

VANCOUVER
FEB 04 2016
COURT OF APPEAL
REGISTRY

Court of Appeal File No: CA43367
Supreme Court File No. 149837
Vancouver Registry

IN THE COURT OF APPEAL OF BRITISH COLUMBIA

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

APPELLANT
(RESPONDENT)

AND:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

RESPONDENTS
(PETITIONERS)

APPELLANT'S FACTUM

The Law Society Of British Columbia

Counsel for the Appellant

Peter A. Gall, Q.C.

Donald R. Munroe, Q.C.

Benjamin J. Oliphant

Gall Legge Grant & Munroe LLP
10th Floor, 1199 West Hastings Street
Vancouver, BC V6E 3T5

Tel: (604) 891-1152

Fax: (604) 669-5101

Email: pgall@glgmlaw.com

Trinity Western University and
Brayden Volkenant

Counsel for the Respondents

Kevin Boonstra

Jonathan Maryniuk

Kuhn LLP
100-32160 South Fraser Way
Abbotsford, BC V2T 1W5

Tel: 604.864.8877 or 604.682.8868

Fax: 604.864.8867 or 604.682.8892

Email: kboonstra@kuhnco.net

INDEX

CHRONOLOGYii

OPENING STATEMENTiii

PART 1 – STATEMENT OF FACTS 1

PART 2 – ERRORS IN JUDGMENT 17

PART 3 – ARGUMENT 17

 A. Introduction 17

 B. The Statutory Power to Disapprove of TWU's Proposed Law School 21

 C. Procedural Fairness 28

 D. The Balancing of *Charter* Rights and Values 31

 E. Conclusion 40

PART 4 – NATURE OF ORDER SOUGHT 40

LIST OF AUTHORITIES..... 41

CHRONOLOGY

Date	Event
June 15, 2012	Trinity Western University (“ TWU ”) submits proposal for new law school to the Minister of Education and Federation of Law Societies of Canada
September 27, 2013	Benchers adopt Rule 2-27(4.1), expressly authorizing the Benchers to refuse to approve a proposed law school
December 16, 2013	Federation of Law Societies of Canada grants TWU’s proposed law school preliminary approval
April 11, 2014	Benchers consider and reject motion to not approve TWU’s proposed law school
June 10, 2014	Special General Meeting (“ SGM ”) requisitioned by Law Society members held across the province, and resolution passed directing Benchers not to approve TWU’s proposed law school
July 11, 2014	Benchers consider SGM result; motions are tabled for consideration at a future meeting following further submissions
September 26, 2014	Benchers consider motions and pass resolution to hold a binding referendum of the membership on the issue of approving TWU’s proposed law school
October 30, 2014	Referendum results announced; 5,951 BC lawyers (74%) voted in favour of and 2,088 (26%) against a resolution to direct the Benchers to not approve TWU’s proposed law school
October 31, 2014	Benchers pass resolution to not approve TWU’s proposed law school with 25 votes in favour, 1 vote against, and 4 abstentions

OPENING STATEMENT

The Benchers' view is that TWU's proposed law school should not be approved. That was not the initial view of the majority of the Benchers, as expressed in April 2014. However, after further consideration of the matter, and input from the membership, the Benchers passed a resolution in October 2014 that TWU's proposed law school would not be approved, as it would impede equal access to the legal profession without discrimination. This decision was arrived at in a manner consistent with the statutory power and mandate of the Law Society, and represents a reasonable balance of *Charter* rights and values.

As the judgement below held, the Law Society has the statutory power to not approve TWU's law school because of its admission policy. The October 2014 Resolution of the Benchers to disapprove TWU's proposed law school is not rendered void because the Benchers held a referendum of the membership on the matter, which, on certain conditions, the Benchers decided would be binding in the result.

The *LPA* expressly contemplates a referendum procedure under section 13, which permits the membership to impose a resolution on the Benchers after a twelve month waiting period, as long as the Benchers conclude that the resolution would not violate their legal obligations, as the Benchers concluded here. Given the importance of the issue to the Law Society, the legal system and the public at large, the Benchers reasonably determined that the most legitimate and sensible process in these unique circumstances was to hold an immediate referendum of the membership as a whole under Rule 1-37, using the same conditions as for a section 13 referendum, instead of either adopting a resolution upon which only a portion of the membership had the opportunity to vote, or artificially delaying a referendum that could be called by the members if they were dissatisfied with the Benchers' decision. TWU was given a full and fair opportunity to make submissions both to the Benchers and to the membership.

There was no fettering of discretion or invalid subdelegation of the Benchers decision-making powers. The Benchers' made the key decision in this case: that a decision not to approve TWU's proposed law school met the Law Society's legal obligations. The issue that needs to be judicially resolved is whether that decision was reasonable.

PART 1 – STATEMENT OF FACTS

1. On June 15, 2012, TWU submitted a proposal for a new law school to both the Minister of Education (the “**Minister**”) for approval under the *Degree Authorization Act*, SBC 2002, c 24, and to the Federation of Law Societies of Canada (the “**Federation**”).
2. Students of TWU’s proposed law school would be “annually required to read, understand and pledge to the terms of the Community Covenant Agreement prior to registering for classes”. The Covenant requires that students adhere to evangelical Christian behavioural norms, and in particular prohibits individuals in same sex or common law marriages, but not individuals in heterosexual marriages, from engaging in sexually intimate activity. In addition, the Covenant prescribes limitations on reproductive choices and therefore has a disproportionate negative impact on women.

Affidavit #1 of E. Phillips (“**Phillips #1**”), Exhibit “B”, Joint Appeal Book, Volume 2 (“**JAB #2**”), pp. 305;

Affidavit #1 of Dr. W.R. Wood, Exhibit “C”, JAB #1, pp. 40-44.

3. The requirement that students adhere to the Covenant as a condition upon admission to and attendance at the proposed law school has generated considerable controversy. The issue of whether Law Societies should approve or condone a discriminatory Covenant has divided Benchers, courts, Law Societies, and the legal profession generally.
4. At the time of TWU’s application to the Minister and the Federation, BC Law Society Rule 2-27(4) defined academic requirements for admission to the BC Bar as “successful completion of the requirements for a bachelor of laws or the equivalent degree from a common law faculty of law in a Canadian University.”

Trinity Western University v. The Law Society of British Columbia, 2015 BCSC 2326 (“**RFJ**”), at para 31, Appeal Record (“**AR**”), pp. 424.

5. On September 27, 2013, the Benchers adopted a new rule, 2-27(4.1) (“**Subrule 4.1**”), pursuant to the powers granted in sections 20 and 21 of the *LPA*. Subrule 4.1 states that a common law program would be approved for the purposes of

establishing adequate academic qualification if approval was granted by the Federation under its national requirements, “unless the Benchers adopted a resolution declaring that it is not or has ceased to be an approved faculty of law.”

RFJ, at para 105, AR, pp. 442-443.

6. In December 2013, an advisory committee established by the Federation issued a report in which it found that there was no clear “public interest bar” to accrediting TWU as an approved institution for the purpose of issuing law degrees. The Federation then granted preliminary approval to TWU’s proposed law school, and on December 17, 2013, the Minister granted consent to TWU to issue law degrees under the *Degree Authorization Act*.

RFJ, at paras 33-34, AR, pp. 424-425.

7. Between January and April of 2014, the Benchers of the Law Society considered whether to adopt a resolution under Subrule 4.1 declaring that the proposed faculty of law at TWU would not be an approved faculty of law. The Benchers convened numerous meetings and solicited submissions from the membership of the Law Society, the public, and TWU regarding the TWU’s proposed law school.

See Affidavit #2 of T. McGee (“**McGee #2**”), paras 10-13, Exhibits “G”, “H”, “I”, JAB #9, pp. 2948-9, 3307-3337;

Phillips #1, paras 11-30, JAB #1, pp. 278-283.

8. In particular, the Law Society sent a letter to TWU in March of 2014, requesting submissions from TWU with respect to the upcoming April meeting. TWU was also provided with all of the materials that were in the possession of the Law Society at that time and that would be before the Benchers, including the public submissions, the legal opinions obtained by the Law Society, particularly relevant court decisions, as well as various other proposals and reports respecting TWU’s proposed law school.

See Phillips #1, paras 18, 22, Exhibits “I”, “M”, JAB #1, pp. 279-280; JAB #2, pp. 505-507, 512-513.

9. Along with TWU’s 166 page application to the Federation of Law Societies, TWU provided the Law Society with comprehensive written submissions in advance of

the Benchers' April meeting, arguing that the Law Society should not invoke Subrule 4.1. The submissions canvassed in detail the factual and legal basis for TWU's position, and proposed that the Law Society should defer to the Federation of Law Society's conclusion.

Phillips #1, Exhibits "B", "P", JAB #2, pp. 290-472; JAB #3, pp. 771-820.

