COURT OF APPEAL FOR ONTARIO

CITATION: Trinity Western University v. The Law Society of Upper Canada, 2016 ONCA 518
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MacPherson, Cronk and Pardu JJ.A.

BETWEEN

Trinity Western University and Brayden Volkenant

Applicants (Appellants)

and

Law Society of Upper Canada

Respondent (Respondent)

Robert W. Staley, Derek J. Bell and Ranjan K. Agarwal, for the appellants

Guy J. Pratte, Nadia Effendi and Duncan Ault, for the respondent

Gerald D. Chipeur, Q.C. and Grace Mackintosh, for the intervener the Seventh-day Adventist Church in Canada

Daniel C. Santoro and Joshua Tong, for the intervener the Justice Centre for Constitutional Freedoms

Albertos Polizogopoulos, for the interveners the Evangelical Fellowship of Canada and Christian Higher Education Canada

André Marshall Schutten, for the intervener the Association for Reformed Political Action (ARPA) Canada

Derek B.M. Ross and John R. Sikkema, for the intervener the Christian Legal Fellowship

Marlys Edwardh, Frances Mahon and Paul Jonathan Saguil, for the interveners Out on Bay Street and OUTlaws

Arden Beddoes, for the intervener the Canadian Secular Alliance

Susan Ursel and David Grossman, for the intervener the Canadian Bar Association

Gavin Magrath, for the intervener Lawyers' Rights Watch Canada

Alan L.W. D'Silva and Alexandra Urbanski, for the intervener the Canadian Civil Liberties Association

Chris Paliare and Joanna Radbord, for the intervener the Advocates' Society

John Norris, for the intervener the Criminal Lawyers' Association (Ontario)

Heard: June 6 and 7, 2016

On appeal from the order of the Divisional Court (Associate Chief Justice Frank N. Marrocco, Justice Edward F. Then and Justice Ian V. B. Nordheimer) dated July 2, 2015, with reasons reported at 2015 ONSC 4250, 126 O.R. (3d) 1.

MacPherson J.A.:

A. INTRODUCTION

[1] The *Canadian Charter of Rights and Freedoms*, enacted by the *Canada Act 1982* (U.K.), c.11, has been a part of the Canadian Constitution since 1982. In 22 succinct sections (2-23), the *Charter* protects the rights and freedoms of all Canadians in six domains – fundamental, democratic, mobility, legal, equality and linguistic.

[2] In the early years of the *Charter*, the Supreme Court of Canada strove to interpret all these rights and freedoms in a broad fashion. One of the

consequences of a broad definition of rights and freedoms is the possibility that they will collide with other important values in Canadian society.

[3] One category of collision is well-known in the 34-year history of the *Charter*. The rights and freedoms in the *Charter*, broadly defined, may collide with important government objectives (security, health, the economy, etc.). This type of collision happens frequently and is resolved by meshing the interpretation of the right or freedom with the limitation in s. 1 of the *Charter*.

[4] A second category of collision occurs more rarely. It is a collision between the broad interpretation of two rights or freedoms. This appeal, involving a clash between religious freedom and equality, is an example of this second category of collision.

[5] Trinity Western University ("TWU") is a longstanding, respected private university in British Columbia. Its mandate is anchored in an underlying evangelical Christian philosophy. Part of its religious philosophy includes a strong opposition to same-sex relationships and marriages, and common law relationships outside marriage.

[6] TWU wants to establish a law school. Although members of the lesbian, gay, bisexual, transgender and queer ("LGBTQ") community may apply to the proposed law school, they will not be admitted unless they are willing to sign and adhere to TWU's Community Covenant, described below, which forbids sexual

intimacy except between married heterosexual couples. The consequence is that LGBTQ students are discriminated against in terms of admission to, and life at, TWU. TWU, on the other hand, says that its Community Covenant is protected by its right to freedom of religion.

[7] This appeal arises from a decision by the Law Society of Upper Canada ("LSUC") on the accreditation of TWU's proposed law school. TWU wants to be sure that its graduates will be eligible to be called to the bar throughout Canada, and so it has applied to the provincial law societies, including the LSUC, for accreditation of its proposed law school.

[8] Six law societies have granted accreditation – Alberta, Saskatchewan, Manitoba, New Brunswick, Prince Edward Island, and Newfoundland and Labrador. To my knowledge, there have not been any court proceedings in the six provinces where accreditation has been granted.

[9] Three law societies have refused accreditation – British Columbia, Nova Scotia, and Ontario. The law society decisions refusing accreditation in British Columbia and Nova Scotia were overturned by superior court decisions in both provinces: see *Trinity Western University v. Law Society of British Columbia*, 2015 BCSC 2326, 392 D.L.R. (4th) 722, and *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25, 381 D.L.R. (4th) 296. These decisions

have been appealed; the Nova Scotia appeal was heard in April 2016 and the British Columbia appeal was heard in June 2016.

[10] In Ontario, by virtue of a 28-21 vote on April 24, 2014, the benchers of the LSUC denied accreditation to TWU's proposed law school.

[11] TWU sought judicial review of this decision. In reasons released on July 2, 2015, a three-judge panel of the Divisional Court dismissed the application for judicial review.

[12] TWU appeals from the Divisional Court decision. As will be seen, the crux of the appeal involves a collision between freedom of religion and equality, both of which are protected in the *Charter* and both of which have been defined and interpreted in a generous fashion by the Supreme Court of Canada.

[13] In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, Dickson C.J. said, at p. 336:

> A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms....

[14] The challenge in this appeal is considering the balance between freedom of religion on the one hand and equality in the context of sexual orientation on the other hand. Who strikes the balance and what is it?

B. FACTS

(1) The parties and events

(a) TWU

[15] TWU is a private Christian university in Langley, British Columbia. It is said to be an arm of the Evangelical Free Church of Canada, which is a Protestant Christian denomination.

[16] TWU was established in 1962. In 1969, the *Trinity Junior College Act*, S.B.C. 1969, c. 44, was enacted. It stated that TWU's education is to be provided "with an underlying philosophy and viewpoint that is Christian."

[17] TWU was recognized as a degree-granting institution in 1979. In 1985 its name was changed to its current name and it was authorized to offer graduate degrees.

