of its community will follow the Community Covenant. Accordingly, TWU says that it does not actively seek out cases of non-compliance with the Community Covenant by its students, faculty or staff. TWU acknowledges, however, that there "may be instances where a person falls short of his or her commitment". The Provost

of TWU says that wilful infractions of the Community Covenant are usually made known by a complaint from another member of the community.

Brayden Volkenant

[18] Brayden Volkenant is a graduate of TWU's Bachelor of Arts (Business) program. He is currently employed by TWU. Brayden is an evangelical Christian. Brayden acknowledged and accepted the Community Covenant. Brayden wants to go to law school. TWU's proposed law school would be Brayden's "top choice" of a Canadian law school. Brayden wishes to "have the option" of applying to work in Ontario after graduating from law school. Brayden also wishes to "have the option" of applying to be a licensee of the respondent. Brayden attended at the respondent's Convocation, on April 24, 2014, as part of TWU's deputation.

The Law Society of Upper Canada

[19] The respondent was created in 1797 to provide the Province of Ontario (then the Province of Upper Canada) with a "learned and honourable body, to assist their fellow subjects as occasion may require, and to support and maintain the constitution of the said Province".[1] The Law Society's original enabling statute provided:

> That no person other than the present Practitioners, and those hereafter mentioned, shall be permitted to practise at the bar of any of His Majesty's Courts in this Province, unless such person shall have been previously entered of and admitted into the said Society as a Student of the Laws, and shall have been standing in the books of the said Society for and during the space of five years, and shall have conformed himself to the rules and regulations of the said Society, and shall have been duly called and admitted to the practice of the law as a Barrister, according to the Constitutions and establishment thereof [...].

[20] Since its formation, the respondent has been the sole authority for determining who could practice law in Ontario, and the requirements associated therewith. In other words, the respondent not only determined who could be admitted to the Bar in Ontario but also the educational requirements for admission.

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[1] *An Act for the better regulating the Practice of Law*, 37th George III. A.D. 1797, c. XIII

[21] The respondent says that the principles of equity and diversity have been at the heart of its governance of the legal profession in Ontario for the more than two hundred years of its existence. The respondent says that it has, throughout its history, actively sought to redress the evils of discrimination. Indeed, the respondent says that it was actively so engaged long before the advent of constitutional and statutory obligations to do so, such as are now found in the *Canadian Charter of Rights and Freedoms* and the *Human Rights Code*, R.S.O. 1990, c. H.19. In that regard, some of the historical background should be mentioned.

[22] In 1833, the Legislature of Upper Canada abolished the requirement that persons called to the Bar take a religious oath as a qualification for admission to the Bar, thus ending discrimination barring Roman Catholics and non-conformists from entering the legal profession in Upper Canada.

[23] In 1855, a black Ontarian was called to the Bar.

[24] In 1893, the definition of "person" was amended so that women were no longer statutorily excluded from becoming members of the Bar.

[25] In the modern context, the respondent continued this approach by adopting, in 1991, a Statement of Policy in which it affirmed that every member of the respondent has a right to equal treatment with respect to conditions of employment without discrimination because of, *inter alia*, race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, gender, sexual orientation and marital status. This approach was again affirmed in April 1995, and yet again in 1997.

[26] Until 1957, the respondent, through the operation of Osgoode Hall Law School, maintained a monopoly on legal studies that led to being admitted to the bar. Although universities were free to teach law, the respondent did not officially adopt law degree programs in other institutions as part of the licensing process in Ontario. In 1957, following discussions between the respondent and various universities, it was agreed that Ontario universities would be able to develop an LL.B. program (with a pre-requisite of two undergraduate years). For the first time, the respondent recognized the degrees of law schools other than its own as satisfying a core licensing requirement.

[27] In 1959, the respondent established the Bar Admission Course (consisting of an articling period, classroom instruction and examinations). Admission to the Bar Admission Course required some undergraduate university training and an LL.B. In 1968, the respondent transferred Osgoode Hall Law School to York University, and thereafter ceased to offer courses leading to the grant of a law degree. The respondent continued to maintain the Bar Admission Course. While universities were allowed to provide academic legal education, the power to set conditions for the issuance of licences to practice law in Ontario remained within the exclusive jurisdiction of the respondent.

[28] In accordance with its governing statute, the respondent regulates the legal profession in the public interest and exercises discretionary public law powers. Section 4.2 of the *Law Society Act*, R.S.O. 1990, c. L.8, states, in part:

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

[29] The *Law Society Act* continues to vest in the respondent control over licensee education, admission, discipline and unauthorized practice. No person can practice law in Ontario without a licence and the respondent has the exclusive authority to establish the requisite classes of licence. As well, under the *Law Society Act*, the respondent has the exclusive authority to prescribe the qualifications and requirements to obtain a licence to practice law.

[30] Pursuant to its by-law making powers, the respondent introduced accreditation of law schools as part of its licensing process. By-Law 4 prescribes, *inter alia*, the requirements for the issuance of a Class Ll licence:

> 1. The applicant must have one of the following:

> i. A bachelor of laws or juris doctor degree from a law school in Canada that was, at the time the applicant graduated from the law school, an accredited law school.
> ii. A certificate of qualification issued by the National Committee on Accreditation appointed by the Federation of Law Societies of Canada and the Council of Law Deans.
>
> 2. The applicant must have successfully completed the applicable licensing examination or examinations set by the Society by not later than two years after the end of the licensing cycle into which the applicant was registered.

An "accredited law school" is defined as a "law school in Canada that is accredited by the Society".

TWU's application

[31] The respondent began the process of considering TWU's application, to have its proposed law school accredited, in January 2014. At the February 2014 Convocation, the then Treasurer outlined the process that the respondent intended to follow to determine the accreditation of TWU.[2] TWU was invited to provide written submissions, which it did on April 2, 2014. The public and the profession were also invited to provide written submissions. The respondent also considered the reports of the Federation of Law Societies and the submissions it received, along with various memoranda on legal issues.

[32] The respondent's decision making process was designed to have two components. First, at Convocation on April 10, 2014, the Benchers discussed the TWU application and raised questions so that TWU would have the opportunity to respond. No vote was taken at this meeting. On April 22, 2014, TWU provided written reply submissions to some of the issues raised at the April 10 Convocation. Second, at the Convocation on April 24, 2014, TWU made oral reply submissions responding to the Benchers' questions from the April 10 Convocation and to the written comments the respondent received on the matter. Subsequently, numerous views were offered by the Benchers in an open discussion, following which Convocation voted. In the

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[2] Convocation is the monthly meeting of the Benchers of the Law Society who are, in essence, the directors who govern the Law Society.

end result, Convocation voted to reject the accreditation of TWU's law school by a vote of 28 to 21 with one abstention.