10. These submissions and others were before the Benchers at the April 11, 2014 meeting, when the Benchers debated whether to adopt a resolution under Subrule 4.1 declaring TWU to not be an approved faculty of law for the purposes of the Law Society admissions process. The submissions were also posted on the Law Society's website for consideration by the membership and the public.

McGee #2, at paras 12-13, Exhibit "H", JAB #9, pp. 2949, 3327-3328.

11. TWU was invited to attend the Benchers' April 11th meeting, and was represented by TWU President, Mr. Bob Kuhn; TWU Vice Provost Business, Mr. Kevin Sawatsky; and Mr. Kevin Boonstra, TWU's legal counsel.

McGee #2, Exhibit "I", JAB #9, pp. 3331.

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

McGee #2, Exhibit "J", JAB #9, pp. 3338-3346; JAB #10, pp. 3347-3389.

13. Following their discussion, the Benchers voted on a motion to declare the proposed TWU law school to not be an approved faculty of law under Subrule 4.1. That motion was defeated by a vote of 20-7.

McGee #2, Exhibit "I", JAB #9, pp. 3337;

RFJ, at para 37, AR, pp. 425.

14. A portion of the Law Society's membership was dissatisfied with the Benchers' April decision, and requisitioned a Special General Meeting of the Law Society

("SGM"), pursuant to what is now Rule 1-11 of the Law Society Rules. As the proponents of the meeting had provided the Benchers with a written request to hold a meeting signed by 5 per cent of the members of the Law Society, the Benchers were required to convene an SGM under what is now Rule 1.11(2).

Phillips #1, Exhibit "V", JAB #3, pp. 886;
RFJ, at paras 38-39, AR, pp. 425-426.

15. The Law Society sent out a Notice to the Profession with respect to the SGM, which included the proposed membership resolution and a letter from the proponent who had initiated the SGM explaining the basis for the proposed resolution ("**SGM Notice**"). The resolution proposed by the membership was to direct the Benchers to invoke Subrule 4.1 to not approve TWU's proposed law school (the "**SGM Resolution**").

Phillips #1, Exhibit "V", JAB #3, pp. 885-891;
RFJ, at para 40, AR, pp. 426-427.

16. The SGM Notice also included links to a webcast and transcript of the Benchers' April meeting, as well as links to the legal opinions received by the Benchers, TWU's submissions, and the submissions from the public, both for and against approving TWU's proposed law school. The SGM Notice specifically encouraged participants to visit the links provided prior to the SGM, and to read all of the available material (including TWU's submissions) on the website.

Phillips #1, Exhibit "V", JAB #3, pp. 887.

17. At the SGM, participating members debated the issues relating to TWU's proposed law school. Amongst the first speakers at the SGM was TWU's President, Mr. Kuhn, who made extensive arguments as to why, in his view, the SGM Resolution should not be passed.

McGee #2, Exhibit "L", JAB #10, pp. 3403-3407.

18. Following the speeches, the participants at the SGM voted on the SGM Resolution directing the Benchers to declare that the proposed law school at TWU is not an

approved faculty of law for the purposes of the Law Society's admission program. The SGM Resolution was passed by a vote of 3,210 to 968.

McGee #2, para 15, Exhibit "M", JAB #9, pp. 2942; JAB #10, pp. 3445.

19. After the SGM, the Benchers sought and received a legal opinion with respect to the implications of the SGM vote, and the options available to the Benchers.

Affidavit #1 of K. Jennings ("**Jennings #1**"), Exhibit "A", JAB #5, pp. 1630-1642.

20. The Benchers also considered the SGM Resolution and the issues stemming from it at their July 11, 2014 meeting. No decision regarding the SGM Resolution was made by the Benchers at that meeting, however three motions were proposed, to be considered and voted on at the Benchers September 26th meeting. The first motion was to follow the recommendations of the membership at the SGM and pass a resolution to not approve TWU. The second motion was to hold a referendum of the membership. The third motion was to reserve judgment until the decisions of other law societies to not approve TWU's proposed law school had been tested in court.

McGee #2, JAB #10, pp. 3446-3447.

21. The July 11th meeting also included a substantive discussion of, *inter alia*, the following:

- The legal and policy implications of passage of a proposed motion to not approve TWU under Subrule 4.1, or a proposed motion to put the matter to a binding referendum of the membership;
- The legal and policy implications of a Bencher-initiated referendum of the Law Society membership;
- The legal and policy implications of pre-determination by the Benchers regarding whether their future decision(s) regarding implementation of the SGM Resolution would breach their "statutory duties" under section 13(4) of the *LPA*;

- The legal and policy implications of deferring action by the Law Society in relation to the SGM Resolution, pending determination of the TWU-accreditation litigation presently underway in Ontario, Nova Scotia and BC.

McGee #2, Exhibit "M", JAB #10, pp. 3447.

22. The Benchers also determined on July 11th that the September 26th meeting would be webcast so that it could be viewed by the membership, and that members of the public and TWU should be given an opportunity to make further submissions.

McGee #2, Exhibit "M", JAB #10, pp. 3445-3446.

23. The Law Society specifically wrote to TWU on July 11, 2014, advising them of the proposed motions and their opportunity to provide further written submissions in light of the SGM result. TWU was given over two months to provide those submissions, and no restrictions were placed on TWU's written submissions by the Law Society. TWU provided written submissions to the Benchers approximately 10 days prior to the September 26th meeting.

Phillips #1, paras 39-40, Exhibits "Z", "AA", JAB #1, pp. 284; JAB #3, pp. 903-916.

24. The Benchers also received submissions from the membership and the public throughout this process. Some of the submissions supported TWU, while others urged the Law Society to not approve TWU's proposed law school. These submissions reflected a range of considerations and arguments against approving TWU, including that the Covenant discriminates against LGBTQ persons and limits reproductive rights of women, thereby depriving both groups of equal access to the legal profession.

Affidavit #2 of C. Chu ("**Chu #2**"), Exhibits "A", "B", JAB #11-13; see e.g. JAB #12, pp. 4401-4402, 4431, 4435, 4439, 4487-4490; JAB #13, pp. 4627.

25. After receiving and reviewing all of the subsequent submissions, the issue of whether to approve TWU's proposed law school was fully discussed by the Benchers at their September 26th meeting. Before the Benchers at this meeting were all of the materials submitted by TWU and the public in advance of the April

meeting, as well as TWU's submissions following the SGM, the results of the SGM, and all of the legal opinions provided to the Benchers throughout the process.

26. The Benchers engaged in extensive discussions at the September 26th meeting, which canvassed the Law Society's and the Benchers' statutory mandate, the legal and practical implications of the SGM vote and of holding a further referendum of the membership, considerations relating to the public interest in the administration of justice, the balancing of *Charter* rights (including the freedom of religion of TWU's membership), the impact of the Supreme Court's decision in *TWU v. BCCT*, and other matters pertaining to the proposed resolutions.

Affidavit #1 of T. Lesberg ("**Lesberg #1**"), Exhibit "B", JAB #4, pp. 1458-1483;
JAB #5, pp.1484-1572;

Trinity Western University v. BCCT, 2001 SCC 31 ("**BCCT**").

27. After this wide-ranging discussion and debate, three motions were then put before the Benchers for consideration. The first motion, as initially proposed at the July 11th Benchers meeting, was to adopt the membership's SGM Resolution and declare that TWU was not an approved faculty of law for the purposes of Law Society admission.

McGee #2, Exhibit "N", JAB #10, at 3455, 3463-3465;
RFJ, at paras 43-46, AR, pp. 427-428.

28. A number of the Benchers' argued against this motion, on the basis that the SGM required personal attendance, and the membership had been informed that the vote would not be binding. A number of Benchers expressed the view that holding a referendum would elicit a wider response than the SGM, and would therefore give all members of the Law Society an opportunity to participate in the decision.

Lesberg #1, Exhibit "B", JAB #4, pp. 1472-1475, 1478-1480; JAB #5, pp. 1516-1518, 1539-1540, 1552-1553, 1571-1572.

29. The Benchers rejected the first motion by a vote of 9 in favour and 21 against. Instead, the Benchers adopted the second motion, which was to direct a

membership-wide referendum on whether the Benchers should adopt the membership's SGM Resolution. The second motion stated, in essential parts:

BE IT RESOLVED THAT:

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

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

Yes _____ No _____ (the "Resolution")

2. The Resolution will be binding and will be implemented by the Benchers if at least: (a) 1/3 of all members in good standing of the Law Society vote in the Referendum; and (b) 2/3 of those voting vote in favour of the Resolution.

3. The Benchers hereby determine that implementation of the Resolution does not constitute a breach of their statutory duties, regardless of the results of the Referendum.

McGee #2, Exhibit "N", JAB #10, pp. 3464-3466;
RFJ, at paras 43-45, AR, pp. 427-428.

30. Significantly, the Benchers had received a legal opinion prior to the September meeting which indicated that "statutory duties" under section 13 of the *LPA* necessarily included the Benchers' and the Law Society's constitutional duties. That opinion further stated that the Benchers could not implement a resolution of the membership if they were of the view that it would conflict with either their statutory duties under the *LPA*, or with their constitutional duties under the *Charter*.