[18] TWU now offers more than 50 undergraduate and graduate programs, including professional programs in business, education, nursing, and counselling psychology, to its student body of approximately 4,000 students.

[19] TWU adheres to the Association of Universities and Colleges of Canada's policy on Academic Freedom.

[20] TWU has a Mission Statement that is central to its operations and programs:

> 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 Jesus Christ who glorify God through fulfilling the Great Commission, serving God and people in the various marketplaces of life.

[21] TWU, consistent with evangelical Christianity, affirms that the Bible is the authoritative and divinely-inspired word of God and that people reach their fullest potential by participating in a community committed to the observation of Biblical teachings. This belief is foundational to TWU's approach to education and community development and finds expression in a document titled "Trinity Western University Community Covenant Agreement" (the "Community Covenant" or "Covenant").

[22] All TWU students must read, understand and agree to abide by the terms of the Community Covenant. The document is a code of conduct that embodies TWU's evangelical Christian religious values. In agreeing to abide by the Covenant, members of the TWU community (administrators, faculty, students and staff) commit themselves to virtues such as love, joy, peace, patience, kindness, goodness, faithfulness, gentleness, self-control, compassion, humility, forgiveness, peacemaking, mercy and justice.

[23] Under the heading "Community Life at TWU", the Community Covenant stipulates that community members must abstain from various activities,

including "sexual intimacy that violates the sacredness of marriage between a man and a woman."

[24] Under the heading "Healthy Sexuality", the Community Covenant states that "according to the Bible, sexual intimacy is reserved for marriage between one man and one woman."

[25] These provisions flow from the evangelical Christian tradition that defines marriage as an exclusive, lifelong, covenantal union of male and female. Parts of the Bible are interpreted as the foundation for this belief. Accordingly, same-sex intercourse and marriage are believed to be contrary to Biblical teaching and are, therefore, morally unacceptable.

[26] While TWU teaches from a Christian perspective, it permits students to hold and express diverse opinions on moral, ethical and religious issues, including same-sex relationships, even if they conflict with TWU's religious beliefs and positions.

[27] TWU does not ban admission to LGBTQ students and there are students from that community at TWU. The Community Covenant prohibits any form of harassment, including harassment on the basis of sexual orientation.

[28] TWU does not actively seek out cases of non-compliance with the Community Covenant but complaints about non-compliance can be made. Discipline may include expulsion.

(b) Brayden Volkenant

[29] Brayden Volkenant is a graduate of TWU's Bachelor of Arts (Business Administration) program. He is an evangelical Christian and so he already believed in many of the values expressed in the Community Covenant when he went to TWU. As a TWU student, he acknowledged and accepted the terms of the Covenant. Mr. Volkenant's preference would have been to attend TWU's proposed law school, but he has now enrolled at the University of Alberta's Faculty of Law. He is interested in practising law in Ontario after graduating from law school.

(c) The LSUC's Mandate

[30] The LSUC was created by Imperial statute in 1797: *An Act for the better regulating the Practice of the Law*, S.U.C. 1797 (37 Geo. III), c. XIII.

[31] In 1877, the LSUC was given the authority to improve legal education, including making rules with respect to the admission of students-at-law, conditions of study, and admission to the practice of law.

[32] In 1912, the LSUC was given the authority to establish and maintain a law school.

[33] In 1957, the LSUC agreed to allow Ontario universities to develop an LL.B. program. Until that point, the LSUC had maintained a monopoly on legal studies that led to admission to the Ontario bar.

[34] Since 1957, the LSUC has retained authority over admission to the profession. No person can practise law in Ontario without a licence and the LSUC has the exclusive authority to establish the requisite classes of licence. As well, under the *Law Society Act*, R.S.O. 1990, c. L.8 ("*LSA*"), the LSUC has the exclusive authority to prescribe qualifications and requirements to obtain a licence to practise law in Ontario. These grants of authority are in keeping with the LSUC's obligation under s. 4.1 of the *LSA* to ensure that all lawyers practising in Ontario satisfy appropriate standards of learning, professional competence and professional conduct. As discussed below, in carrying out its functions, duties and powers, the LSUC must have regard to the "public interest" under s. 4.2 of the *LSA*.

[35] Pursuant to its by-law making powers, the LSUC introduced accreditation of law schools as part of its licensing process. By-law 4 prescribes that one of the requirements for a class L1 licence to practise law is a degree from "an accredited law school." An "accredited law school" is defined as a "law school in Canada that is accredited by the Society."

(d) Federation of Law Societies of Canada Process

[36] In 2010, all the Canadian law societies agreed to give the Federation of Law Societies of Canada's Canadian Common Law Program Approval Committee ("Federation Approval Committee") the power to review new common

law degree programs to ensure that graduates are adequately prepared for admission to the bar.

[37] In June 2012, TWU submitted its proposal to the Federation Approval Committee for a law school to open in September 2015 (later amended to September 2016). The Federation Approval Committee granted preliminary approval to TWU in December 2013.

[38] In the meantime, the Federation established a Special Advisory Committee with a mandate to advise on this question:

> What additional considerations, if any, should be taken into account in determining whether future graduates of TWU's proposed school of law should be eligible to enroll in the admissions program of any of Canada's law societies, given the requirement that all students and faculty of TWU must abide by TWU's Community Covenant Agreement as a condition of admission and employment, respectively?

[39] The Special Advisory Committee concluded that there was "no public interest reason to exclude future graduates of the program from law society bar admissions programs."

(e) The LSUC's Process

[40] In January 2014, TWU asked the LSUC to accredit its law school.

[41] In early 2014, the Treasurer[1] of the LSUC delivered a statement outlining the process it would follow in order to arrive at a decision about TWU's request for accreditation.

[42] TWU was invited to provide written submissions, which it did on April 2, 2014.

[43] The LSUC invited members of the profession and public to make submissions. The LSUC received approximately 210 submissions.

[44] The record also included the relevant reports of the Federation of Law Societies of Canada and three legal opinions that the LSUC solicited: by Freya Kristjanson on the approach to ss. 4.1 and 4.2 of the *LSA*; by Mahmud Jamal on the implications of the *Charter* in the accreditation decision; and by Andrew Pinto on the relevance of the *Human Rights Code*, R.S.O. 1990, c. H.19 ("*HRC*").