II: The standard of review

[33] Before turning to the central issue raised by this application, we will address the issue of the appropriate standard of review. Initially, that appeared to be unnecessary, since, in their main factum, the applicants took the position that the standard of review is reasonableness. The same position was taken by the respondent. All of the intervenors, save for The Justice Centre for Constitutional Freedoms, either asserted that the standard of review is reasonableness or were silent on the issue. Only The Justice Centre for Constitutional Freedoms took the position that the appropriate standard of review is correctness.

[34] However, in their reply factum, the applicants reversed their original position that the appropriate standard of review is reasonableness, and asserted that the appropriate standard of review is correctness. The professed reason for this reversal of position was the fact that, in the interim, the Supreme Court of Canada had released its decision in *Mouvement laïque québécois v. Saguenay (City)* [2015] S.C.J. No. 16, that the applicants contend changed the legal landscape on this issue.

[35] We do not agree that the decision in *Saguenay* substantively changed the appropriate legal principles that are to be applied to the question of the applicable standard of review as were set out in great detail in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190. Indeed, the decision in *Saguenay* expressly adopts the principles from *Dunsmuir*. The majority in *Saguenay* did apply the correctness standard to one question that arose in that case, that is, "the scope of the state's duty of neutrality that flows from freedom of conscience and religion" (para. 51) as it arose in the context of that appeal. As we shall explain, that question of general importance does not arise in this case. Consequently, and for the following reasons, we conclude that the standard of review applicable to the respondent's decision is reasonableness.

[36] The applicants first submit that the standard of review is correctness because the issue that was before the respondent for determination was a general question of law that is of

importance to the legal system and that falls outside the particular expertise of the respondent. We do not accept that submission. While the issue may raise a general issue of law, as most issues involving *Charter* rights will do in the broadest sense, the decision that the respondent was called upon to make was not one of general application. It was specific to the context of the regulation of the legal profession in Ontario, the historical background to the respondent's role as the regulator of the legal profession, and the statutory authority under which the respondent operates as that regulator. As we shall develop more fully, when we get to the central question, the respondent's decision depends very much on that specific context for its determination. It is an issue that did not allow for only one conclusion but, rather, required the respondent to consider a number of different factors in arriving at a decision that was consistent with the particular authority that the respondent was statutorily mandated to exercise. It was the type of decision that was described by the majority in *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607 at para. 2:

> 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.

[37] In making its decision, the respondent was required to follow the statutory authority that was given to it by the *Law Society Act* pursuant to which it is directed to exercise "its functions, duties and powers" in the public interest and to maintain and advance the cause of justice and the rule of law. The respondent was uniquely qualified to determine how the public interest, as it relates to the regulation of the legal profession in this Province, would be best advanced. Its conclusion, in that regard, should normally be evaluated on a standard of reasonableness, as the decision in *Saguenay* itself points out. At para. 46 of that decision, Gascon J. said, in part:

> … the Court noted that, on judicial review of a decision of a specialized administrative tribunal interpreting and applying its enabling statute, it should be presumed that the standard of review is reasonableness [citations omitted].

[38] That presumptive approach is reflected in other decisions of the Supreme Court of Canada, notably *Dunsmuir* and, more recently, *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395. In *Doré*, for example, the court said, at para. 48:

> This case, among others, reflected the increasing recognition by this Court of the distinct advantage that administrative bodies have in applying the *Charter* to a specific set of facts and in the context of their enabling legislation (see *Conway*, at paras. 79-80).

[39] The decision in *Doré* also identified the danger inherent in a conclusion that just because *Charter* rights are implicated in a decision, a standard of review of correctness must be adopted. In refuting that suggestion, the court said, at para. 51:

> The alternative – adopting a correctness review in every case that implicates *Charter* values – will, as Prof. Mullan noted, essentially lead to courts "retrying" a range of administrative decisions that would otherwise be subjected to a reasonableness standard: [quotation omitted].

[40] As the decision in *Saguenay* also points out, it is important not to apply an overly broad characterization to questions posed as being ones of general legal interest. At para. 48, Gascon J. said:

> As LeBel and Cromwell JJ. pointed out in *Mowat* (at para. 23), however, it is important to resist the temptation to apply the correctness standard to all questions of law of general interest that are brought before the Tribunal: [quotation omitted].

[41] The nature of the question that was before the respondent for determination allowed for different answers to be given, not only different answers at the time but different answers at different times when the question might arise. It is also a question that might allow for different answers among different professions, who operate under different statutory and regulatory regimes.

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

[43] On the issue of the respondent's expertise, we should mention the argument, advanced by the applicants, that, because the respondent sought a legal opinion on this matter, that fact, in effect, amounts to an acknowledgement by the respondent of its lack of expertise to address the question. It is difficult to give much credence to that argument. Many administrative tribunals, who are well recognized as being expert tribunals, have legal advice and advisors available to them. Indeed, some expert tribunals have independent counsel assigned to them and the hearings that they conduct. For example, an Inquiry Committee of the Canadian Judicial Council has independent counsel. It would be difficult to conclude that, as a consequence, the Inquiry Committee is then demonstrating that it lacks the expertise to investigate the proper conduct of judges.

[44] We will address one final argument put forward by the applicants in support of their contention that a standard of review of correctness ought to apply to the respondent's decision. The applicants assert that the fact that the respondent did not give any reasons for its decision means that this court should not afford any deference to the decision and should, consequently, apply the correctness standard. We note that this argument was first raised at the hearing of this application. It was not raised in either the applicants' main factum or in their reply factum. Indeed, notwithstanding the various criticisms that were levelled by the applicants at the respondent's decision in their written material, at no point was the absence or adequacy of reasons raised as a complaint.

[45] The situation here is, of course, different than the normal situation where this court is asked to review a tribunal's decision. In the normal situation, the tribunal will constitute a panel of persons that will hear a matter and then render a decision. In that instance, reasons are to be expected and are normally given. Here we have a "tribunal" that consisted of forty elected Benchers and eight lay Benchers, who reached their decision in Convocation by way of a vote, after speeches were delivered both for and against the proposed resolution. The decision in this case was, consequently, not the result of the normal deliberative process of a tribunal but, rather,

is more akin to the decisions reached by elected bodies such as Parliament, Provincial Legislatures and municipal councils.

[46] That said, we acknowledge that it was still open to the respondent to provide reasons for its decision.[3] In this case, the respondent chose not to provide such reasons but to allow the record, the speeches made by the Benchers who spoke on the issue, and the vote, to represent the reasons. In fairness, we should note that the respondent received legal advice that it could proceed in that fashion. While it might have been preferable for the respondent to have provided reasons, given the nature of the question being decided, it is difficult to be overly critical of the respondent for not proceeding in that fashion. The respondent is not, after all, to be held to a standard of perfection.

[47] In respect of this submission, we would note three points, all of which can be drawn from the Supreme Court of Canada's decision in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708. First, is that the adequacy of reasons is not a stand-alone basis for quashing a decision. As the court said, at para. 14:

> It is a more organic exercise – the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes.