Jennings #1, Exhibit "A", JAB #5, pp. 1635-1636.

31. As the referendum motion confirmed at clause 3, a majority of the Benchers determined at the September 26th meeting that passing a resolution to not approve TWU's proposed law school was not in breach of their statutory duties, which includes their constitutional obligations.

32. Bencher Miriam Kresivo, who seconded the referendum motion, explained at the September 26th meeting that the Benchers “are considering both potential outcomes of the resolution and whether in the future we would be willing to vote for either of the outcomes”.

Lesberg #1, Exhibit “B”, JAB #4, pp. 1480.

33. Similarly, Bencher Joe Arvay explained the impact of the second motion, stating that “those of you who may be intending to support the motion... to order a referendum now you will be acknowledging that whatever the outcome you would not be acting contrary to your statutory duty.”

Lesberg #1, Exhibit “B”, JAB #5, pp. 1499-1500.

34. With respect to the process adopted, Bencher Tony Wilson clarified that adopting the second motion “expedites the referendum process already available under our legislation”. He also noted that while it had been argued that the Law Society was without the authority to initiate a referendum of this nature, “we are the Law Society of British Columbia regulating the legal profession in the public interest... the referendum model, or rather, motion... put forward expedites the process already permitted under the *Legal Profession Act* under section 13. We don’t want to wait until a referendum brought in July 2015”.

Lesberg #1, Exhibit “B”, JAB #4, pp. 1474-1475.

35. Other Benchers made similar comments. Bencher Phil Riddell observed that under section 13, the membership could require a vote by the following June, and added:

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

Lesberg #1, Exhibit “B”, JAB #5, pp. 1514-1516; see also pp. 1512-1514, 1525, 1559.

36. Bencher Kresivo argued that while the referendum option may not be “perfect”, it was the “right path forward” because it is “responsive and recognizes the significance of the issue to the membership”.

Lesberg #1, Exhibit “B”, JAB #4, pp. 1476-1477.

37. She also emphasized that section 13 of the *LPA* was important in reaching this conclusion:

The fact that the Act requires a referendum is important to me because it says that we Benchers — some say we Benchers must determine the issue without looking to the membership. It is not an issue for which membership should have issue. And I say if the Act didn't provide for it we perhaps would consider that. But we must look at what the Act provides for, which is a referendum. What is proposed in motion 2 is merely bringing it forward.

Lesberg #1, Exhibit “B”, JAB #4, pp. 1479.

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

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

Lesberg #1, Exhibit “B”, JAB #5, pp. 1508.

39. Similarly, Bencher Crossin provided his view of the duty of the Law Society in this matter:

You know, my thoughts on this really boil down to first principles. We -- and when I say "we" I mean the lawyers of this province, are a self-governing profession and we well know that in order to maintain our independence and guard against unwarranted intrusions by the state or otherwise, it is critical in our decision making to ensure and foster public confidence in our profession and the administration of justice.

Section 3 of our *Legal Profession Act* reflects that recognition. Section 3 isn't the voice of the government and it's not the voice of the courts and it's not the voice of the public. And it's not merely the voice of the Benchers. Section 3 is the voice of the lawyers and the members recognize as fundamental that any erosion of the public trust or surrender of the public interest, you know, places our profession as we know it in jeopardy. And so in order to carry out that mandate we, the members, settled on a democratic construct of governance. I'm elected by the members to govern their affairs and to make decisions to ensure the public is well served by a competent and ethical and independent bar. So my duty, as I see it, both as a matter of statute and as a covenant with the membership, is to do what I believe best serves the public and to do so with reflection, good faith, and a clear conscience. (...)

Lesberg #1, Exhibit "B", JAB #5, pp. 1492-1493; see also pp. 1558.

40. With respect to deviating from the initial April decision, it was clear that the views of many Benchers had evolved between the April 11th meeting and the September 26th meeting.
41. As Bencher Jamie McLaren observed, many of the votes at the April meeting in favour of TWU stemmed "from the view that accreditation is required by law *despite* being contrary to the public interest", and were cast notwithstanding that most if not all of the Benchers disagreed with the sentiments in the Covenant. Bencher David Mossop echoed this view, stating that "none of the Benchers support the controversial provisions of the community covenant. So let's get that out of the way. Even those who supported the approval stated that pretty clearly."

Lesberg #1, Exhibit "B", JAB #4, pp. 1468, 1481-1482.

42. However, by September, many had reconsidered their position as to whether they were legally bound to approve TWU. For example, the comments of Bencher David Crossin at the April 11th meeting appeared to indicate that he felt bound by the ruling in *BCCT*. However, by the September 26th meeting, he had become less certain, arguing that "how the legal issues will be decided are unknown and uncertain".

Lesberg #1, Exhibit "B", JAB #5, pp. 1494.

43. Others clarified their comments from the April meeting with respect to whether *BCCT* was binding on the matters before them. For instance, Benchers Elizabeth Rowbotham stated that while she was quoted as saying that *BCCT* is the law in Canada, she “should have said it appears to be the law.” Even those who remained of the view that TWU should be approved acknowledged the “valid arguments” that the *BCCT* decision would not apply.

Lesberg #1, Exhibit “B”, JAB #5, pp. 1554; JAB #4, pp. 1482; see also JAB #5, pp. 1512, 1537-1538, 1542, 1549-1551, 1552-1554, 1562.

44. Therefore, notwithstanding previous statements, many Benchers had ultimately come to the conclusion that “there is not really one right answer” to the question before them. This evolution in the Benchers views as to their legal obligations – and the conclusion that there was no legally required answer – necessarily informed their September decision to hold a referendum.

Lesberg #1, Exhibit “B”, JAB #4, pp. 1481-1482.

45. Overall, then, a review of the speeches at this meeting reveal that the view of many of the Benchers had evolved. They were alive to their statutory obligations, to the limits on their own power as set out by statute, to their role as governors of a self-governing profession, to the constitutional dimensions of the decision, and to their obligations to protect and uphold the public interests and to fulfill the Law Society’s duties in section 3 of the *LPA*.

46. After first determining that a decision not to approve TWU’s proposed law school met their statutory duties, which includes their constitutional obligations, the Benchers decided at the September 26th meeting that the most appropriate method of resolving this issue was to hold a referendum of the membership. The motion to hold a referendum passed with a vote of 20 votes in favour and 10 votes against.

McGee #2, Exhibit “N”, JAB #10, pp. 3466.

47. In reaching the conclusion that either outcome of the referendum was consistent with their statutory duties, the Benchers considered all of the material referred to above, which was made available to the public and the profession on the Law

Society's website. Much of this material was focused on the *Charter* implications of voting to either approve or disapprove TWU's proposed law school.

Chu #2, Exhibits "A", "B", JAB #11-13, pp. 3718-4773.

48. At the Law Society's Annual General Meeting ("**AGM**") on September 30, 2014, certain members brought forward, and attendees voted on, a separate and non-binding resolution, which read as follows:

WHEREAS discrimination continues in the legal profession in Canada despite significant progress towards its elimination;

WHEREAS ending discrimination in the legal profession benefits the profession by enabling it to represent itself with integrity as an advocate for justice;

WHEREAS discrimination in legal education undermines the ethical underpinnings of the legal profession;

WHEREAS the existence of discrimination may contribute to an educational environment in which freedom of expression is inhibited;

WHEREAS the formation of values in law school has a long-term impact on Canada's future lawyers;

WHEREAS discrimination is not a recognized protected form of freedom of expression;

WHEREAS any conflict between enumerated freedoms must consider the potential impact on the legal profession, the justice system and our society as a whole;

BE IT RESOLVED THAT the Law Society of British Columbia require all legal education programs recognized by it for admission to the bar to provide equal opportunity without discrimination on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, gender expression, gender identity, age or mental or physical disability, or conduct that is integral to and inseparable from identity for all persons involved in legal education – including faculty, administrators and employees (in hiring continuation, promotion and continuing faculty status), applicants for admission, enrolled students and graduates of those educational programs.

See Affidavit #1 of J. Hoskins ("**Hoskins #1**"), Exhibit "C", JAB #11, pp. 3710-3711.

49. This motion passed at the AGM, with a majority of members present voting in favour. The final vote was 188 in favour of the motion to 48 against.

See Hoskins #1, paras 7-8, JAB #11, pp. 3706.

50. The Law Society then sent out a Notice to the Profession about the upcoming referendum (the “**Referendum Notice**”). The Referendum Notice included the referendum ballot, and provided members of the Law Society with access to the audio-visual recordings and the transcripts of the Benchers’ discussions. The Referendum Notice also provided the membership with a link to the entirety of the submissions made to the Law Society (including from TWU), as well as the legal opinions before the Benchers, in order to inform their opinion and vote.

See McGee #2, Exhibit “P”, JAB #10, at 3467-3468;
See also Phillips #1, Exhibit “EE”, JAB #3, pp. 931-933.