[45] On April 10, 2014, the benchers of the LSUC, in Convocation, discussed accrediting the proposed law school. They also posed questions to the TWU representatives who were present at the meeting.

[46] On April 22, 2014, TWU provided written reply submissions to some of the issues raised at the April 10 meeting.

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[1] In Ontario, the 'Treasurer' is the head of the LSUC and is elected every year.

[47] On April 24, 2014, the LSUC held a final meeting. The Secretary posed this question:

> Given that the Federation Approval Committee has provided preliminary approval to the Trinity Western University law program, in accordance with processes Convocation approved in 2010 respecting the national requirement and in 2011 respecting the approval of law school academic requirements, should the Law Society of Upper Canada now accredit Trinity Western University pursuant to section 7 of by-law 4?

[48] The President of TWU, Bob Kuhn, then addressed Convocation. He spoke for about an hour and a half, concluding with:

> I urge you to decide this matter in a manner consistent with the rule of law and every other authority that has considered the fate of Trinity Western University's law school, and I commend that decision to you in the good faith that you will see your task as upholding the rule of law and upholding the place of religious freedom in this country.

[49] For the rest of the day, many benchers spoke and declared their positions. Late in the afternoon, the vote was called. The question set out above was answered: Yes - 21; No - 28; Abstention - 1. The LSUC decided not to accredit the proposed TWU law school.

[50] TWU brought an application for judicial review of the LSUC decision.

(2) The Divisional Court Decision

[51] The Divisional Court dismissed TWU's application for judicial review. The key components of its reasons, which were "By the Court", are:

(1) the appropriate standard of review of the LSUC decision is reasonableness;

(2) when deciding whether to accredit a law school, the LSUC is not restricted simply to considering standards of competence; a broader spectrum of considerations with respect to the public interest is engaged;

(3) the decision of the Supreme Court of Canada in *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772 ("*TWU 2001*"), is not determinative of the application for judicial review;

(4) the LSUC decision not to accredit TWU's proposed law school infringes TWU's and Mr. Volkenant's freedom of religion under s. 2(a) of the *Charter;*

(5) in assessing the "public interest", the LSUC is entitled to consider that the impact of TWU's Community Covenant on members of the LGBTQ community is contrary to the equality rights protections in the *Charter* and the *HRC*; and

(6) the LSUC engaged in a proportionate balancing of the rights at play – freedom of religion and equality – and its decision refusing to accredit TWU's proposed law school is, therefore, reasonable.

C. ISSUES

[52] The issues on this appeal are:

(1) Is the decision of the Supreme Court of Canada in *TWU 2001* determinative of this appeal?

(2) Was the Divisional Court correct in applying a reasonableness standard of review?

(3) Applying the relevant standard of review, did the Divisional Court err in:

(a) its interpretation of the LSUC's statutory mandate in ss. 4.1 and 4.2 of the *LSA*; and

(b) its conclusion that the LSUC engaged in a proportionate balancing of freedom of religion and equality and made a reasonable decision by refusing to accredit TWU's proposed law school?

[53] In their factum, the appellants also submit that the LSUC's decision infringes the appellants' s. 2(b) right to freedom of expression and s. 2(d) associational rights. In oral argument, however, their focus was on freedom of religion. In light of my conclusion on freedom of religion, I need not address the appellants' s. 2(b) and s. 2(d) arguments.

D. ANALYSIS

(1) The *TWU 2001* decision

[54] Before the Divisional Court, the appellants argued that the Supreme Court of Canada's decision in *TWU 2001* was binding and determinative of the judicial review application. The Divisional Court rejected this submission.

[55] On the appeal, the appellants advanced this argument in their factum, albeit very briefly (three paragraphs). In response to a question in oral argument, counsel stated that the appellants did not explicitly abandon the argument but would rest on the submissions in their factum.

[56] Given that the appellants failed to press this issue in oral argument, the respondent touched on it only very briefly in its oral argument and the interveners, some of whom discussed it thoroughly in their factums, moved on to other points in their oral submissions.

[57] In short, TWU moved away from its earlier categorical position that *TWU 2001* was determinative of the outcome of the appeal. In my view, this development was a welcome one. I agree with the Divisional Court's reasoning and conclusion on this issue, at paras. 59-72. As the Divisional Court stated, at para. 60, "[t]he issue raised before the Supreme Court of Canada in [*TWU 2001*] involved different facts, a different statutory regime, and a fundamentally different question."

[58] There is an additional reason that *TWU 2001* does not dispose of this appeal. The British Columbia College of Teachers denied accreditation on the basis that the Community Covenant might affect TWU graduates' ability to teach in public schools in a non-discriminatory manner. In contrast, the LSUC accepts that TWU graduates would not be at any more risk of discriminating because of the Community Covenant than graduates of other law schools. Rather, it argues that it is not in the public interest to accredit a law school that prevents access through a discriminatory policy. In other words, the regulator's argument in this case is different than the argument addressed by the Supreme Court in *TWU 2001*.

[59] I make a final comment on this issue. Although *TWU 2001* is not determinative of this appeal, I agree with the Divisional Court's observation, at para.72, "that is not to say that the decision in [*TWU 2001*] is not an important consideration in the resolution of the issues that are presented to us." For example, in *TWU 2001* the Supreme Court expressed views about balancing freedom of religion and equality rights in a sexual orientation context that are directly relevant to this appeal.

(2) Standard of review

[60] Before the Divisional Court and in their appeal factum, the appellants took the position that the question whether a professional licensing body is justified in

rejecting TWU based on its religious beliefs had already been decided on a standard of correctness in *TWU 2001*. In the alternative, they argued that if *TWU 2001* is not determinative, the correctness standard applies to at least parts of the LSUC's decision because it raises questions about the scope of the LSUC's jurisdiction and engages important questions of law that are outside of its expertise. Finally, the appellants argued that the lack of reasons militates in favour of a correctness standard.

[61] While the appellants did not abandon their arguments on correctness in oral argument at the appeal hearing, they did not push them. Instead, they advanced a forceful submission that the LSUC's decision was unreasonable.