[48] Second, and as we shall develop a bit further below, reasons are not always required: *Newfoundland Nurses* at para. 20. Third, where reasons are not given, or are not viewed as adequate, the court should first seek to supplement the reasons "before it seeks to subvert them" (para. 12). This exercise includes the court looking at the record in order to assess the reasonableness of the decision. As the court said, in *Newfoundland Nurses* at para. 15:

> This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

[49] In the absence of reasons, what is important, when considering the appropriate standard of review, is whether it is possible for this court, on a review, to understand the basis upon which

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[3] We note, in that regard, that under its prior statutory regime, the Benchers would, from time to time, provide reasons for disciplinary decisions notwithstanding that those decisions were also reached in Convocation.

the decision was reached, and the analysis that was undertaken in the process of reaching that decision. We have no difficulty in concluding that this court can achieve that understanding on the record that is before us.

[50] We would add that an elected body that reaches a decision, which is then the subject of a judicial review, does not lose the right to have its decision adjudicated on a reasonableness standard just because there are no reasons for a court to review. Indeed, given the democratic process that is inherent in reaching such a decision, it is likely unrealistic to expect that reasons will be provided. This point was directly addressed in *Catalyst Paper Corp. v. North Cowichan (District),* [2012] 1 S.C.R. 5 where McLachlin C.J.C. said, at para. 29:

> Formal reasons may be required for decisions that involve quasi-judicial adjudication by a municipality. But that does not apply to the process of passing municipal bylaws. To demand that councillors who have just emerged from a heated debate on the merits of a bylaw get together to produce a coherent set of reasons is to misconceive the nature of the democratic process that prevails in the council chamber. The reasons for a municipal bylaw are traditionally deduced from the debate, deliberations and the statements of policy that give rise to the bylaw.

[51] We conclude, therefore, that the appropriate standard of review is reasonableness.

III: Jurisdiction

[52] There is no dispute between the parties that the respondent had jurisdiction to consider whether to accredit TWU's law school. The parties disagree, however, over the ambit of the respondent's authority in this regard, that is, what matters the respondent could, and could not, take into consideration in arriving at its decision.

[53] The applicants submit that the sole focus of the respondent in determining the issue of accreditation is whether TWU's law school would graduate competent lawyers. The applicants say that that is the sole function of the respondent under its governing statute, the *Law Society*

Act.[4] The applicants submit that this sole function is set out in s. 4.1 of the *Law Society Act*, which reads:

> It is a function of the Society to ensure that,
>
> (a) all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide; and
>
> (b) the standards of learning, professional competence and professional conduct for the provision of a particular legal service in a particular area of law apply equally to persons who practise law in Ontario and persons who provide legal services in Ontario.

[54] The applicants proceed from this submission to further submit that the respondent could only consider matters that affected the professional competence and conduct of TWU graduates in arriving at its conclusion on whether to accredit TWU's law school. More specifically, the applicants submit that it was not open to the respondent to consider broader public interests in reaching its decision.

[55] On that latter point, the applicants assert that the public interest component of the respondent's authority, as set out in s. 4.2 (that we have reproduced at para. 28 above) is expressly subservient to the function of the respondent set out in s. 4.1. In other words, according to the applicants, the only public interest that the respondent can consider is the public interest in having lawyers who are competent.

[56] We do not agree with the applicants' submissions on this point for a number of reasons. First, s. 4.1 refers to "a" function of the respondent, not "the" function of the respondent. The wording would thus suggest that s. 4.1 is meant to expressly identify one of the functions of the respondent, not to mandate that the respondent has but a singular function. That conclusion is reinforced by the French version of s. 4.1 that begins:

> L'une des fonctions du Barreau est de veiller à ce que …

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[4] The applicants sought to gain support for this submission by referring to one legal opinion, among others that the respondent had received, that stated that s. 4.1 of the *Law Society Act* "sets out the functions of the Society". As will be seen, we do not agree with that opinion.

In English, those words translate to:

> One function of the Society is to ensure that …

[57] Second, s. 4.2 refers to the plural "functions" and not the singular "function". Third, a complete reading of the *Law Society Act* shows that the respondent is empowered to carry out more functions than just the one set out in s. 4.1. Fourth, there is nothing in the wording of s. 4.2 that restricts its application solely to s. 4.1. Had the Legislature intended to so restrict s. 4.2, it would have been a simple matter, for example, to have had s. 4.2 begin: "In carrying out its functions, duties and powers under s. 4.1 of this Act …".

[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.

IV: The 2001 *BCCT* decision

[59] The next issue to be determined is the applicants' assertion that the issues raised in this application have already been decided, in their favour, by the Supreme Court of Canada's decision in *TWU University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772. Accordingly, the applicants say that there is no issue left to resolve.

[60] We do not accept that central contention by the applicants. The issue raised before the Supreme Court of Canada in *BCCT* involved different facts, a different statutory regime, and a fundamentally different question. Under its statute, the British Columbia College of Teachers was mandated to:

> …establish, having regard to the public interest, standards for the education, professional responsibility and competence of its members …

It will be seen therefore that, unlike the respondent, the public interest mandate of the British Columbia College of Teachers was directly, and solely, linked to the setting of standards for the education, professional responsibility and competence of its members.

[61] In addition, it is of significant importance to a proper understanding of the decision in *BCCT* to recognize that the evidence in that case did not show that any person had been denied admission to the TWU teachers' programme because of a refusal to sign the Community Standards document.[5] Specifically, Iacobucci and Bastarache JJ. said, at para. 22:

> There is no evidence before this Court that anyone has been denied admission because of refusal to sign the document or was expelled because of non-adherence to it. On the other hand, there is evidence that not all students admitted to TWU adhere to the Christian world view.

[62] Whatever the evidence was before the court in *BCCT*, the evidence in this case is directly opposite to that conclusion. In this case, it is admitted that no person can become a student at TWU's law school unless they sign the Community Covenant. Individuals who refuse to sign the Community Covenant will, perforce, be denied admission.

[63] The evidence in this case also makes it clear that any student who signs the Community Covenant, but who then does not adhere to its restrictions (whether on or off campus), is at risk of being expelled. This point is made in the Community Covenant itself where, among others, the following statements appear:

> TWU reserves the right to question, challenge or discipline any member in response to actions that impact personal or social welfare.
>
> …
>
> The University also provides formal accountability procedures to address actions by community members that represent a disregard for this covenant.

[64] The approach to transgressions of the Community Covenant are then referred to, and expanded upon, in TWU's Student Handbook, where the following statement appears:

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[5] While the precise document at issue in the *BCCT* case was not put in the record before us, despite a request for it, we were told that the document was the equivalent of the Community Covenant.