51. Despite an apparent confusion in the Chief Justice’s reasons, the Referendum Notice did not include a letter from the proponent of the SGM, as that letter was only relevant to the SGM, which had already occurred.

RFJ, at para 150, AR, pp. 455.

52. On or around October 2nd, 2014, TWU sent an advocacy letter to all members of the Law Society who had publicly available email addresses. The email urged the membership to vote against the adopting of the Resolution in the forthcoming referendum, and attached a letter from the Petitioner Mr. Volkenant providing his views in favour of approving TWU’s proposed law school. TWU estimates that it was able to directly contact approximately 6,000 BC lawyers, or approximately half of the law society’s membership, through this email.

Affidavit #1 of B. Volkenant, paras 27-28, Exhibit “A”, JAB #1, pp. 5-6, 7-10;
Phillips #1, paras 45-46, JAB #1, 285.

53. The referendum was conducted by mail-in ballot throughout October, and the referendum results were announced on October 30, 2014. A total of 5,951 BC lawyers (74%) voted in favour of and 2,088 (26%) against the resolution declaring that the proposed law school at TWU is not an approved faculty of law for the purpose of the Law Society’s admission program. As well over one third of eligible members voted, and as the vote in favour exceeded the two-thirds threshold, this

met the criteria set out in the Referendum Notice, which had been drawn from section 13 of the *LPA* for the holding of a binding referendum of the membership.

McGee #2, paras 19-20, Exhibit “R”, JAB #9, pp. 2949-2950; JAB #10, pp. 3480.

54. On October 31, 2014, the Benchers reviewed the results of the referendum, and adopted a resolution under Subrule 4.1 that the proposed TWU law school was not an approved faculty of law for the purposes of admission to the BC Bar (the “**October Resolution**”). The October Resolution was adopted with 25 votes for, one vote against, and four abstentions.

McGee #2, Exhibit “R”, JAB #10, pp. 3480-3481.

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

McGee #2, Exhibit “S”, JAB #10, pp. 3489.

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

57. In his decision on TWU’s judicial review application, Chief Justice Hinkson ruled:
- (i) that the Benchers had the statutory power not to approve TWU’s proposed law school; but
 - (ii) that the Benchers illegally fettered the exercise of their statutory powers by basing their decision on the results of the referendum.

RFJ, at paras 108, 120, AR, pp. 443, 447.

58. Chief Justice Hinkson also held that TWU was not given a full and fair opportunity to present its case to the membership in the referendum, and therefore was denied procedural fairness by the Benchers.

RFJ, at para 125, AR, pp. 448.

59. Although not fully explained at this stage of his reasons, this conclusion seems to be based on the belief that the Law Society sent out an advocacy letter along with the Referendum Notice, without providing TWU with an equal opportunity to state their case to the membership, as well as the Chief Justice's belief (without any evidence on this point) that it was "unlikely" the membership would have adequately considered the available material.

RFJ, at paras 148, 150, AR, pp. 454-455.

60. The Chief Justice's understanding that an advocacy letter was sent out with the Referendum Notice was incorrect. In fact, neither proponents nor opponents of the Resolution were permitted to attach a letter to the Referendum Notice sent to the membership. Rather, as noted above, the Referendum Notice provided a link to the Law Society's website, where all of the relevant material, including all of TWU's submissions, were available to the membership and the public.

61. The Chief Justice concluded that even if he was wrong that the Benchers had fettered their discretion by holding a referendum, "I find that the Decision [not to approve] was made without consideration and balancing of the *Charter* rights at issue, and therefore cannot stand".

RFJ, at para 152, AR, pp. 455.

62. In the result, the Chief Justice granted the following remedy:

I find that given inappropriate fettering of its discretion by the LSBC and its failure to resolve the collision of the competing *Charter* interests in the October Referendum or the Decision, the appropriate remedy is to quash the Decision and restore the results of the April 11, 2014 vote, and I so order [*RFJ*, at para 156, AR, pp. 456.]

PART 2 – ERRORS IN JUDGMENT

63. The Chief Justice erred in concluding that:
- a. the decision making process followed by the Benchers inappropriately fettered their discretion or amounted to an impermissible sub-delegation of authority;
 - b. TWU was not provided with procedural fairness; and
 - c. the Law Society's decision did not reasonably balance and resolve the competing *Charter* rights and values.

PART 3 – ARGUMENT

A. Introduction

64. In October 2014, the Benchers exercised their power under Subrule 4.1 to adopt a resolution not to approve TWU's proposed law school. In doing so, they accepted the wishes of a substantial majority of the members as expressed in a referendum, after determining at the September 26th meeting that both outcomes would be consistent with the Law Society's legal obligations.
65. However, the Benchers did not leave this issue to the membership to decide without exercising their independent judgment. Rather, prior to the referendum, the Benchers thoughtfully and repeatedly considered the matter, over the course of months, and decided that a resolution to not approve TWU's proposed law school was consistent with the legal obligations of the Law Society.
66. Section 3 of the *Legal Profession Act*, SBC 1998, c 9 ("**LPA**") states that "[i]t is the object and duty of the society to uphold and protect the public interest in the administration of justice", including "by preserving and protecting the rights and freedoms of all persons".
67. In complying with this obligation in the situation at hand, the Law Society had to achieve a reasonable balance between these statutory duties and the competing

Charter rights and values at play – the religious and associational rights of TWU and its community against the equality rights of LGBTQ people and women.

68. Numerous submissions, reports and commentary, from members of the profession, the legal academy and the public, were provided to and considered by the Benchers on this issue.
69. After extensive consideration and debate, a majority of the Benchers determined at the September 26th meeting that there was no single correct legal answer to how these competing rights and values should be balanced in this situation. As a decision in favour of either of the competing rights and values was considered to be reasonable, the Benchers concluded that the clear direction of the membership participating in the SGM should be put to a referendum.
70. Accordingly, after the membership had clearly expressed their view that adopting the resolution was the decision that the Law Society should make on this difficult and contentious issue, the Benchers passed the October Resolution.
71. The Chief Justice held that the Benchers could not do this, because it amounted to an unlawful fettering or sub-delegation.
72. With respect, that is legally wrong.
73. The *LPA* does not require the Benchers alone to decide whether to approve TWU's proposed law school without the participation of the membership.
74. Section 13 of the *LPA* gives the membership the power to pass binding resolutions for the Law Society, as long as the Benchers determine that the resolutions are not in breach of their statutory and constitutional duties.
75. Under section 13, the Benchers act as a legal check on the exercise of decision-making power by the members, as the Benchers are prohibited from implementing a resolution that would be inconsistent with their statutory duties. However, if the Benchers conclude that a resolution of the members is not in breach of their statutory duties, which includes the constitutional obligations of the Law Society, they must implement a resolution passed by the membership under section 13.

76. In the situation at hand, the membership had already adopted a resolution at the SGM directing the Benchers to not approve TWU's proposed law school.
77. The Benchers could have changed their mind and adopted the SGM resolution at the September 26th meeting, which the logic of the judgment below accepts.
78. And if the Benchers did not decide to adopt the resolution within 12 months of the SGM, the membership could have held a referendum requiring the Benchers to adopt the SGM Resolution under section 13, as long as the Benchers considered the resolution to be consistent with their statutory duties.
79. Having concluded that the resolution was consistent with their statutory duties, and given the importance of the decision to the legal profession and the public generally, the Benchers decided it was preferable in these circumstances to expedite the referendum, which they have the power to hold under Rule 1-37, instead of waiting the 12 month period.
80. A referendum allowed for broader membership participation than an AGM or SGM, and expediting the referendum procedure was seen as a mechanism to provide a speedy and definitive resolution of the matter, which would be in the best interests of everyone involved.
81. The Benchers essentially concluded, consistent with section 4(2) of the *LPA*, that holding a referendum "was necessary for the promotion, protection, interest or welfare of the society."
82. Under section 4(3) of the *LPA*, "the Benchers may take any action consistent with this Act by resolution".
83. Holding a binding referendum was consistent with the *LPA*, after the Benchers first decided that a vote by the membership not to approve TWU's proposed law school met the Benchers statutory duties, including their constitutional obligations.
84. Thus, the Benchers did exercise their discretion over the key issue in this matter, that is, whether the decision to not approve TWU's proposed law school was consistent with their statutory duties and reasonably balanced the competing *Charter* rights and values.