[62] In my view, this change of tack was warranted. *TWU 2001* was decided at a time when, in the administrative law context, there were three standards of review – correctness, reasonableness *simpliciter* and patent unreasonableness.

[63] After *TWU 2001*, in *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at para. 62, Iacobucci J. adopted a reasonableness *simpliciter* standard in reviewing a sanction imposed for professional misconduct:

> Although there is a statutory appeal from decisions of the Discipline Committee, the expertise of the Committee, the purpose of the enabling statute, and the nature of the question in dispute all suggest a more deferential standard of review than correctness. These factors suggest that the legislator intended that the Discipline Committee of the self-regulating Law Society should be a specialized body with the primary

> responsibility to promote the objectives of the Act by overseeing professional discipline and, where necessary, selecting appropriate sanctions. In looking at all the factors as discussed in the foregoing analysis, I conclude that the appropriate standard is reasonableness *simpliciter*. Thus, on the question of the appropriate sanction for professional misconduct, the Court of Appeal should not substitute its own view of the "correct" answer but may intervene only if the decision is shown to be unreasonable.

[64] After *TWU 2001* and *Ryan,* there was a sea change in this area of law with the decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, that reduced the standard of review to two categories – correctness and reasonableness.

[65] The reasonableness standard has since been adopted as the presumptive standard of review to be applied with respect to the decisions of professional regulatory bodies engaged in an interpretation of their enabling statutes, including those that regulate the legal profession.

[66] Thus, in a case dealing with an appeal of a decision of a discipline tribunal in the legal profession, *Doré v. Barreau du Quebec*, 2012 SCC 12, [2012] 1 S.C.R. 395, the court affirmed that the deferential standard set out in *Ryan* was consistent with *Dunsmuir* principles, with Abella J. saying, at para. 30:

> In *Dunsmuir*, the Court held that judicial review should be guided by a policy of deference, justified on the basis of legislative intent, respect for the specialized expertise of administrative decision-makers, and recognition that courts do not have a monopoly on adjudication in the administrative state (para. 49).

[67] I do not see, and the appellants do not assert, any qualitative difference between decisions of law society discipline tribunals (*Ryan* and *Doré*) and a decision whether to accredit a law school. Both categories of decision are in the wheelhouse of the expertise of the law society.

[68] Nor can the fact that the LSUC's decision in this case required a careful analysis and balancing of the appellants' *Charter* rights with other *Charter* values remove the standard of review from the reasonableness category. Administrative tribunals are entitled, indeed required, to take account of, and try to act consistently with, *Charter* values as they make decisions within their mandate: see *Doré*, at para. 24, and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613, at para. 37. The balancing of *Charter* rights and values does not in and of itself take a decision outside of the expertise of an administrative tribunal. Here, the LSUC's accreditation decision, which took into account *Charter* rights and values, was within the LSUC's expertise.

[69] Contrary to the appellants' assertions, there is no true question of jurisdiction here. For reasons I will elaborate below, the LSUC's decision not to accredit TWU fell squarely within its statutory mandate to act in the public interest. For this reason as well, no general question of law of central importance and outside the LSUC's specialized area of expertise arises in this case.

[70] Finally, the adequacy of an administrative tribunal's reasons is not a "stand-alone basis for quashing a decision": *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 14. It also does not change the applicable standard of review. While the nature of the reasons certainly can have a bearing on whether a decision meets the requirement for justification, transparency and intelligibility, set out in *Dunsmuir,* at para. 47, it does not subject a decision that would otherwise be reviewed on the reasonableness standard to a review for correctness.

[71] For these reasons, I conclude that the Divisional Court was correct to hold that the appropriate standard of review with respect to the LSUC's accreditation decision was reasonableness.

(3) The LSUC's decision – reasonable?

[72] The appellants contend that the LSUC's decision not to accredit TWU's proposed law school was unreasonable in two respects: (1) it flowed from an overly expansive interpretation of ss. 4.1 and 4.2 of the *LSA*, and (2) it was based on a flawed balancing of the competing *Charter* rights and values – freedom of religion and equality.

[73] I will consider these submissions in turn. I do so mindful of the definition and implications of the reasonableness standard of review.

[74] In my view, *Dunsmuir* remains the leading case on the definition of reasonableness. Bastarache and LeBel JJ. stated, at para. 47:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[75] A second case that provides a clear description of the reasonableness standard and its implications is *Ryan*, wherein Iacobucci J. said, at paras. 51 and 55-56:

> There is a further reason that courts testing for unreasonableness must avoid asking the question of whether the decision is correct. Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness. For example, when a decision must be taken according to a set of objectives that exist in tension with each other, there may be no particular trade-off that is superior to all others. Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

...

> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere. This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling.
>
> This does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole. [Citations omitted.]

[76] With these definitions and comments in mind, I turn to the LSUC decision and the Divisional Court's review of that decision.

[77] The Divisional Court found that the LSUC's decision not to accredit TWU's proposed law school infringed the appellants' freedom of religion. However, the decision was saved because the LSUC engaged in a proportionate balancing of the *Charter* rights and values in play (freedom of religion and equality) and reached a reasonable decision.

[78] The appellants agree with the Divisional Court's conclusion about the infringement of their freedom of religion. They disagree with the conclusion about proportionate balancing.

[79] In assessing the reasonableness of the LSUC's decision, this court must consider it in the context of (i) the appellants' *Charter* rights at stake; (ii) the LSUC's statutory objectives; and (iii) whether the decision represents a reasonable balance between the two: see *Doré*, at paras. 55-58.

(a) The appellants' *Charter* rights

[80] The Divisional Court found, at para. 81, that the LSUC's decision infringed the appellants' freedom of religion:

> [W]e 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.

[81] In its factum the LSUC argued, briefly, that the appellants' *Charter* s. 2(a) freedom of religion is not engaged.

[82] However, in the course of oral argument, the LSUC moderated its position, and made it clear that its primary submission was that any limitation on the appellants' freedom of religion was reasonable.

[83] I agree with the Divisional Court's conclusion and the LSUC's position taken in oral argument on this issue. However, since the question of infringement is a key competent of the *Doré* analysis, I offer my own reasoning on this issue.