> If a student, in the opinion of the University, is unable, refuses or fails to live up to their commitment, the University reserves the right to discipline, dismiss, or refuse re-admission to the University.

[65] Further on this point, while TWU may not "actively seek out cases of non-compliance with the Community Covenant by its students, faculty or staff"[6], it is clear that there is a positive obligation on every member of TWU, especially its students, to report any violations of the Community Covenant. This is made clear in the Student Handbook:

> At a grass roots level, it is expected and encouraged that students, staff and faculty will hold each another[*sic*] accountable to the commitments each has made to the University and community.
>
> …
>
> The student accountability process may be initiated as a result of a complaint against a student brought to Student Life by another member of the community or as a result of concerns from the community regarding a student's conduct.

[66] Another distinction between this case and the case in *BCCT* is that there was apparently no evidence before the court in *BCCT* of any limitations on the availability of positions at universities for any person who wished to pursue the required program to become a teacher. This appears to have been of some significance, to the conclusion reached in that case, that persons adversely affected by the admissions policy of TWU would simply not apply to that programme, but enrol someplace else. Indeed, in *BCCT*, Iacobucci and Bastarache JJ. said, at para. 35:

> While homosexuals may be discouraged from attending TWU, a private institution based on particular religious beliefs, they will not be prevented from becoming teachers.

[67] Once again, the evidence in this case is to the contrary. In this case, there is evidence of a substantial limitation on the number of available spots at Canadian law schools. The evidence is that, in 2013, there were approximately 9,000 law school applicants in Canada and only 2,782 law school spots. In Ontario, the number of applicants was 4,758 for 1,502 spots. In other words, in rough terms, there were three applicants for every single spot available at a law school.

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[6] affidavit of Robert Wood, para. 44

At some particular law schools, the constraints were worse. For example, for the University of Toronto law school, the ratio was ten to one. Consequently, it is clear that, in this case, being eliminated from TWU as a place to attend law school means, for many persons, that their likelihood of gaining acceptance to any law school is decreased. Absent access to a law school, of course, persons cannot pursue a legal education or their dream of becoming a lawyer.

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

[69] Another distinction is that neither the British Columbia College of Teachers nor the Supreme Court of Canada engaged in a human rights analysis under the applicable human rights legislation. Rather, it appears that the Supreme Court of Canada assumed that TWU was exempt from that legislation by virtue of what is now s. 41 of the *Human Rights Code*, R.S.B.C. 1996, c. 210. However, in this case, as we shall comment on further below, the respondent is subject to the *Human Rights Code*, R.S.O. 1990, c. H.19. The respondent was therefore required to comply with the requirements of the *Code* in reaching its decision.

[70] Lastly on this point, and although it is not integral to our decision, we observe that the area of human rights is one that continues to evolve. The attitudes of the general population towards such issues changes almost daily. Certainly those attitudes, as they relate to the issues that are raised in this case, especially towards LGBTQ persons, have changed considerably in the last fifteen years. As such, this area of law is probably the most fluid of any area of law in terms

of the appropriate application of legal principles and the context in which they come to be applied. Some of the presumptions or predispositions that may have existed in the past, and which may have informed decisions at that time, cannot now be safely relied upon for the continuation of attitudes that were previously enunciated.[7] The Supreme Court of Canada has itself recognized that reality in cases, such as *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, where McLachlin C.J.C. said, at para. 42:

> Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.

[71] Not only have there been significant developments in the law as they relate to LGBTQ individuals since 2001, as we have already explained, the circumstances and evidence in this case has, in our view, fundamentally shifted the parameters of the debate.

[72] All of that is not to say that the decision in *BCCT* is not an important consideration in the resolution of the issues that are presented to us. By way of just one example, the Supreme Court held in *BCCT* that it was open to the British Columbia College of Teachers "to consider discriminatory practices as part of its evaluation of TWU's application" (para. 50), just as the respondent has here. But it is an overstatement to say that the decision in *BCCT* preordains the result that this court should arrive at in this case or, for that matter, the decision that the respondent ought to have reached.

V: Infringement of freedom of religion

[73] A first step in the analysis of the reasonableness of the respondent's decision is a determination whether the decision involves an infringement of the applicants' freedom of religion. If there is no infringement, then there is no basis to challenge the respondent's decision.

[74] The scope of freedom of religion has been addressed by the Supreme Court of Canada in many cases including, most recently, in *Loyola High School v. Quebec (Attorney General)*, [2015] S.C.J. No. 12. But, as was noted in that decision, the foundation for our approach to

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[7] In some judicial systems, such changes in attitude are referred to as "evolving standards".

freedom of religion can be traced back to the decision of Dickson J. in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 where he said, at para. 94(QL):

> 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.

[75] However, Dickson J. added an important caveat to that enunciation of the concept of freedom of religion. In summarizing the purpose of freedom of religion under the *Charter,* he said, at para. 123(QL):

> 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. [emphasis added]

[76] We believe it is appropriate, at this point, to make one point perfectly clear. No party, in the course of these proceedings, has suggested that TWU, or the persons who attend that institution, do not hold their religious views sincerely. It is accepted that TWU and its faculty, staff and students, sincerely adhere to evangelical Christian beliefs. It is also accepted that TWU sincerely wishes to create a law school where students, who ascribe to evangelical Christian beliefs, can be educated in that environment. That position was made absolutely clear by the respondent in the hearing before us, perhaps, in part, as a response to some statements by one or more Benchers, in the course of their debate.

[77] In order to establish an infringement of freedom of religion, the applicants must establish two things. One is that they sincerely believe in a belief or practice that has a nexus with religion. We have just set out that the applicants have such a sincere belief. The other is that the decision that is challenged must interfere with the applicants' ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial. As was observed by McLachlin C.J.C. in *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 at para. 32:

> "Trivial or insubstantial" interference is interference that does not threaten actual religious beliefs or conduct.

[78] There is no evidence before us that the ability of an evangelical Christian to gain a legal education requires that they study at a law school that only permits the presence of evangelical Christian beliefs and only permits the attendance of those persons who commit to those beliefs. Indeed, the contrary would appear to be obvious from the fact that evangelical Christians have been attending secular law schools, and successfully becoming lawyers, for decades, if not longer.

[79] In addition, TWU stated through the affidavit of Mr. Robert Wood, the Provost of TWU, that:

> …students are free to hold and express diverse viewpoints on the legal, religious, and social issues arising in relation to homosexuality and same-sex relationships, even if they are contrary to TWU's religious beliefs and positions.[8]

[80] If that is the case, then having other beliefs and points of view present, at the law school, should not pose an obstacle to obtaining a proper legal education nor should those opposing viewpoints represent a threat to the maintenance of evangelical Christian beliefs. Indeed, contrary to posing a threat, the presence of opposing viewpoints would appear to be consistent with what TWU has put forward in the affidavit of Samuel Reimer, a professor of sociology, as one of the chief strengths of evangelicalism, that is, its engagement with others who do not share the same views:

> Since evangelicalism is an "engaged subculture", in that they do not physically remove themselves from the broader culture, they develop a greater understanding of their distinctiveness through interaction with non-evangelicals.[9]

[81] All of that said, we are nonetheless satisfied that the decision of the respondent does amount to an infringement of the applicants' rights to freedom of religion. We reach that conclusion by applying a broad interpretation of those rights – one that is consistent with the jurisprudence on the subject.