85. Although section 13 had not yet been formally engaged, the Benchers deliberately adopted the procedure for a binding referendum set out in that section of the *LPA*. It provided that if at least one third of the membership voted, with at least two thirds of the vote in favour of the resolution, the result of the referendum would be binding. As those thresholds were met, and the membership voted overwhelmingly in favour of the resolution, the Benchers adopted it.
86. Viewed in the context of the decision making processes in the *LPA*, read as a whole, the Benchers' decision to hold a referendum was a reasonable exercise of its statutory powers, which is the legal test on judicial review. As the Supreme Court of Canada has stressed, statutory bodies are to be given a considerable amount of discretion to exercise the powers granted to them, unless their decisions are clearly unreasonable.
87. On a reasonable interpretation of the *LPA*, the decision to hold the disputed referendum did not amount to a fettering of discretion or an invalid sub-delegation.
88. The Benchers exercised their discretion by vetting the decision not to approve TWU's proposed law school for consistency with the Law Society's legal obligations. Having done so, it was legally open to the Benchers to be guided by the membership in adopting the October Resolution.
89. There was no breach of procedural fairness to TWU in the way the referendum was conducted. The membership had available to them all of the submissions and other material that had been provided to the Benchers. And, contrary to what the judgement below says, neither side in the debate was allowed to present a letter or submission in the referendum materials sent to the membership.
90. As the Benchers concluded, there is no single, legally correct answer to how the competing rights and values are to be balanced in this situation. Both positions are reasonable. Thus, contrary to what the Chief Justice held, the Benchers did resolve this collision of competing *Charter* interests by determining, at the September 26th meeting, that adopting the Resolution would be consistent with their statutory and constitutional obligations.

91. In summary, the Law Society's, and the Benchers', interpretation of their home statute and the scope of the power granted under it was entirely reasonable and is entitled to the considerable deference owed to a self-governing profession operating under its home statute.
92. Finally, the decision not to approve TWU's proposed law school achieved a reasonable and proportionate balance of the competing *Charter* rights and values in this context, which meets the appropriate standard on judicial review of the *Charter* issue.

B. The Statutory Power to Disapprove of TWU's Proposed Law School

i. The Law Society Had the Statutory Power to Not Approve TWU

93. In its judicial review petition, TWU argued that the Law Society did not have the statutory power to disapprove of TWU's law school for the purpose of admission to the BC Bar.
94. Chief Justice Hinkson ruled against TWU on this issue, holding as follows:

I find that, like the LSUC, the LSBC has a broad statutory authority that includes the object and duty to preserve and protect the rights and freedom of all persons. I also find that a decision to refuse to approve a proposed faculty of law on the basis of an admissions policy is directly related to the statutory mandate of the LSBC and its duties and obligations under the LPA. I conclude that the LSBC correctly found that it has the jurisdiction to disapprove the academic qualifications of a common law faculty of law in a Canadian university, so long as it follows the appropriate procedure and employs the correct analytical framework in doing so. [*RFJ*, at para 108, AR, pp. 443]

95. Although the Law Society submits that the appropriate standard of review on this issue was reasonableness, as the Benchers were construing and applying their home statute and rules, the Chief Justice nevertheless correctly concluded that the Law Society's broad statutory authority included the assessment of whether a propose law school admissions policy is consistent with its statutory obligations.

96. This flows from section 3 of the *LPA*, which sets out the object and duty of the Law Society:
3. It is the object and duty of the society to uphold and protect the public interest in the administration of justice by
 - (a) preserving and protecting the rights and freedoms of all persons,
 - (b) ensuring the independence, integrity, honour and competence of lawyers,
 - (c) establishing standards and programs for education, professional responsibility and competence of lawyers and of applicants for call and admission,
 - (d) regulating the practice of law, and
 - (e) supporting and assisting lawyers, articulated students and lawyer of other jurisdiction who are permitted to practice law in British Columbia in fulfilling their duties in the practice of law.
97. As can be seen, the object and duty of the Law Society goes well beyond ensuring the competency and fitness of lawyers for admission to the BC Bar; it is a broad duty to uphold and protect the public interest in the administration of justice.
98. The Law Society's specific authority to make rules to accomplish its statutory mandate in the context of enrolment and admissions is contained in sections 20 and 21 of the *LPA*. The relevant part of those provisions state as follows:
- 20** (1) The benchers may make rules to do any of the following:
- (a) establish requirements, including academic requirements, and procedures for enrollment of articulated students; (...)
- 21** (1) The benchers may make rules to do any of the following:
- (...) (b) establish requirements, including academic requirements, and procedures for call to the Bar of British Columbia and admission as a solicitor of the Supreme Court;
99. The Law Society must exercise its statutory powers – such as those conferred by ss. 20-21 – to ensure a proposed law school's admissions policy is consistent with the public interest in the administration of justice, and the rights and freedoms of all persons. Therefore, the Law Society had to decide whether to approve TWU's proposed law school in light of its admissions policies.

ii. *Standard on Review Regarding Alleged Error in Holding a Referendum*

100. On appeal of a judicial review decision, this Court does not accord any deference to the conclusions of the court below. The question on appeal is whether the court below identified the appropriate standard of review and applied it properly. The appellate court will ‘step into the shoes’ of the lower court such that its “focus is, in effect, on the administrative decision”.

Agraira v. Canada (Public Safety and Emergency Preparedness), 2013 SCC 36
at para 45-47;

Kanhasamy v. Canada (Citizenship and Immigration), 2015 SCC 61
 (“**Kanhasamy**”) at para 42.

101. Although finding that the decision itself fell within the jurisdiction of the Law Society, the Chief Justice held that the Law Society did not fulfil its statutory duty because the Benchers based their decision on a referendum of the membership. In his view, this was an “abuse of discretion”, which constituted a breach of procedural fairness on a correctness standard of review.

RFJ, at paras 99, 101, 114, 120, AR, pp. 441, 444-447.

102. With respect, the Benchers’ interpretation of the Law Society’s governing statute is subject to the reasonableness standard of review, and not the correctness standard, as the Chief Justice held.
103. The Supreme Court has held since at least 2003 that questions involving an alleged abuse of discretion are to be considered within the general administrative law approach to substantive review, and therefore do not automatically lead to a correctness standard.

Dr. Q. v. College of Physicians and Surgeons of British Columbia, 2003 SCC 19
at paras 22-25.

104. That is because whether there has been an impermissible fettering of discretion or subdelegation involves an interpretation of the statute to determine how the legislature intended decisions to be made. For instance, the question of whether there has been an impermissible subdelegation requires a consideration of the

nature of the powers given in the statute; it “is essentially a matter of construction of the legislation”.

JF Northey, “Sub-Delegated Legislation and *Delegatus Non Potest Delegare*” (1953) 6 Res Jud 294 at 303;

Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, vol 3 (Toronto: Canvasback Publishing, 2009) at 13-17.

105. Similarly, in *Januario*, Justice Russell Brown held that while “fettering by an administrative tribunal of its discretion was once a stand-alone nominate ground of judicial review”, it is now properly considered in the context of a *Dunsmuir* analysis. Brown J. explained that because “fettering discretion as a ground of review involves interpreting an administrative tribunal’s enabling (‘home’) statute”, it “typically (as here) requires reviewing courts to show deference”.

Alberta (Director of Assured Income for the Severely Handicapped) v. Januario, 2013 ABQB 677 at paras 30, 36.

106. This has been recently confirmed by the Supreme Court of Canada, where both the majority and dissenting judges agreed that the issue whether the decision-maker had unduly fettered their discretion was considered as a matter going to the reasonableness of the decision as a whole. Neither judgment treated it as a matter of procedural fairness.

Kanthisamy, *supra* at paras 32, 60, 113-122.

See also *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57 at paras 97-100.

107. Therefore, on a modern approach to judicial review, and in the context of this decision, the question before the court is whether this decision-making process was reasonable in light of the Law Society’s statutory mandate, which requires deference to the Benchers’ interpretation of their home statute.

Paul Daly, “A New Angle on the TWU Saga: *Trinity Western University v. The Law Society of British Columbia*, 2015 BCSC 2326”, *Administrative Law Matters*, (January 8, 2015).

iii. *The Decision-Making Process Was Reasonable in the Context of the LPA*

108. A careful review of the *LPA* shows that the Benchers reasonably concluded that they could seek the guidance of the members on whether to approve TWU's proposed law school, once the Benchers had decided that either outcome was reasonable and consistent with their statutory and constitutional obligations.
109. This review begins with section 3 of the *LPA*, which imposes a duty on the Law Society "to uphold and protect the public interest in the administration of justice", including by "preserving and protecting the rights and freedoms of all persons".
110. Next, section 4 deals with the powers, duties and obligations of the Benchers in carrying out that statutory mandate. Section 4(2) states as follows:
- (2) The benchers govern and administer the affairs of the society and may take any action they consider necessary for the promotion, protection, interest or welfare of the society.
 - (3) The benchers may take any action consistent with this Act by resolution.
 - (4) Subsections (2) and (3) are not limited by any specific power or responsibility given to the benchers by this Act. [emphasis added]
111. Significantly, section 4(2) allows the Benchers to do what they think is necessary to promote or protect the interests of the Law Society.
112. In this case, the Benchers determined that it would be in the interests of the Law Society to involve its members in the decision whether to approve TWU's proposed law school.
113. Other provisions highlight the broad discretion conferred by the legislature upon the Benchers as governors of a self-regulating profession. Section 11(1), for instance, gives the Benchers the power to "...make rules for the governing of the society, lawyers, law firms, articulated students and applicants, and for the carrying out of this Act". And section 11(2) states that section 11(1) "is not limited by any specific power or requirement to make rules given to the benchers by this Act".
114. With respect to the decision at issue, sections 20 and 21 specifically give the Benchers the power to "make rules" governing admission to the Bar.