[84] The first step in analyzing the LSUC's decision requires this court to consider whether the decision "engages the *Charter* by limiting its protections": see *Loyola*, at para. 39. The question to be asked in this context is whether the decision has 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": *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 85.

[85] The purpose of the right protected under s. 2(a) was first explored by Dickson C.J. in *Big M*, at pp. 336-37:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.
>
> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect within reason from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from

> acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

[86] In *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 759, Dickson C.J. added: "The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices."

[87] Most recently, in *Saguenay*, at para. 69, Gascon J. summarized the principles originating in *Big M* and *Edwards Books* succinctly:

> [F]reedom of conscience and religion protects the right to entertain beliefs, to declare them openly and to manifest them, while at the same time guaranteeing that no person can be compelled to adhere directly or indirectly to a particular religion or to act in a manner contrary to his or her beliefs. [Citations omitted.]

[88] To determine whether the LSUC's decision interferes with the claimants' freedom of religion, it is necessary to apply the test for establishing a breach of s. 2(a) first set out in *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at paras. 56-57, and recently restated in *Saguenay*, at para. 86, as follows:

> To conclude that an infringement has occurred, the court or tribunal must (1) be satisfied that the complainant's belief is sincere, and (2) find that the complainant's ability to act in accordance with his or her beliefs has been interfered with in a manner that is more than trivial or insubstantial. [Citations omitted.]

[89] In *Amselem*, at para. 56, Iacobucci J. described the inquiry at the first step of the test as follows:

> Thus, at the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief. Only then will freedom of religion be triggered.

[90] I do not hesitate in concluding that both TWU and Mr. Volkenant are sincere in their beliefs about the benefits to the TWU community that are fostered by the existence, adherence to, and enforcement of the Community Covenant, and further, that Mr. Volkenant is sincere in his belief that his pursuit of higher education taught through the lens of an evangelical Christian worldview subjectively furthers the practice of his faith. The link between the values enshrined in not only the Covenant but also TWU's foundational documents,

such as its Mission Statement, and the appellants' evangelical Christian religious belief and practice is self-evident.

[91] It is readily apparent that Mr. Volkenant's s. 2(a) right is engaged here. As Dickson C.J. observed in *Big M*, at p. 336, freedom of religion encompasses not only the right to hold beliefs, but also "the right to manifest religious belief by worship and practice or by teaching and dissemination." As was argued forcefully and eloquently by counsel for the Evangelical Fellowship of Canada and Christian Higher Education Canada, the decision to attend TWU is fundamentally a religious one that manifests the evangelical Christian religious beliefs held by the student.

[92] For Mr. Volkenant, attending TWU's proposed law school would allow him to not only practise the Covenant's values, which he would in any event be free to do without attending TWU, but also to participate in an educational community, consisting largely of like-minded individuals, that embraces values grounded in evangelical Christian beliefs about the conduct both prescribed and proscribed by the Covenant. To borrow a phrase from *Amselem*, at para. 56, Mr. Volkenant's participation in such a community "subjectively engender[s] a personal connection with the divine" over and above the connection achieved by his own personal adherence to the Covenant's values.

[93] Turning to TWU, while the degree to which religious organizations can independently claim the protection afforded by s. 2(a) has not been established conclusively in the jurisprudence, it is clear that freedom of religion under the *Charter* has a collective aspect: see *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 27, [2009] 2 S.C.R. 567, at para. 31; *Loyola*, at para. 33, *per* Abella J., and, at para. 89, *per* McLachlin C.J. and Moldaver J., concurring. In *Loyola*, at para. 33, the majority recognized "that individuals may sometimes require a legal entity in order to give effect to the constitutionally protected communal aspects of their religious beliefs and practice".

[94] On the facts of this case, TWU's own s. 2(a) right is also engaged. The collective aspect of freedom of religion is particularly important in the context of the present case, where individuals such as Mr. Volkenant necessarily require an entity to both establish a community within which members can study law from an evangelical Christian perspective and to set and enforce the religious practices to be followed by the law school community. It is only through TWU that the claim to operate a degree-granting accredited law school from an evangelical Christian perspective can possibly be advanced. In this way, TWU acts as the vehicle through which the religious freedoms of its individual members, including teachers, students, and staff, can be manifested, pursued and achieved. Echoing the observations of McLachlin C.J. and Moldaver J. in *Loyola*, at para. 94, here "[t]he individual and collective aspects of freedom of religion are indissolubly

intertwined" in that "the freedom of religion of individuals cannot flourish without freedom of religion for the organizations through which those individuals express their religious practices and through which they transmit their faith."

[95] For there to be an interference with TWU's and Mr. Volkenant's sincere religious beliefs, the LSUC's decision to deny accreditation must have the effect of interfering with their ability to act in accordance with those beliefs in a manner that is more than trivial or insubstantial: see *Edwards Books*, at p. 759; *R. v. Jones*, [1986] 2 S.C.R. 284, at p. 313-14; *Amselem*, at para. 57; and *Saguenay*, at para. 86. Determining whether an alleged interference with freedom of religion is more than trivial or insubstantial is a context-specific exercise, and "requires an objective analysis of the rules, events or acts that interfere with the exercise of the freedom": see *Amselem*, at para. 59; *S.L. v. Commission scolaire des Chenes*, 2012 SCC 7, [2012] 1 S.C.R. 235, at para. 24.

[96] In my view, it is premature to attempt to assess on the facts now before us whether and to what extent there may be an interference with Mr. Volkenant's s. 2(a) *Charter* rights or indeed an interference with the s. 2(a) rights of any other student who eventually graduates from TWU's law school, should they face some alternate process to be admitted to the Bar of Ontario. I understand that currently there is no process by which a law graduate from an unaccredited law school in Canada could be admitted to the Ontario Bar. That does not, however, end the inquiry.

[97] It must be observed here, as the LSUC argues and the Divisional Court also observed below, that the LSUC cannot directly compel either TWU or Mr. Volkenant to do, or not do, anything. Even absent accreditation, TWU would be free to operate its law school in the manner it chooses and Mr. Volkenant would be free to attend in accordance with his personal beliefs.