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[8] affidavit of Robert Wood, para. 15.
[9] affidavit of Samuel Reimer, para. 44

[82] In that regard, we refer first and foremost to the decision in *Loyola* that appears to place a somewhat more expansive interpretation on freedom of religion than may have been reflected in *Big M Drug Mart*. For example, in *Loyola*, at para. 60, the majority said:

> Religious freedom under the *Charter* must therefore account for the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions: [citation omitted]

[83] Loyola High School was, like TWU, a private institution. It was created to support the collective practice of Catholicism. TWU was created to support the collective practice of evangelical Christianity. One of TWU's purposes is, obviously, to promote evangelical Christian beliefs. The result of the decision of the respondent is to place an impediment in the path of TWU to pursue its faith-based objective through one component part of its institution, i.e., its law school. In that respect, the impact of the respondent's decision is akin to the impact of the Minister's decision in *Loyola* that the majority described, in the following terms, at para. 61:

> The Minister's decision therefore demonstrably interferes with the manner in which the members of an institution formed for the very purpose of transmitting Catholicism, can teach and learn about the Catholic faith. This engages religious freedom protected under s. 2(a) of the *Charter*.

[84] There is another aspect to this issue that revealed itself during the course of the argument. TWU said, for the first time, that if the respondent's decision is upheld, it is "highly unlikely" that TWU's law school would open. If that should ultimately be the result, then the nature of the interference with the applicants' freedom of religion arising from the respondent's decision would become more evident.

[85] Like other aspects of this case, that observation is not, itself, without countervailing considerations. The applicants assert that that result would arise from the interference with their religious freedom. Viewed from an opposite perspective, the warning from TWU that its law school will not open, if it is not accredited in Ontario, can be seen, not as arising from any interference with religious beliefs, but rather as a consequence of the fact that the single largest market for law school graduates may be foreclosed to them. Viewed from that perspective, the result appears to represent much more an economic decision, as opposed to a religious one.

[86] However, it seems to us to be preferable to evaluate those different considerations as part of the balancing exercise directed by *Doré*. That said, we acknowledge that a different approach could be justified, one that would direct that those matters be considered in concluding whether there has been any infringement of the *Charter* right. This confusion arises from the fact that it is not entirely clear, from our reading of the authorities, what level of conduct is necessary to constitute an infringement.

[87] By way of explanation, we have already set out above the quotation from *Hutterian* where the necessary degree of infringement was referred to as a "threat" to religious beliefs and conduct. The same expression was used in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 where Dickson J. said, at para. 97(QL):

> The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened.

[88] On the other hand, in *Loyola*, the majority described the infringement in the following terms, 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.

[89] In a similar way, the infringement was described in the following terms by Gascon J., in *Saguenay*, at para. 85:

> Second, the state practice must have the effect of interfering with the individual's freedom of conscience and religion, that is, impeding the individual's ability to act in accordance with his or her beliefs.

[90] Perhaps it is just a matter of semantics but it does seem to us that there is a qualitative difference between actions that threaten the very existence of a religious belief and those that simply interfere with, or impede, a religious belief. Whether there is such a dichotomy in the level of effect that is necessary to establish an infringement, we leave for another court to resolve. We choose to use the less stringent test for infringement and leave the issue of the degree of that infringement to be considered in the balancing exercise stipulated in *Doré*, to which we now turn.

[91] Consequently, we conclude that the decision of the respondent does have the effect of interfering with the applicants' rights to religious freedom under s. 2(a) of the *Charter*.

VI: The balancing of rights

[92] Once an infringement is established, the parties appear to agree that the appropriate framework for reviewing the respondent's decision is that set out in *Doré*. In that decision, the court set out a two-stage process for an administrative decision-maker's application of *Charter* values in the exercise of a discretionary decision. First, the decision-maker must balance the applicable *Charter* values with the statutory objectives the decision-maker is to fulfill. Second, the decision-maker asks how the *Charter* values at issue will be best protected in view of those statutory objectives.

[93] On judicial review, the question then becomes whether the decision reached reflects a proportionate balancing of the *Charter* protections at play. The end result of the analysis was noted by the court in *Doré*, at para. 58:

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

[94] For the purposes of this case, we start with the statutory objectives of the respondent that are set out in s. 4.2 of the *Law Society Act*, to which we made reference above. Nonetheless, they bear repeating. Those objectives are:

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

[95] As we attempted to set out in our recitation of the factual background of this case, the respondent has been engaged in determining the requirements of a legal education, necessary for the purposes of qualifying individuals for admission to the Bar, for more than 200 years. Indeed, until 1957, the respondent not only determined what those requirements would be, it was the sole source in Ontario for the necessary legal education. Commencing in 1957, other law schools were permitted to provide that legal education, with the respondent's express approval. Over time, the respondent withdrew entirely from the field of directly providing legal education for law students, but retained the authority to approve the legal education provided by others.

[96] In addition to those realities, we are satisfied that, in carrying out its mandate under its enabling statute, the respondent, throughout its long history, has acted to remove obstacles based on considerations, other than ones based on merit, such as religious affiliation, race, and gender, so as to provide previously excluded groups the opportunity to obtain a legal education and thus become members of the legal profession in Ontario.

[97] In keeping with that tradition, throughout those many years, the respondent has acted to remove all barriers to entry to the legal profession save one – merit. It is the respondent's position that it is in the public interest to ensure that the legal profession is open to everyone. It views that approach as being fundamental to its functions. In adopting that position, the respondent says that it achieves two companion objectives. One is to ensure diversity in the legal profession. The other is that, if the legal profession is open to everyone then, perforce, it is open to "the best and the brightest".

[98] The respondent is not alone in its position that equal access to a legal education is important to the public interest role that the legal profession plays in our society. In an address given by Dickson, C.J.C. in 1986 he said, in part, the following:[10]

> Secondly, I want to say a few words about the gatekeepers to legal education, namely those involved in the admissions process. Those who fulfill this role are, in a real sense, the gatekeepers of the legal profession. Ultimately, the ethos of the profession is determined by the selection process at law schools. In order to ensure that our legal system continues to fulfill its important role in Canadian

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[10] B. Dickson, "Legal Education", (1986) 64:2 Can. Bar Rev. 374 at p. 377

> society, it is necessary that the best candidates be chosen for admission to law schools.
>
> …
>
> Furthermore, it is incumbent upon those involved in the admission process to ensure equality of admissions. […] Canada is a country which prides itself on adherence to the ideal of equality of opportunity. If that ideal is to be realized in our profession then law schools, and ultimately the legal profession, must be alert to the need to encourage people from minority groups and people from difficult economic circumstances to join our profession.