115. In this case, the “power [that] is assigned under its enabling legislation” to the Benchers is therefore the power to make rules under sections 20 and 21 respecting admissions. The Benchers independently exercised this power by adopting Subrule 2-27(4.1), which provides that a proposed law school would not be an approved faculty of law if the Benchers adopted a resolution stating otherwise.

RFJ, at para 114, AR, pp. 444-445.

116. There is no challenge to the adoption of Rule 2-27 generally, or Subrule 4.1 specifically. Rather, TWU’s challenge is to the Benchers’ decision under this rule not to approve TWU’s proposed law school, and the process followed in determining whether to invoke it.
117. The *LPA* does not stipulate how the decision whether to approve a faculty of law is to be made, or by whom. It does not state that the Benchers alone must make this decision, much less that it must do so without being influenced or guided by the views of the membership, or that it cannot hold a binding referendum of the members on this matter.
118. Put differently, the Benchers are not “the decision maker the *legislation* has designated” to make a decision under Subrule 4.1, because the *LPA* does not contemplate this specific decision.

See *RFJ*, at para 100, AR, pp. 441.

119. Rather, the October Resolution was adopted pursuant to a rule enacted by the Benchers as governors of a self-regulating profession.
120. As noted above, whether a statutory discretion has been improperly fettered or subdelegated is not a procedural fairness issue. It is an issue that involves an interpretation of the Law Society’s home statute and rules, and requires the reasonable exercise of a statutory power.

121. In this respect, section 13 of the *LPA* specifically indicates a legislative intention to provide a mechanism for decisions of the Law Society to be resolved through a referendum of the membership. It reads as follows:

Implementing resolutions of general meeting

13(1) A resolution of a general meeting of the society is not binding on the benchers except as provided in this section.

(2) A referendum of all members must be conducted on a resolution if

(a) it has not been substantially implemented by the benchers within 12 months following the general meeting at which it was adopted, and

(b) the executive director receives a petition signed by at least 5% of members in good standing of the society requesting a referendum on the resolution.

(3) Subject to subsection (4), the resolution is binding on the benchers if at least

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

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

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

122. As can be seen, the Benchers must determine under section 13(4) whether a resolution of the members is consistent with the Benchers' statutory duties before it can be implemented.
123. Here, before holding the referendum, the Benchers decided that passing a resolution to not approve TWU's proposed law school would be consistent with their statutory duties, which includes the constitutional obligations of the Law Society.
124. The Benchers could have waited for the section 13 referendum to be triggered by the membership in June 2015, as appeared certain to occur. However, the Benchers recognized that such a delay would not serve the interests of anyone, including TWU, and so the Benchers' exercised their power to hold a referendum conferred by Rule 1-37 of the Rules. This effectively expedited the expected referendum process to October 2014.

125. Acting in a manner that is responsive to the views of their membership – within the bounds of their lawful authority – was therefore not only contemplated, but ensured by the legislature, by including this specific statutory process for holding a binding referendum of the membership.
126. The reasonableness of the Benchers' decision making process in this case must be considered with that legislative intent in mind, along with the broad powers conferred upon the Benchers, including the power to take any act consistent with the *LPA* by resolution.
127. As the Benchers considered the members' resolution to be consistent with their statutory and constitutional duties, the determination of the Benchers that they could exercise their power under Rule 1-37 to hold a referendum on whether to approve TWU's law school was a reasonable interpretation and application of the statutory powers in the *LPA*.

C. Procedural Fairness

128. Although not listed in his conclusion as a basis upon which his decision was grounded, the Chief Justice nevertheless found that TWU was denied procedural fairness by the Law Society, aside from considerations about the exercise of the Benchers' discretion, addressed above.

RFJ, at paras 125, 148, 152, AR, pp. 448, 454-455.

129. "(T)he concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". In deciding how a particular standard of fairness it to be applied, "a margin of deference" is to be afforded to statutory decision makers.

Dunsmuir v. New Brunswick, 2008 SCC 9 at para 79;
Mission Institution v. Khela, 2014 SCC 24 at para 89.

130. The Chief Justice did not undertake a detailed examination of the context of this decision, nor did he apply all of the *Baker* factors in determining the degree of procedural fairness owed to TWU in this unique context. Respectfully, the Chief

Justice’s review of the context was cursory and relied on a number of questionable findings, such as implying that the decision will impact “one’s ability to practice their profession”.

See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (“*Baker*”) at paras 23-27; *RFJ*, at para 123, AR, pp. 447-448.

131. This finding is not self-evident, as every other law school in the country is open to evangelical Christians, as they are open to LGBTQ students, or any other students who want to practice law.
132. However, the Law Society submits that whatever duty of fairness was owed to TWU was met in this complex factual context. It is important to emphasize that this was not a discrete adjudicative hearing with two adversarial parties, where the standards of natural justice are relatively straightforward.
133. The October Resolution was ultimately a policy decision resulting from the culmination of approximately one year of investigation and debate into the issue across the entire Law Society. It involved a constantly shifting factual landscape, six Benchers meetings, a membership resolution and SGM, an AGM, and referendum of the membership. In this context especially, “important weight must be given to the choice of procedures made by the agency itself and its institutional constraints”, as the Court emphasized in *Baker*.

Baker, supra at para 27;

Moreau-Bérubé v. New Brunswick (Judicial Council), 2002 SCC 11 at para 81.

134. TWU was given extensive participatory rights throughout the process, including:
 - TWU provided extensive submissions in its proposal to the Minister and Federation of Law Societies, which was also provided to the Law Society;
 - TWU’s representatives were invited to attend and did attend the Benchers’ meetings; TWU was also represented at the SGM, and observed the counting of ballots;
 - TWU was kept informed throughout the decision-making process, and was specifically provided with all of the information before the Benchers in order to facilitate TWU’s response;

- TWU was invited by the Law Society to provide extensive written submissions both before the April 11th meeting and before the September 26th meeting; and
 - TWU provided written submissions prior to the April 11th meeting, following the SGM, following the September 26th motion, and filed with the Law Society extensive affidavit evidence prior to the October vote.
135. In total, TWU's submissions to the Law Society amounted to many hundreds pages of evidence and argument, which were provided to the Benchers and made available to the membership on the Law Society's website, and to which the membership was directed in both the SGM Notice and the Referendum Notice through links to the Law Society's website.
136. Both the Benchers and the membership as a whole were fully informed of TWU's position, and TWU has repeatedly presented its position to the Law Society, both through the formal consultation process, through direct appeals to members, and through public advocacy.
137. Moreover, TWU was provided with access and a full opportunity to respond to all of the information available to the Benchers and membership in making their decision, including the submissions of the public and legal opinions.
138. In fact, the only specific procedural concern cited in the Chief Justice's reasons was his understanding that a letter from the proponent of the SGM Resolution "was included within the Notice to the Profession inviting members to vote on the Referendum Question".

RFJ, at para 150, AR, pp. 454-455.

139. However, this did not occur. As noted earlier in the Chief Justice's reasons, the letter was in fact sent out months prior to the referendum, and was attached to the SGM resolution in order to inform individuals of the basis for the proponent calling for the SGM.

RFJ, at para 40, AR, pp. 426-427.

140. And in any event, TWU had an extensive opportunity to respond to that letter:

- TWU submissions were reviewed and considered by the Benchers, were posted online, and were available to the Law Society membership and the broader public, prior to the SGM and prior to the referendum;
- the Law Society membership was twice directed to TWU's submissions along with the other submissions received by the Benchers, in the SGM Notice and the Referendum Notice;
- TWU's President was present at the SGM, and was given a considerable amount of time to state his case before the thousands of participants; and
- TWU sent out public appeals to lawyers, sent direct appeals to approximately 6,000 of them, and had access to various publications, websites, and social media outlets in which to make its voice heard to the membership and the public.

141. With respect, TWU was not entitled to uninhibited and direct access to the legal profession, and the Law Society was not legally required to permit TWU, but no one else, to present its position along with the Referendum Notice.

142. As the Chief Justice's determination appears to be based on a palpable and overriding error as to the timing of the Law Society's delivery of the SGM letter, and TWU was given extensive and special participatory rights throughout this process, his finding of procedural unfairness to TWU cannot be sustained.

D. The Balancing of *Charter* Rights and Values

i. The Court's role in reviewing a balancing of Charter rights and values

143. The Law Society was statutorily obliged to determine whether TWU's proposed law school was consistent with the public interest in the administration of justice and the Law Society's obligation to uphold the rights and freedoms of all persons.

144. In making this determination, the Benchers had to reasonably balance these statutory obligations with any competing *Charter* rights and values engaged by the decision. As the Supreme Court of Canada has repeatedly recognized, this balancing exercise need not necessarily lead to a single correct answer; a reasonable and proportionate balance is all that is required.