[98] As *Big M* makes clear, at p. 337, however, s. 2(a) is concerned not only with direct interferences with freedom of religion, but also "indirect forms of control which determine or limit alternative courses of conduct available to others." I accept that because the LSUC's decision would discourage individuals like Mr. Volkenant, who may wish to eventually practise law in Ontario, from attending TWU's proposed law school in favour of a law school accredited by the LSUC, it would also affect TWU's ability to attract students given that Ontario is the largest market in Canada for law graduates.

[99] While TWU has suggested that it may not open its law school absent accreditation by the LSUC, there is no evidence before us that the LSUC's decision would have so dramatic an effect. The question remains, however, whether the LSUC's decision not to accredit TWU because of the existence of the Covenant would interfere with TWU's religious freedom in a manner that is more than trivial or insubstantial. I accept that it would. The failure to accredit means that TWU would face an increased burden in attracting students to its law

school. In my view, this increased burden, while it may not go so far as to threaten the law school's existence, cannot be said to be insignificant.

[100] The LSUC argued that the protection granted by s. 2(a) is limited in that freedom of religion does not extend to practices, like the Covenant, that interfere with the rights and freedoms of others, and so even if TWU's s. 2(a) right may be engaged, it is not infringed. I agree that the jurisprudence establishes that freedom of religion is not absolute and that in any *Charter* analysis the competing rights of other individuals must always be taken into account: see *Big M*, at p. 346; *TWU 2001*, at paras. 29-30; *Amselem*, at paras. 61-62. However, in the context of the analysis mandated by *Doré*, in my view it is appropriate to adopt a broad definition of freedom of religion at this stage of the analysis and instead consider the impact of the exercise of that freedom on other *Charter*-protected interests at the second stage of the analysis.

[101] Accordingly, I would find that the LSUC's decision infringes Mr. Volkenant's and TWU's right to freedom of religion under s. 2(a) of the *Charter*.

(b) The statutory objectives of the LSUC

[102] Relying on s. 4.1 of the *LSA*, the appellants submit that the LSUC's function is to ensure that Ontario's lawyers are appropriately educated,

competent and ethical and that function, in and of itself, protects the public interest within the meaning of s. 4.2.3.

[103] Sections 4.1 and 4.2 provide as follows.

> 4.1 It is a function of the Society to ensure that,
>
> (a) all persons who practise 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.
>
> 4.2 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. <u>The Society has a duty to protect the public interest</u>.
>
> 4. The Society has a duty to act in a timely, open and efficient manner.
>
> 5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized. [Emphasis added.]

[104] I am not persuaded by the appellants' submission, which adopts a narrow reading of these provisions.

[105] I begin by reiterating that the LSUC's decision, including the LSUC's interpretation of its home statute, is subject to review on a reasonableness standard. As the Divisional Court said, at para. 37:

> 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].

[106] After TWU applied to the LSUC for accreditation of its proposed law school, the LSUC commissioned a legal opinion from Ms. Kristjanson, a senior and respected constitutional and administrative lawyer, now a judge of the Superior Court. In a comprehensive letter dated April 4, 2014, Ms. Kristjanson discussed the relationship between ss. 4.1 and 4.2 of the *LSA*. Her advice included an analysis of the interpretation of the term "public interest" in the context of those provisions:

> The next step in Convocation's analysis is to determine what constitutes the "public interest" in the context of the accreditation decision. This can be done by looking at how the "public interest" has been interpreted in the context of the *LSA* and how courts have approached administrative decision-making in the "public interest" more broadly. With respect to the *LSA*, courts have determined that the Society must consider the members of the public who utilize legal services, as well as the public at large who may require legal services in the future. The public interest mandate of the Society has been relied on in the discipline jurisprudence as a means to ensure that the public has access to quality and reliable legal services, and that the public retains trust in the legal community.
>
> ...
>
> [T]he requirement of governing lawyers in the public interest has been interpreted *inter alia* through a number of reports to Convocation. ... In the Society's own materials, regulating in the public interest has been understood as a mandate to integrate equity and diversity values and principles into the Society's model policies, services, programs and procedures.... [Emphasis added.]

[107] The Divisional Court concluded on this issue as follows, at para. 58:

> [T]he 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.

[108] I agree with Ms. Kristjanson's analysis and the Divisional Court's conclusion. There is no wall between ss. 4.1 and 4.2 of the *LSA*. The LSUC has

an obligation to govern the legal profession in the public interest: see *Groia v. Law Society of Upper Canada*, 2016 ONCA 471, at para. 89. In setting and maintaining standards of learning, professional competence and professional conduct under s. 4.1 of the *LSA*, the LSUC is entitled to do so against the backdrop of the composition of the legal profession, including the desirable goal of promoting a diverse profession.

[109] It follows that one of the LSUC's statutory objectives is to ensure the quality of those who practise law in Ontario. Quality is based on merit, and merit excludes discriminatory classifications. As explained by the Divisional Court, at paras. 95-97, the LSUC over its long history has strived to remove discriminatory barriers to access to the legal profession:

> 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.
>
> [I]n 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.
>
> 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.

[110] That the LSUC is also subject to the *Charter* and the *HRC* means that *Charter* and human rights values must inform how the LSUC pursues its stated objective of ensuring equal access to the profession.

[111] In light of all the above, it was entirely appropriate for the LSUC to consider this statutory objective, informed by the values found in the *Charter* and *HRC*, when deciding whether to accredit TWU.

(c) Balancing

[112] In assessing whether accreditation is in the public interest, the LSUC was required to balance the statutory objectives of promoting a legal profession based on merit and excluding discriminatory classifications with the limit that denying accreditation would place on the appellants' religious freedom.

[113] The balancing of these two constructs necessarily involved the collision of TWU's religious freedom and respect for LGBTQ equality rights. As in *TWU 2001*, at para. 37, "the scope of the freedom of religion and equality rights that have come into conflict in this appeal" needs to be reconciled.

[114] I have already concluded that the LSUC's decision not to accredit TWU's proposed law school infringed TWU's religious freedom.

[115] I have no hesitation saying that TWU's admission policy, viewed in conjunction with the Community Covenant, discriminates against the LGBTQ

community on the basis of sexual orientation contrary to s. 15 of the *Charter* and s. 6 of the *HRC*.