[99] As a consequence of its approach, the respondent points to the fact that all law schools, that are currently accredited by it, provide equal access to all applicants. No currently accredited law school has any policy that discriminates in terms of who may apply for entry to that law school. TWU seeks to be the sole exception.

[100] It is clear that the respondent has a public interest obligation to fulfill as part of its statutory authority, as we earlier described. The respondent has taken an appropriate approach to the interpretation of the public interest as it relates to that statutory authority – one that is justified not only on the historical record but also on the nature of the public interest that is at stake.

[101] The question then becomes, in reaching its decision in furtherance of its statutory authority, did the respondent engage in a "proportionate balancing" of the *Charter* protections at issue.

[102] This is not a case where only one *Charter* right is implicated. As will be apparent, the decision of the respondent necessarily involved two *Charter* rights. On one side, there is the right of the applicants to freedom of religion including their right to operate a law school designed for persons who share a common religious belief. On the other side, there are the rights of the members of the respondent, both current and future, to equal access, on a merit basis, to membership that the respondent, consistent with its history, has a duty to protect. Moreover, there is the statutory requirement that the respondent must comply with s. 6 of the *Ontario Human Rights Code*.

[103] This is an appropriate point to say that the applicants' assertion, that their religious rights were "ignored" by the respondent in reaching its decision, does not withstand even a cursory examination. A fair reading of the speeches made by the Benchers during the course of the Convocations held to consider this issue make it clear that the applicants' freedom of religion was one of the concerns with which the Benchers were wrestling. The suggestion that, just because a given Bencher did not expressly mention freedom of religion, they did not consider that freedom, is neither a fair nor reasonable characterization to place on that Bencher's speech. The speeches are not read fairly by treating them as if they were reasons of a court where all competing arguments may be recited, or by reading an individual speech in isolation from the debate in which it took place. The Benchers were all well aware of the clash between religious rights and equality rights that the question before them presented.

[104] On the other side of this issue are the equality rights of persons who might wish to attend TWU's law school in order to pursue their legal education but who, at the same time, wish to be true to themselves and to their own beliefs. While much attention in this case was directed at the discriminatory effect of TWU's Community Covenant on LGBTQ persons, the reality is that the discrimination inherent in the Community Covenant extends not only to those persons, but also to women generally; to those persons of any gender who might prefer, for their own purposes, to live in a common law relationship rather than engage in the institution of marriage; and to those persons who have other religious beliefs.

[105] We use the words discrimination and discriminatory in this context intentionally. Despite some efforts by TWU to contend that the Community Covenant does not operate in a discriminatory fashion, it is self-evident that it does. It requires, by its very content, that individuals adhere to a particular view, and a particular belief system, in order to attend TWU. In addition, this is not merely an aspirational code. To the contrary, failure to adhere to the conduct imposed by the Community Covenant, carries with it serious consequences.

[106] For example, a student, in signing the Community Covenant, runs the risk of being suspended or expelled if they subsequently fail to abide by its terms. Such failure includes sexual misconduct which is mandated, by the terms of the Community Covenant, to be a serious breach warranting, at a minimum, suspension. Sexual misconduct under the terms of the

Community Covenant, of course, includes sexual intimacy outside of marriage and sexual intimacy involving persons of the same sex. In other words, individuals who may not believe in marriage, or LGBTQ persons, may attend TWU but they must first sign the Community Covenant and thus, in essence, disavow not only their beliefs but, in the case of LGBTQ individuals, their very identity. To assert that that result is not, at its core, discriminatory is to turn a blind eye to the true impact and effect of the Community Covenant.

[107] On this point, we should add that implicit in the applicants' submissions was the concept that, if actions are not unlawful discrimination under a statute, they are not discriminatory. TWU says that it is statutorily exempt from the application of the *Human Rights Code*, R.S.B.C. 1996, c. 210 by virtue of s. 41 and is geographically exempt from the application of the Ontario *Human Rights Code*. Consequently, TWU says that it cannot be found to be acting in a discriminatory fashion.

[108] We make three points in response to that position. First, discrimination is still discrimination, regardless of whether it is unlawful. The fact that, for policy reasons, a Provincial Legislature has chosen not to make certain acts of discrimination actionable under human rights legislation does not mean that those acts are any less discriminatory. The Community Covenant, by its own terms, constitutes a prejudicial treatment of different categories of people. It is, therefore, by its very nature, discriminatory.

[109] Second, the fact that the Community Covenant may promote an important right, that is, the observance of a particular religious belief, does not mean, by virtue of that itself, that the effect of the Community Covenant is not discriminatory. This point was aptly made in *Miron v. Trudel*, [1995] 2 S.C.R. 418 where McLachlin J. said, at para. 158:

> Discrimination is evil. But the grounds upon which it rests are not. […] The issue is not whether marriage is good, but rather whether it may be used to deny equal treatment to people on grounds which have nothing to do with their true worth or entitlement due to circumstance.

[110] Third, while TWU may not be subject to the Ontario *Human Rights Code*, the respondent is. The respondent has to ensure that its actions are compliant with human rights legislation. Section 6 of the *Human Rights Code* reads:

> Every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability. [emphasis added]

[111] In an apparent attempt to eliminate the concerns that obviously arise from the discriminatory effect of the Community Covenant, TWU presents itself as an institution that accommodates everyone, regardless of their beliefs, and makes them welcome at its institution, including LGBTQ persons. TWU says that it does not permit discrimination against anyone attending its institution, and does not allow any conduct that might amount to harassment or intimidation, or that would otherwise be objectionable, to take place just because someone may not adhere to the evangelical Christian beliefs for which TWU stands.

[112] We accept that it is TWU's stated position that everyone attending its institution is treated with fairness and courtesy and open-mindedness. But it does not change the fact that, notwithstanding TWU's stated benevolent approach to the conduct of students and others at its institution, in order for persons, who do not hold the beliefs that TWU espouses, to attend TWU, they must openly, and contractually, renounce those beliefs or, at the very least, agree not to practice them. The only other apparent option for prospective students, who do not share TWU's religious beliefs, but who still desire to obtain one of its coveted law school spots, is to engage in an active deception, in terms of their true beliefs and their true identity, with dire consequences if their deception is discovered. TWU's technically correct statement that it "does not ban or prohibit admission" to LGBTQ students must be read and understood in this context.[11]

[113] This reality is of particular importance for LGBTQ persons because, in order to attend TWU, they must sign a document in which they agree to essentially bury a crucial component of their very identity, by forsaking any form of intimacy with those persons with whom they would wish to form a relationship. Contrary to the contention of the applicants, that requiring person to refrain from such acts does not intrude on the rights of LGBTQ persons, it is accepted that sexual conduct is an integral part of a person's very identity. One cannot be divorced from the other.