145. At the September 26th meeting, the Benchers considered the arguments made, and the resolution passed, at the SGM. This caused them to reconsider their positions and to conclude that there was no single correct answer to how the *Charter* rights and values were to be balanced in this situation, and therefore they were not legally bound to approve TWU's proposed law school.
146. As a result, after determining that either outcome would be consistent with their legal obligations under the *LPA* and the *Charter*, the Benchers decided that holding a referendum under Rule 1-37 was the best way to determine whether TWU's proposed law school should be approved.
147. The Chief Justice disagreed with this conclusion. He apparently thought there was a single, correct answer that the Benchers had to arrive at and which therefore could not be decided in a referendum.
148. With respect, that is not so as a matter of law.
149. In scrutinizing the balancing of *Charter* rights and values in the exercise of statutory powers by administrative decision makers, the court will engage in a two-step process. The court will ask, first, whether the decision infringes *Charter* rights; and if so, whether the decision reflects a reasonable balancing of the *Charter* protections at play.

Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations), 2015 BCCA 352 at paras 48-49.

150. Assuming that *Charter* rights or values are engaged on both sides of the equation (as discussed below), how these interests are to be balanced is subject to a reasonableness standard of review. The cases in which this has been established post-date the *BCCT* decision upon which the Chief Justice relied.

See e.g. *Doré v. Barreau du Québec*, 2012 SCC 12 (“**Doré**”);
Divito v. Canada (Public Safety and Emergency Preparedness), 2013 SCC 47;
Loyola High School v. Quebec (AG), 2015 SCC 12 (“**Loyola**”).

151. Once it is understood that reasonableness is the appropriate standard of review on the *Charter* balancing issue, and presuming no legal fault be taken with the

decision-making process followed by the Benchers in this case (as argued above), the Benchers' conclusion that either outcome is reasonable must be accepted.

152. The Chief Justice erred in finding that the process followed in this case necessarily negates this balancing exercise. If the process followed is authorized by a reasonable interpretation of the statute – as it was in this case – then the question becomes, in the words of the Supreme Court, whether “the decision reflects a proportionate balancing of the *Charter* protections at play”.

Doré, supra, at para 57;

Loyola, supra at para 37.

153. This exercise requires an assessment of whether the outcome reached reflects a reasonable balance of *Charter* rights and values, not the specific internal or subjective assessments made by the decision makers, which cannot be definitively known in the absence of a common set of reasons. This decision was not produced in a formal adjudicative setting, nor was the Law Society required to provide formal reasons for the decision; rather, this decision was “more akin to the decisions reached by elected bodies such as Parliament, Provincial Legislatures and municipal councils”.

Trinity Western University v The Law Society of Upper Canada, 2015 ONSC 4250 (“*TWU v. LSUC*”) at para 45.

154. As the Ontario Divisional Court held:

In the absence of reasons, what is important, when considering the appropriate standard of review, is whether it is possible for this court, on a review, to understand the basis upon which the decision was reached, and the analysis that was undertaken in the process of reaching that decision.”

TWU v. LSUC, supra at para 49.

155. The Chief Justice found that, “(l)ike the Divisional Court”, he had “no difficulty” achieving the required understanding of the Decision on the record before him. At that stage, like the Divisional Court, he should have then turned his mind to determining whether the ultimate decision reflected a reasonable balance. With

respect, he should not have attempted to read the minds of the membership voting in the referendum, if such a task was even possible.

RFJ, at paras 111, 150, AR, pp. 444, 455;
TWU v. LSUC, *supra* at paras 48-49.

156. In this context, where no reasons were given or required, the court should look to the basis for the decision and “the reasons that *could* be offered”, based on a review of the record and all of the circumstances of the case. Like a decision of a City Council, the reasons in support of a decision for the purposes of a reasonableness analysis are to be determined by a review of the record and the surrounding circumstances – in this case, the speeches of the Benchers, the submissions and material available to them and the Law Society, and any other relevant information casting light on the grounds in support of the decision.

Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association, 2011 SCC 61 at para 54;

Catalyst Paper Corp. v. North Cowichan (District), 2012 SCC 2 at paras 33-35.

157. Therefore, this appeal should turn on whether the process the Benchers followed was reasonable (as argued above), and whether the outcome reflected a reasonable and proportionate balance of *Charter* rights and interests.

ii. BCCT Does Not Dictate the Outcome of the Balancing Analysis

158. The Benchers did not legally err in concluding that there is no single correct answer to how the competing *Charter* rights and values should be balanced in this situation and therefore that either outcome was reasonable. Therefore, they did not err in ultimately concluding that passing the October Resolution reflected a reasonable and proportionate balance.
159. Contrary to what the Chief Justice apparently thought, the decision whether to approve TWU’s proposed law school is not dictated by the *BCCT* case. *BCCT* did not involve access to the legal profession and the public’s perception of the fairness of the justice system; it involved the training of teachers.

160. And, unlike in the *BCCT* case, the Law Society is not saying that TWU's graduates would not be qualified to practice law in the province. Rather, as stated before, the concerns animating the adoption of the Resolution were the impact of approving TWU's proposed law school on LGBTQ people and women seeking to practice law, and the broader impact on the public interest in the administration of justice.

See *TWU v. LSUC*, *supra* at paras 59-72.

iii. Impact on Religious Freedom

161. The first step in the *Doré* analysis is to determine whether *Charter* rights have been infringed by the decision and if so, to what extent. Consideration of the context is important in making this determination.
162. The context here is admission to an educational institution that plays a central role in the administration of justice.
163. The Resolution has an impact on the ability of TWU to create a law school which has a discriminatory admissions policy; that is, to exclude individuals from a law school who cannot abide by TWU's religious practices and beliefs. To that extent, the religious freedom of TWU's community is affected by the Resolution.
164. However, the Resolution is not aimed at, and does not interfere with, religious practices or the holding of religious beliefs, as such. Rather the Law Society has not approved TWU's proposed law school because the imposition of a discriminatory admissions policy impacts the rights and freedoms of others.

See Richard Moon, "Freedom of Religion Under the *Charter of Rights*: The Limits of State Neutrality" (2012) 45 UBC L Rev 497.

165. Importantly, the religious beliefs of TWU's religious community do not require their followers to study law in a setting that discriminates against or excludes LGBTQ people and women. TWU's own evidence confirms that evangelical Christianity does not require isolation from those with different beliefs, values, or practices.

Affidavit #1 of S. Reimer, paras 24, 43-44, JAB #4, pp. 1367, 1371-1372;

See also *TWU v. LSUC*, *supra* at paras 78-80.

166. Members of TWU's religious community are free to hold, practice and express their religious beliefs both generally and while attending any law school across the country, and they can freely associate for the purposes of holding, practicing and expressing these beliefs. They could also do so at TWU, absent a discriminatory admissions policy seeking to force those views and practices on others as a condition of admission to the proposed law school.
167. Some members of the evangelical Christian community may *prefer* to attend a law school only with co-religionists adhering to a strict code of conduct, and in this respect, may consider themselves to be akin to a private religious club or place of worship, which are legally entitled to have an exclusionary admission policy.
168. But a law school is not like a private club or church. As stated before, law schools are an integral part of the justice system, and the admissions policies of a law school determine who will have access to scarce law school spots, and ultimately, the legal profession and the judiciary. Instruction in law is not the practice of a religion, and issuing law degrees is not a religious rite or practice.
169. It should also be recognized that there is a constitutional difference between state action which directly impinges upon religious freedom, and public bodies refusing to condone or approve of religiously-based actions that have a discriminatory impact.

RE Charney, "Should the Law Society of Upper Canada Give Its Blessing to Trinity Western University Law School?" (2015) 34 NJCL 173.

170. This point was made by Justice Stevens in his concurring opinion in the U.S. Supreme Court's decision in *Christian Legal Society v. Martinez*, where the Court held that Hastings College of the Law did not have to give official status to a Christian legal group that required its members to sign a Covenant which restricted membership to heterosexuals:

In this case, petitioner excludes students who will not sign its Statement of Faith or who engage in "unrepentant homosexual conduct," App. 226. The expressive association argument it presses, however, is hardly limited to these facts. Other groups may exclude or mistreat Jews, blacks, and women—or those who do not share their contempt for Jews, blacks, and

women. A free society must tolerate such groups. It need not subsidize them, give them its official imprimatur, or grant them equal access to law school facilities [emphasis added].

Christian Legal Society v. Martinez, 130 S.Ct. 2971 (2010) at 2998.