[116] As expressed by Iacobucci and Bastarache JJ. in *TWU 2001*, at para. 25, the Community Covenant exacts a price on LGBTQ students:

> Although the Community Standards are expressed in terms of a code of conduct rather than an article of faith, we conclude that a homosexual student would not be tempted to apply for admission, and could only sign the so-called student contract at considerable personal cost.

[117] On the discrimination issue, the Divisional Court said, at paras. 112-14:

> 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 practise 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.
>
> 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[s] 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. 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.
>
> 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.

[118] In their factum, the interveners Out on Bay Street and OUTlaws say:

> 15. The Covenant is not merely an expression of TWU's beliefs. The Covenant is a document that discriminates against LGBTQ persons by forcing them to renounce their dignity and self-respect in order to obtain an education.
>
> ...
>
> 17. LGBTQ persons applying to TWU, or who come out while at TWU, will experience the stigma of not belonging and other destructive effects of regulating queer sexuality.

[119] I agree with, and adopt, these statements by the Supreme Court of Canada, the Divisional Court, and the interveners Out on Bay Street and

OUTlaws. My conclusion is a simple one: the part of TWU's Community Covenant in issue in this appeal is deeply discriminatory to the LGBTQ community, and it hurts.

[120] Against this backdrop of a laudatory statutory objective of non-discrimination and its collision with freedom of religion, I turn to the appellants' principal submission on the reasonableness of the LSUC's decision.

[121] The appellants contend that a review of the opposed benchers' speeches at Convocation, which presumably justified their vote against accrediting TWU, demonstrates that many of them ignored their legal obligation, *per Doré*, to balance the appellants' *Charter* rights with the laudatory statutory objectives.

[122] I do not accept this submission. Before turning to the benchers' speeches, I want to say a contextual word about the process that led to the decision on April 24, 2014. In my view, the process adopted by the LSUC to consider TWU's application was excellent. The record consisted of TWU's application and supporting material, the relevant reports of the Federation of Law Societies of Canada, three legal opinions designed to provide guidance to the benchers in their deliberative process, and approximately 210 submissions from members of the profession and the public.

[123] Moreover, the actual decision-making process took place in two stages. On April 10, Ms. Kristjanson addressed Convocation on procedural fairness issues.

Representatives of TWU were present and many benchers posed questions about TWU's application. Then TWU prepared and submitted a written reply to the questions.

[124] On April 24, Mr. Kuhn, TWU's President, was permitted to address Convocation, which he did for almost an hour and a half. Then, over a four and a half hour period, 29 benchers made speeches – of necessity, quite brief – on the resolution. Those speeches, as I read them, were thoughtful, respectful, and even eloquent. A full reading of the 29 speeches leaves a reader impressed. The benchers knew that they were making an historic decision – bencher Peter Wardle began his speech with the observation "I found this a difficult decision, professionally, personally, morally, and as a practising Catholic" – and their remarks befit the occasion.

[125] I turn to the benchers' speeches. The benchers had been given specific advice about the *Doré* analytical framework in one of the legal opinions. In my view, even without making allowances for the necessary brevity of the speeches, it is clear that the benchers, on both sides of the issue, engaged in a fair balancing of the conflicting rights. I cite but a few examples:

> Bencher Mercer
>
> The issue before Convocation today raises fundamental principles: freedom of religion, freedom of association, equality rights and the rule of law.
>
> ...

Justice LeBel for the court in *Doré* asked the question, how then does an administrative decision maker, which we are, apply *Charter* values in the exercise of statutory discretion? And to be clear, we're exercising statutory discretion. Justice LeBel said the decision maker should first consider the statutory objectives, and I think that is fundamental to the exercise before us and I think we have to think long and hard about the statutory objectives pursuant to which we must decide.

Justice LeBel then went on to say that the decision maker should ask how the *Charter* values at issue will be best protected in view of the statutory objectives. This requires the decision maker to balance the severity of the interference with *Charter* protection with statutory objectives.

...

It seems to me to follow that freedom to control the conduct of others, including the sexual conduct of others, would be worthy of even lesser protection. I think this might properly be part of the *Doré* analysis.

<u>Bencher Wardle</u>

I accept that TWU as a religious institution has certain rights, the right of freedom of association, and the right to practice their beliefs sincerely held, and I don't think anybody here believes that those rights shouldn't be respected and I don't think anybody believes the TWU adherents do not sincerely believe they're right.

...

[T]here are other fundamental rights at stake, and those rights are the right of gay, lesbian, bisexual and transgender persons to have access, unfettered access to an institution that can give them a law degree and ultimately access to this great profession.

<u>Bencher Bredt</u>

> What does the law tell us about how we are to balance the right not to be discriminated against on the basis of sexual orientation with TWU's right to freedom of religion?
>
> Bencher Minor
>
> When the courts tell us – and, in fact, TWU reminded us that we need to balance here and they said they didn't hear much balancing. Well, when we're balancing, what the court says is you first must look at the context in which you're balancing and the context here is the availability of professional spaces; that is to say, spaces in professional schools.
>
> ...
>
> So, in my submission, there is no compelling reason to afford the claim for religious rights or religious freedom a higher acknowledgment than the rights of those who would enter into the law school process eventually to enter into our licensing program. And in my mind, that is balancing, that is how I would do it.

[126] It is true that not all of the benchers engaged in precisely this style of reasoning that is explicitly faithful to the *Doré* analytical framework. However, all the benchers had received and reviewed a legal opinion on this topic and everyone heard all the speeches. I agree with the Divisional Court's comment, at para. 103:

> 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.

[127] Indeed, focusing on the benchers' speeches in minute detail, as suggested by the appellants, misses the bigger picture. As the Divisional Court held, at para. 50, the vast majority of benchers are democratically elected (or, in the case of lay benchers, appointed to office by the provincial government) and they made their decision after undertaking a democratic process. The Supreme Court stated in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 29:

> 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.

The same comments apply equally to benchers. The LSUC's decision must be assessed from the record as a whole, not from individual speeches.

[128] Accordingly, I reject the appellants' argument on this point.