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[11] Applicants' factum, para. 31

As Rothstein J. said in *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 S.C.R. 467 at para. 124:

> Courts have thus recognized that there is a strong connection between sexual orientation and sexual conduct. Where the conduct that is the target of speech is a crucial aspect of the identity of the vulnerable group, attacks on this conduct stand as a proxy for attacks on the group itself.

[114] That is the reality with which the respondent was faced. It was essentially asked to approve and accept students from an institution that engaged in discrimination against persons who did not share the religious beliefs that were held by TWU, and the student body that it prefers to have at its institution.

[115] On this point, it is important to not mischaracterize the nature of the respondent's action. It was not an attempt to regulate TWU's law school – a fact that distinguishes this case from the efforts of at least one other provincial legal governing body. The decision of the respondent did not purport to interfere with the right of TWU to create its law school in the fashion that it proposes, exercising its rights to freedom of religion. That right does not carry with it, however, a concomitant right in TWU to compel the respondent to accredit it, and thus lend its tacit approval to the institutional discrimination that is inherent in the manner in which TWU is choosing to operate its law school. To reach a conclusion by which TWU could compel the respondent, directly or indirectly, to adopt the world view that TWU espouses would not represent a balancing of the competing *Charter* rights. Rather, such a conclusion would reflect a result where the applicants' rights to freedom of religion would have been given unrestricted sway.

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

minorities. Condoning discrimination can be ever much as harmful as the act of discrimination itself.

[117] The respondent was also entitled, in the exercise of its statutory authority, to refuse to accredit TWU's law school arising from the discriminatory nature of the Community Covenant. It remains the fact that TWU can hold and promote its beliefs without acting in a manner that coerces others into forsaking their true beliefs in order to have an equal opportunity to a legal education. It is at that point that the right to freedom of religion must yield: *Big M Drug Mart Ltd.* at para. 123(QL); *Loyola* at para. 63.

[118] It was open to the respondent to take a decision that it viewed as not only promoting its statutory mandate but, as importantly, being seen as promoting that mandate. It was also open to the respondent to view accrediting TWU's law school, while professing equal opportunity and equal treatment for its members, its prospective members, and for the legal profession as a whole, as fundamentally inconsistent, if not hypocritical.

[119] The respondent was also not confined, in the exercise of its statutory authority, to simply addressing actual acts of discrimination committed by members of the Bar after admission through its disciplinary process. The disciplinary process does not deal with the impact of discrimination on the opportunities of persons to become members of the Bar. As Dickson C.J.C. said, equality of opportunity is a value of fundamental importance to our country. It is a value that state actors (of which the respondent is one) are always entitled to respect and promote. As the majority in *Loyola* said, at para. 47:

> These shared values – equality, human rights and democracy – are values the state always has a legitimate interest in promoting and protecting. […] Religious freedom must therefore be understood in the context of a secular, multicultural and democratic society with a strong interest in protecting dignity and diversity, promoting equality, and ensuring the vitality of a common belief in human rights.

[120] On the other side, what is the effect of the respondent's decision on the applicants? The decision does not, in fact, preclude TWU from opening a law school. It does not preclude TWU from opening a law school that requires students to sign the Community Covenant. TWU counters that reality by saying that, without accreditation from the respondent, it will not open its

law school. While we earlier accepted that there is a degree of interference with religious beliefs, should that result occur, we also earlier noted that the motivating force not to open the law school appears to be more economic than it is religious. What TWU would then be essentially saying is that it not only wishes to operate its law school in a particular way in order to advance its religious beliefs, but that it will only do so if it is guaranteed access to the single largest market for law school graduates. That position takes freedom of religion too far. As has been observed in a number of cases, including *Adler v. Ontario* (1994), 19 O.R. (3d) 1 (C.A.), freedom of religion cannot be used as a mechanism to compel state support.

[121] If TWU wanted to operate its law school for purely religious purposes, it would be content to proceed with its view of the proper law school but with the full knowledge that its students would only be automatically eligible for membership in the Bar of some Provinces, while not of others. The trade-off for TWU law students would be the benefit of a religious based legal education against the disadvantage of a potentially narrower market for their skills upon graduation. That trade-off does not take into account that TWU graduates would nonetheless be entitled to apply to the respondent for admission to the Bar of Ontario, and the respondent would be obliged to provide them with a timely, open, and efficient, accreditation process in order to minimally impair their freedom of religion and association.

[122] Nevertheless, it remains the fact that the record before this court fails to reveal any evidence that any secular law school treats its students, who are evangelical Christians, in such a manner that attendance at those law schools is threatening to their beliefs or erodes those beliefs or that makes attendance so unpleasant or uncomfortable that that route for obtaining a legal education is essentially precluded to them. A single affidavit filed by TWU from an evangelical Christian student who says that she felt "uncomfortable" at the University of Toronto law school fails, by a wide margin, to constitute such evidence.[12] The fact is that evangelical Christians have been attending secular law schools for decades without any evident problem.

[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

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[12] affidavit of Jessie Legaree, para. 20.

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.

[125] While that conclusion addresses the central question before this court, some other issues still fall to be addressed.

VII: Future TWU graduates

[126] Another aspect of this question that deserves attention is the fact that there remains the possibility that TWU will proceed with its law school, notwithstanding that it has not been accredited by the respondent. While we were told by counsel for TWU that the law school would likely not proceed in those circumstances, we were also told that there has not been a firm and final decision made, so the possibility of the law school proceeding remains.

[127] We mention this possibility only to observe that, if that eventuality should occur, and as we have alluded to, individual graduates of the law school might still seek to be admitted to the Bar of Ontario. Should that situation come to pass, the respondent will be obliged to have a fair

and timely process in place to evaluate and rule on those requests for admission. Apart from the conclusion regarding TWU's application as an institution, the individual graduates have their own rights and a proper consideration of those rights requires that form of accommodation.

[128] In making that observation, we recognize that the respondent has never been asked, by either of the applicants or by anyone else, what its position would be if an individual graduate of a TWU law school made his/her own application for admission. We simply raise the issue to make it clear that the interests of individual graduates may arise at some future point and, if they do, the respondent will be duty bound to properly consider their accreditation requests, in order to ensure that the religious rights of any graduate of TWU's law school are minimally impaired.

VIII: The Nova Scotia decision

[129] Another issue is that we are, of course, aware that a judge in Nova Scotia reached a different conclusion with respect to the rejection of TWU's law school by the Nova Scotia Barristers' Society.[13] There are, however, important differences between the case that had to be decided in Nova Scotia and the one that falls to be determined here. The most significant of those differences is the fact that the NSBS did not have the broad statutory authority, under its governing statute, that the respondent has here. In particular, the NSBS did not have an express mandate "to maintain and advance the cause of justice and the rule of law". The NSBS also did not have the degree of control over legal education requirements for admission to the Bar that the respondent has historically exercised in Ontario.