171. Thus, while the ability of TWU to exclude others on the basis of their religious beliefs is impacted by the Law Society's Resolution, there are legitimate questions about the extent to which it is entitled to constitutional protection in the circumstances of this case.

iv. Equality Rights of LGBTQ persons and women

172. The impact on TWU's ability to create a law school composed entirely of people who adhere to their religious beliefs has to be balanced against the equality rights of LGBTQ people and women.
173. TWU's admissions policy effectively deprives LGBTQ individuals and women an equal opportunity to access law school, and therefore deprives them of equal access to the profession and the judiciary.
174. Depriving individuals of equal access to law school on the basis of protected characteristics like sexual orientation or gender is a serious incursion upon their autonomy and personhood. The Ontario Divisional Court found that the Covenant is "by its very nature, discriminatory":

[I]n order for persons, who do not hold the beliefs that TWU espouses, to attend TWU, they must openly, and contractually, renounce those beliefs or, at the very least, agree not to practice them. The only other apparent option for prospective students, who do not share TWU's religious beliefs, but who still desire to obtain one of its coveted law school spots, is to engage in an active deception, in terms of their true beliefs and their true identity, with dire consequences if their deception is discovered...

This reality is of particular importance for LGBTQ persons because, in order to attend TWU, they must sign a document in which they agree to essentially bury a crucial component of their very identity, by forsaking any form of intimacy with those persons with whom they would wish to form a relationship

TWU v. LSUC, *supra* at paras 108, 111-112.

175. As was the case in *Vriend v. Alberta*, the failure of public bodies to condemn the discriminatory admission and enrollment policies of TWU sends the message that “it is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation”.

Vriend v. Alberta, [1998] 1 SCR 493 at para 102.

176. While TWU is not strictly bound by the *Charter*, the Law Society is. The Law Society must take into account the equality rights of persons who would be deprived of equal access to the legal profession through the approval of a proposed law school with discriminatory admissions and enrolment policies.

177. Indeed, as the Supreme Court has recently held, religious freedom itself must 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.” According to the Court, “the state always has a legitimate interest in promoting and protecting” values such as diversity and equality, as the Law Society has done here.

Loyola, supra at paras 47-48 (emphasis added).

v. The Law Society’s Reasonable Balance

178. The Law Society was legally required to strike a reasonable balance between these competing *Charter* rights and values. Previous cases involving the conflict between religious freedom and equality rights have found that the ability of religious individuals to exclude others did not outweigh the right of LGBTQ persons to participate in society free from discrimination in the provision of benefits or services.

See e.g. *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3;

Brockie v Ontario (Human Rights Commission), [2002] OJ No 2375 (QL);

Ontario Human Rights Commission v. Christian Horizons, 2010 ONSC 2105;

Eadie and Thomas v. Riverbend Bed and Breakfast (No. 2), 2012 BCHRT 247.

179. In the case of TWU, thoughtful arguments have been made on both sides of the issue. Benchers, lawyers, judges and law societies across the country have divided on where the balance between religious freedom and substantive equality should be struck, and it cannot be said with certainty that only one position is legally correct or that either position is clearly unreasonable.
180. That is what the Benchers concluded at their September 26th meeting, before holding a referendum to decide the matter. They understood that they could not implement a resolution that was contrary to their statutory and constitutional obligations, and expressly confirmed that they were of the opinion “that implementation of the Resolution does not constitute a breach of their statutory duties”.
181. Like the Benchers, the members understood that they were voting on how the competing *Charter* rights and values should be balanced. And in the referendum, they expressed their view that the desire of TWU’s membership to exclude others who could not abide by their religious precepts did not prevail over the rights of LGBTQ persons and women to equal access to law schools and the legal profession.
182. The Benchers adopted the October Resolution because in their view, that resolution met the Law Society’s statutory duty to uphold and protect the public interest in the administration of justice.
183. That statutory duty is the legal touchstone in this case – and the Benchers’ determination that a vote by the membership not to approve TWU’s proposed law school was in the public interest in the administration of justice resolved the collision of competing *Charter* interests in a reasonable manner.
184. Passing the October Resolution therefore effected a reasonable balance between the Law Society’s statutory mandate and the effected *Charter* rights and interests, and the fact that the Benchers’ ultimate decision to disapprove of TWU’s proposed law school was guided by a vote of the members does not make their decision unreasonable.

E. Conclusion

185. The judgement below restored the Benchers' initial decision, which was to not disapprove TWU's proposed law school.
186. But the April decision does not reflect the position of the Law Society. The Law Society's position is that it is in the interest of the public in the administration of justice to not approve TWU's proposed law school, and that this conclusion reasonably balances the competing *Charter* rights and values.
187. This is the issue that needs to be judicially resolved regarding TWU's proposed law school.

PART 4 – NATURE OF ORDER SOUGHT

188. An order quashing the decision of the Chambers Judge below, and restoring the October Resolution of the Law Society.

Dated at the City of Vancouver, Province of British Columbia, this February 3rd of 2016.

"Peter A. Gall"

Peter A. Gall, Q.C.
Lawyer for Appellant

"Donald R. Munroe"

Donald R. Munroe, Q.C.
Lawyer for Appellant

LIST OF AUTHORITIES

AUTHORITIES	PARAGRAPH #
<i>Agraira v. Canada (Public Safety and Emergency Preparedness)</i> , 2013 SCC 36	100
<i>Alberta (Director of Assured Income for the Severely Handicapped) v. Januario</i> , 2013 ABQB 677	105
<i>Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association</i> , 2011 SCC 61	156
<i>Baker v. Canada (Minister of Citizenship and Immigration)</i> , [1999] 2 SCR 817 (“ Baker ”)	130, 133
<i>Brockie v Ontario (Human Rights Commission)</i> , [2002] OJ No 2375 (QL)	178
<i>Canadian Broadcasting Corp. v. SODRAC 2003 Inc.</i> , 2015 SCC 57	106
<i>Catalyst Paper Corp. v. North Cowichan (District)</i> , 2012 SCC 2	156
<i>Christian Legal Society v. Martinez</i> , 130 S.Ct. 2971 (2010)	170
<i>Divito v. Canada (Public Safety and Emergency Preparedness)</i> , 2013 SCC 47	150
<i>Doré v. Barreau du Québec</i> , 2012 SCC 12 (“ Doré ”)	150, 152, 161
<i>Dr. Q. v. College of Physicians and Surgeons of British Columbia</i> , 2003 SCC 19	103
<i>Dunsmuir v. New Brunswick</i> , 2008 SCC 9	105, 129
<i>Eadie and Thomas v. Riverbend Bed and Breakfast (No. 2)</i> , 2012 BCHRT 247	178
<i>Kanthisamy v. Canada (Citizenship and Immigration)</i> , 2015 SCC 61 (“ Kanthisamy ”)	100, 106
<i>Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)</i> , 2015 BCCA 352	149

<i>Loyola High School v. Quebec (AG)</i> , 2015 SCC 12 (“ Loyola ”)	150, 152, 177
<i>Marriage Commissioners Appointed Under The Marriage Act (Re)</i> , 2011 SKCA 3	178
<i>Mission Institution v. Khela</i> , 2014 SCC 24	129
<i>Moreau-Bérubé v. New Brunswick (Judicial Council)</i> , 2002 SCC 11	133
<i>Ontario Human Rights Commission v. Christian Horizons</i> , 2010 ONSC 2105	178
<i>Trinity Western University v. BCCT</i> , 2001 SCC 31 (“ BCCT ”)	26, 42, 43, 150, 158-160
<i>Trinity Western University v. The Law Society of British Columbia</i> , 2015 BCSC 2326 (“ RFJ ”)	4, 5, 6, 13, 14, 15, 27, 29, 51, 57, 58, 59, 61, 62, 94, 101, 115, 118, 128, 130, 138, 139, 155
<i>Trinity Western University v. The Law Society of Upper Canada</i> , 2015 ONSC 4250 (“ TWU v. LSUC ”)	153, 154, 155, 160, 165, 174
<i>Vriend v. Alberta</i> , [1998] 1 SCR 493	175
STATUTES	
<i>Degree Authorization Act</i> , SBC 2002, c 24	1, 6, 55
<i>Legal Profession Act</i> , SBC 1998, c 9 (“ LPA ”)	5, 21, 34, 30, 35, 37, 38, 45, 66, 73, 74, 75, 78, 81, 82, 83, 85, 86, 87, 96, 98, 108, 109, 110, 111, 113, 114, 115, 116, 117, 118, 121, 124, 126, 127, 146

OTHERS	
Donald J.M. Brown and John M. Evans, <i>Judicial Review of Administrative Action in Canada</i> , vol 3 (Toronto: Canvasback Publishing, 2009) at 13-17	104
JF Northey, "Sub-Delegated Legislation and <i>Delegatus Non Potest Delegare</i> " (1953) 6 Res Jud 294 at 303	104
Paul Daly, "A New Angle on the TWU Saga: Trinity Western University v. The Law Society of British Columbia, 2015 BCSC 2326", <i>Administrative Law Matters</i> , (January 8, 2015)	107
RE Charney, "Should the Law Society of Upper Canada Give Its Blessing to Trinity Western University Law School?" (2015) 34 NJCL 173	169
Richard Moon, "Freedom of Religion Under the <i>Charter of Rights: The Limits of State Neutrality</i> " (2012) 45 UBC L Rev 497	164