[129] Having rejected the appellants' principal submission on the balancing issue, the ultimate question still remains: was the LSUC's decision or the outcome (*Dunsmuir*, at para. 47) reasonable within the parameters set by *Dunsmuir*, *Ryan* and *Doré*? In my view, the answer to this question is 'Yes', indeed 'Clearly yes'. I say this for several reasons.

[130] First, the LSUC is one of two sets of gatekeepers to entry into the legal profession. Law schools are the first set of gatekeepers; law societies are the second.

[131] In a well-known speech in 1986 – "Legal Education", (1986) 64:2 Can. Bar Rev. 374, at p. 377 – Dickson C.J. said this about the first set of gatekeepers:

> I want to say a few words about the gatekeepers to legal education, namely those involved in the admissions process. Those who fulfill that 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 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.

[132] In my view, there is also an important role for the second set of gatekeepers, the law societies, in ensuring equality of admission to the legal profession. There is nothing wrong with a law society, acting within its jurisdiction, scrutinizing the admission process of a law school in deciding whether to accredit the law school. In doing so with respect to TWU's application, the LSUC could pay heed to what Iacobucci and Bastarache JJ. said in *TWU*

2001, at para. 25: "a homosexual student would not be tempted to apply for admission, and could only sign the so-called student contract at considerable personal cost." As well, the LSUC could take account of the fact that all law schools currently accredited by it provide equal access to all applicants in their admissions processes. An accredited TWU would be an exception.

[133] Second, as the Divisional Court noted, at para. 110, "while TWU may not be subject to the *HRC*, the respondent is." Accordingly, in balancing the various rights at issue, the LSUC could attach weight to its obligations under s. 6 of the *HRC*, which provides:

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

[134] Third, there is an important distinction to be made when a religious institution and its members seek to exercise their religious beliefs in a manner that discriminates against others. In her article "TWU Law: A Reply to Proponents of Approval", (2014) 37:2 Dal. L. J. 621, Professor Elaine Craig said, at p. 646:

> The deficiencies with TWU's proposed program do not flow from its Christian worldview or intention to teach from that perspective. ... Many worthy and highly esteemed educational institutions such as St. Francis Xavier, Trinity College at the University of Toronto, and Notre Dame in the United States, have a faith-based

> tradition. The distinction, and it is an important one, is that these institutions do not impose formal policies that discriminate on the basis of sexual orientation. [Emphasis added.]

[135] As I have explained, TWU's Community Covenant discriminates against members of the LGBTQ community, and the LSUC was entitled to consider whether the discriminatory policy precluded accreditation.

[136] The American experience provides an apt example of the distinction between state action that interferes with religious belief itself and state action that denies a benefit because of the impact of that religious belief on others. In *Bob Jones University v. United States*, 461 U.S. 574 (1983), the Internal Revenue Service ("IRS") took away Bob Jones University's tax-exempt status because of its discriminatory admissions policy. The school denied admission to any black students until 1971. After 1971, black students were admitted, but only if they were married. Bob Jones University's sponsors believed that the Bible forbids interracial dating and marriage.

[137] Chief Justice Burger held that Bob Jones University's sincerely held religious beliefs did not immunize it from the application of the IRS policy of denying tax-exempt status to educational institutions with discriminatory admissions policies. Integral to the Chief Justice's opinion was the compelling government interest in eradicating racial discrimination in education. He also held that the government, by granting exemptions, was in effect making taxpayers

indirect or vicarious donors to Bob Jones University. Bob Jones University's admissions policy was at odds with the "common community conscience" and therefore the conferral of a public benefit could not be justified.

[138] TWU, like Bob Jones University, is seeking access to a public benefit – the accreditation of its law school. The LSUC, in determining whether to confer that public benefit, must consider whether doing so would meet its statutory mandate to act in the public interest. And like in *Bob Jones University*, the LSUC's decision not to accredit TWU does not prevent the practice of a religious belief itself; rather it denies a public benefit because of the impact of that religious belief on others – members of the LGBTQ community.

[139] Fourth, I agree with the intervener Lawyers' Rights Watch Canada that international human rights law, and especially international treaties and other documents that bind Canada, is relevant in assessing the reasonableness of the LSUC's decision. In that vein, I note that Article 18(3) of the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.Y.S. 171, Can. T.S. 1976, provides:

> Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals <u>or the fundamental rights and freedoms of others</u>. [Emphasis added.]

[140] In my view, the LSUC's balancing in its accreditation decision was faithful to this article of an important international law document to which Canada is a signatory.

[141] Fifth, I agree with Professor Bruce Ryder who wrote, in "State Neutrality and Religious Freedom" (2005), 29 Sup. Ct. L. Rev. (2d) 168 at 173:

> Religious neutrality does not mean that the state must refuse to take positions on policy disputes that have a religious dimension. Many if not most legislative policies will accord with some religious beliefs and violate others.

[142] Thus, the LSUC did not violate its duty of state neutrality by concluding that the public interest in ensuring equal access to the profession justified a degree of interference with the appellants' religious freedoms. It was entitled to take a position. And, for the reasons given above, the position it took was a reasonable one.

[143] Taking account of the extent of the impact on TWU's freedom of religion and the LSUC's mandate to act in the public interest, the decision to not accredit TWU represents a reasonable balance between TWU's 2(a) right under the *Charter* and the LSUC's statutory objectives. While TWU may find it more difficult to operate its law school absent accreditation by the LSUC, the LSUC's decision does not prevent it from doing so. Instead, the decision denies a public benefit, which the LSUC has been entrusted with bestowing, based on concerns that are entirely in line with the LSUC's pursuit of its statutory objectives.

E. DISPOSITION

[144] The vote at Convocation was 28-21, with one abstention. In the context of a comprehensive and very fair decision-making process, the closeness of the vote brings to mind what the Supreme Court of Canada said in *Dunsmuir*, at para. 47:

> [C]ertain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions.

[145] I am satisfied that the LSUC's decision not to accredit TWU was indeed a reasonable conclusion. I would therefore uphold the Divisional Court's decision.

[146] Accordingly, I would dismiss the appeal. The respondent is entitled to its costs of the appeal, if sought.

J. MacPherson J.A.

I agree. E.A. Cronk J.A.

I agree G. Pardu J.A.

Released: JCM

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