[130] The decision in Nova Scotia turned first and foremost on whether the NSBS had jurisdiction under its statute to reject TWU's law school for the reasons that it did. As we have already set out, there is no issue regarding the respondent's jurisdiction in this case. Further, the nature of the action taken by the NSBS was directed at controlling the formation of TWU's law school and to direct the manner in which TWU could operate that law school. Again, that is not the nature of the action taken by the respondent here.

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[13] *TWU University v. Nova Scotia Barristers' Society*, [2015] N.S.J. No. 32 (S.C.)

[131] In addition, the judge in the Nova Scotia case characterized the actions of the NSBS in the following terms, at para. 180:

> The NSBS action is not directed toward preventing discrimination against anyone in Nova Scotia. It is not intended to prevent anyone from being treated unequally in Nova Scotia.

[132] Whether that was a fair characterization of the actions of the NSBS, it would not be a fair characterization of the actions, and intentions, of the respondent here. It is clear, in our view, that the actions of the respondent in this case were a direct effort to prevent and combat discrimination, and its ultimate effect on the composition of the legal profession in Ontario, and to be seen as doing so.

[133] Finally, the judge in the Nova Scotia case appears to have adopted a *de minimis* analysis to the impact of the discriminatory effect of TWU's Community Covenant. In his decision, at para. 247, the judge said:

> TWU's law school would add 60 students to a total class of about 2500 in Canadian common-law law schools. That is an increase of about 2.4%. Of that 2.4% some percentage may make their way to Nova Scotia. It is a stretch to speculate that requiring that group or individual to make special application for admission on as yet unknown criteria will help to improve the proportion of LGBT lawyers. Even if it did, placing a barrier before Evangelical Christians or those willing to associate with them, so that the proportion of LGBT lawyers is increased would be so inappropriate and wrongheaded that it could not possibly be what was intended.

[134] We disagree with the import of that analysis. Discrimination is not evaluated on a numbers basis. It should be self-evident that, since discrimination is usually directed at minorities, the number of people who experience the effect of discrimination will be fewer in number than the people who are the source of the discrimination. Discriminatory actions are no less discriminatory because they only effect a few rather than many.

[135] The fact remains that the effect of the Community Covenant is to exclude certain persons from eligibility for all of the spaces available at TWU's law school. That reduces their opportunities for acceptance to law school in comparison with all other persons, and it does so on a discriminatory basis.

IX: The allegation of bias

[136] Another issue to be addressed is the assertion by the applicants that the respondent's decision was a biased one. The applicants complain that Clayton Ruby, who is an *ex officio* bencher, spoke on the subject of TWU's application at the Convocation on April 10.[14] Mr. Ruby was, at the time, intending to be counsel for an individual who was going to challenge TWU's accreditation in British Columbia. TWU asserts that this conduct resulted in a biased decision by the respondent.

[137] We see no merit in that assertion. First, Mr. Ruby, as an *ex officio* bencher, was entitled to speak at Convocation. Second, all of the other benchers presumably knew of Mr. Ruby's intended representation of the individual in British Columbia and would have taken that fact into consideration in evaluating his submissions. Third, Mr. Ruby was not entitled to vote, and did not vote, on the question that was before the benchers. Indeed, Mr. Ruby was not even present at Convocation, on April 24, when the vote was taken.

[138] In those circumstances, and contrary to the assertion of the applicants, no informed person "viewing the matter realistically and practically and having thought the matter through" would consider the presence of Mr. Ruby to have so tainted the process as to have rendered the ultimate decision of the Benchers an unfair or biased one.[15]

X: Freedom of expression/Freedom of association

[139] We will deal very briefly with the alternative grounds advanced by the applicants that the respondent's decision violates either or both of their rights to freedom of expression and freedom of association under s. 2(b) and s. 2(d), respectively, of the *Charter*. We deal with these briefly, at least in part, because they were not pursued actively in the oral argument.

[140] In terms of freedom of expression, there is nothing in the decision of the respondent that prohibits or inhibits the applicants, or any TWU student, from expressing their religious beliefs.

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[14] Our use of the term *ex officio* Bencher in this instance is a reference to those persons who are Benchers by virtue of the fact that, by June 1, 2015, they had held the office of elected bencher for at least 16 years – *Law Society Act*, s. 12.

[15] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 46(QL).

Whether they attend a law school at TWU, or at any other university, there is no evidence that any evangelical Christian law student will be constrained in the expression of their religious beliefs at the instance of the respondent. No infringement of freedom of expression arises on the facts of this case.

[141] Similarly, the applicants fail to establish that their freedom to associate is violated by the respondent's decision. The purpose of the freedom to associate set out in s. 2(d) has been recently affirmed by the Supreme Court in *Mounted Police Association of Ontario v. Canada (Attorney General),* [2015] S.C.J. No. 1 but it traces back to the decision in *Reference re Public Service Employee Relations Act (Alta.),* [1987] 1 S.C.R. 313 where Dickson J. said, at para. 86(QL):

> The purpose of the constitutional guarantee of freedom of association is, I believe, to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends.

[142] For the reasons that we have already given, there is no prohibition, in the decision of the respondent, against TWU establishing a law school. There is no state-enforced isolation of evangelical Christians. Assuming that economic opportunities may differ for TWU graduates does not interfere with their rights to associate. Nor can the applicants use the right to freedom of association to argue in favour of state action that will permit them to be equal to, but operate separate from, all other law schools. As the court said in *Moore v. British Columbia (Education),* [2012] 3 S.C.R. 360 at para. 30:

> To define 'special education' as the service at issue also risks descending into the kind of "separate but equal" approach which was majestically discarded in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

[143] We conclude, therefore, that neither freedom of expression nor freedom of association is infringed by the respondent's decision.

XI: Conclusion

[144] The application for judicial review is dismissed.

[145] If the parties cannot agree on the appropriate disposition of the costs of the application, they may file written submissions. The respondent shall file its submissions within thirty days of the date of the release of these reasons and the applicants shall file their submissions within fifteen days thereafter. The submissions of each party shall not exceed ten pages in length. No reply submissions shall be filed without leave of the court. There will be no award of costs in favour of, or against, any of the interveners.

MARROCCO A.C.J.

THEN J.

NORDHEIMER J.

Date of Release:

CITATION: Trinity Western University v. The Law Society of Upper Canada, 2015 ONSC 4250
DIVISIONAL COURT FILE NO.: 250/14

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Applicants

– and –

THE LAW SOCIETY OF UPPER CANADA

Respondent

REASONS FOR DECISION

BY THE COURT

Date of Release: