



**SUPREME COURT OF CANADA**

**CITATION:** Trinity Western University v. Law Society of Upper Canada, 2018 SCC 33      **APPEAL HEARD:** November 30, December 1, 2017  
**JUDGMENT RENDERED:** June 15, 2018  
**DOCKET:** 37209

**BETWEEN:**

**Trinity Western University and Brayden Volkenant**  
Appellants

and

**Law Society of Upper Canada**  
Respondent

- and -

**Attorney General of Ontario, Association for Reformed Political Action (ARPA) Canada, Canadian Civil Liberties Association, Advocates' Society, International Coalition of Professors of Law, National Coalition of Catholic School Trustees' Associations, Lawyer's Rights Watch Canada, Canadian Bar Association, Criminal Lawyers' Association (Ontario), Christian Legal Fellowship, Canadian Association of University Teachers, Start Proud, OUTlaws, Canadian Council of Christian Charities, United Church of Canada, Law Students' Society of Ontario, Canadian Conference of Catholic Bishops, Seventh-day Adventist Church in Canada, Evangelical Fellowship of Canada, Christian Higher Education Canada, Lesbians, Gays, Bisexuals and Trans People of the University of Toronto (LGBTOUT), British Columbia Humanist Association, Canadian Secular Alliance, Egale Canada Human Rights Trust, Faith, Fealty & Creed Society, Roman Catholic Archdiocese of Vancouver, Catholic Civil Rights League, Faith and Freedom Alliance and World Sikh Organization of Canada**  
Intervenors

**CORAM:** McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

**JOINT REASONS FOR JUDGMENT:** Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ.  
(paras. 1 to 43)

**CONCURRING REASONS:** McLachlin C.J.  
(paras. 44 to 47)

**REASONS CONCURRING IN THE  
RESULT:** Rowe J.  
(paras. 48 to 55)

**JOINT DISSENTING REASONS:** Côté and Brown JJ.  
(paras. 56 to 82)

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**Trinity Western University and  
Brayden Volkenant**

*Appellants*

v.

**Law Society of Upper Canada**

*Respondent*

and

**Attorney General of Ontario,  
Association for Reformed Political Action (ARPA) Canada,  
Canadian Civil Liberties Association,  
Advocates' Society,  
International Coalition of Professors of Law,  
National Coalition of Catholic School Trustees' Associations,  
Lawyers' Rights Watch Canada,  
Canadian Bar Association,  
Criminal Lawyers' Association (Ontario),  
Christian Legal Fellowship,  
Canadian Association of University Teachers,  
Start Proud,  
OUTlaws,  
Canadian Council of Christian Charities,  
United Church of Canada,  
Law Students' Society of Ontario,  
Canadian Conference of Catholic Bishops,  
Seventh-day Adventist Church in Canada,  
Evangelical Fellowship of Canada,  
Christian Higher Education Canada,  
Lesbians, Gays, Bisexuals and Trans People  
of the University of Toronto (LGBTOUT),  
British Columbia Humanist Association,  
Canadian Secular Alliance,  
Egale Canada Human Rights Trust,  
Faith, Fealty & Creed Society,  
Roman Catholic Archdiocese of Vancouver,**

**Catholic Civil Rights League,  
Faith and Freedom Alliance and  
World Sikh Organization of Canada**

*Interveners*

**Indexed as: Trinity Western University v. Law Society of Upper Canada**

**2018 SCC 33**

File No.: 37209.

2017: November 30, December 1; 2018: June 15.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Law of professions — Barristers and solicitors — Law society — Approval of law school — Law society denying accreditation to proposed law school with mandatory covenant prohibiting sexual intimacy except between married heterosexual couples — Whether law society entitled under its enabling statute to consider admissions policy in deciding whether to approve proposed law school.*

*Administrative law — Judicial review — Standard of review — Law society — Administrative decision engaging Charter protections — Law society denying accreditation to proposed law school with mandatory religiously-based*

*covenant — Application for judicial review challenging decision on basis that it violated religious rights — Whether law society’s decision engages Charter by limiting freedom of religion — If so, whether decision proportionately balanced limitation on freedom of religion with law society’s statutory objectives — Whether law society’s decision reasonable — Application of Doré/Loyola framework — Canadian Charter of Rights and Freedoms, ss. 1, 2(a) — Law Society Act, R.S.O. 1990, c. L.8, ss. 4.1, 4.2.*

Trinity Western University (“TWU”) is an evangelical Christian postsecondary institution that seeks to open a law school that requires its students and faculty to adhere to a religiously-based code of conduct, the Community Covenant Agreement (“Covenant”), which prohibits “sexual intimacy that violates the sacredness of marriage between a man and a woman”. The Covenant would prohibit the conduct throughout the three years of law school, even when students are off-campus in the privacy of their own homes. The Law Society of Upper Canada (“LSUC”) is the regulator of the legal profession in Ontario. The LSUC decided, by resolution of its Benchers, to deny accreditation to TWU’s proposed law school because of its mandatory Covenant. TWU and V, a graduate of TWU’s undergraduate program who would have chosen to attend TWU’s proposed law school, sought judicial review of the LSUC’s decision on the basis that it violated religious rights protected by s. 2(a) of the *Charter*. They were unsuccessful in their application for judicial review in the Ontario Divisional Court and in their subsequent appeal to the Court of Appeal.

*Held* (Côté and Brown JJ. dissenting): The appeal should be dismissed.

*Per Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ.:* The LSUC's decision not to accredit TWU's proposed law school represents a proportionate balance between the limitation on freedom of religion guaranteed by s. 2(a) of the *Charter* and the statutory objectives that the LSUC sought to pursue. The LSUC's decision was therefore reasonable.

It is clear that the LSUC was entitled to consider TWU's admissions policy to determine whether to accredit the proposed law school. The LSUC's enabling statute requires the Benchers to consider the overarching objective of protecting the public interest in determining whether a particular law school should be accredited. The LSUC was entitled to conclude that equal access to the legal profession, diversity within the bar, and preventing harm to LGBTQ law students were all within the scope of its duty to uphold the public interest. The LSUC has an overarching interest in protecting the values of equality and human rights in carrying out its functions.

Administrative decisions that engage the *Charter* are reviewed based on the framework set out in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613. For the reasons set out in the companion appeal of *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 ("*Law Society of B.C.*"), the LSUC's decision not to accredit TWU's proposed law school engaged the religious

freedom of members of the TWU community. Evangelical members of TWU's community have a sincere belief that studying in a community defined by religious beliefs contributes to their spiritual development. This belief is supported through the universal adoption of the Covenant, which helps to create an environment in which TWU students can grow spiritually. By interpreting the public interest in a way that precludes the accreditation of TWU's law school governed by the mandatory Covenant, the LSUC has interfered with these beliefs and practices in a way that is more than trivial or insubstantial. The result is that the religious rights of TWU's community members were limited, and therefore engaged, by the LSUC's decision.

Under the *Doré/Loyola* framework, an administrative decision which engages a *Charter* right will be reasonable if it reflects a proportionate balancing of the *Charter* protection with the statutory mandate. The reviewing court must consider whether there were other reasonable possibilities that would give effect to *Charter* protections more fully in light of the objectives. The reviewing court must also consider how substantial the limitation on the *Charter* protection was compared to the benefits to the furtherance of the statutory objectives in this context.

In this case, the LSUC only had two options — to accredit, or not accredit, TWU's proposed law school. Given the LSUC's mandate, accrediting TWU's proposed school would not have advanced the relevant statutory objectives, and therefore was not a reasonable possibility that would give effect to *Charter* protections more fully in light of the statutory objectives.

The LSUC's decision also reasonably balanced the severity of the interference with the benefits to the statutory objectives. The LSUC's decision only interferes with TWU's ability to operate a law school governed by the *mandatory* Covenant. This limitation is of minor significance because a mandatory covenant is not absolutely required to study law in a Christian environment in which people follow certain religious rules of conduct, and studying law in an environment infused with the community's religious beliefs is preferred, not necessary, for prospective TWU law students.

On the other side of the scale, the decision significantly advanced the statutory objectives by ensuring equal access to and diversity in the legal profession and preventing the risk of significant harm to LGBTQ people. The LSUC's decision means that TWU's community members cannot impose those religious beliefs on fellow law students, since they have an inequitable impact and can cause significant harm. The LSUC chose an interpretation of the public interest which mandates access to law schools based on merit and diversity, rather than exclusionary religious practices.

Given the significant benefits to the statutory objectives and the minor significance of the limitation on the *Charter* rights at issue, and given the absence of any reasonable alternative that would reduce the impact on *Charter* protections while sufficiently furthering those objectives, the decision made by the LSUC represented a proportionate balance. Therefore, the decision was reasonable.



*Per McLachlin C.J.:* There is agreement with the majority that under its enabling statute the LSUC had jurisdiction to deny accreditation to TWU's proposed law school. However, there is disagreement with the majority on the framework for reviewing *Charter*-infringing administrative decisions, the severity of the infringement in this case, and the reasons for which the LSUC's decision is justified, for the reasons set out in the companion appeal of *Law Society of B.C.*

*Per Rowe J.:* There is agreement with the majority that the LSUC had the jurisdiction to consider the effect of the mandatory Covenant in deciding not to accredit the proposed law school at TWU. For the reasons set out in the companion appeal of *Law Society of B.C.*, however, this decision did not infringe any of the *Charter* rights raised by TWU. The decision must consequently be reviewed under the usual principles of judicial review. In this case, the standard of review is reasonableness, as the decision under review falls within the category of cases where deference is presumptively owed to decision-makers who interpret and apply their home statutes. The decision of the LSUC will command deference if it meets the criteria set out in *Dunsmuir*. Reasonableness does not always require the decision-maker to give formal reasons. In this case, the Court must look to the record to assess the reasonableness of the decision.

With regard to process, the record of the Benchers' deliberations provides an account of the manner in which the decision was reached and the reasons why the Benchers voted to refuse to accredit the proposed law school. With regard to

substance, the LSUC only had two options — to accredit, or not accredit, TWU’s proposed law school. In choosing not to accredit, the LSUC’s decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. Therefore, the LSUC’s decision to deny accreditation was reasonable.

*Per Côté and Brown JJ.* (dissenting): A careful reading of the *Law Society Act* (“*LSA*”) and the LSUC’s relevant by-laws leads to the unavoidable conclusion that the only proper purpose of an LSUC accreditation decision is to ensure that individual applicants are fit for licensing. Because there are no concerns relating to competence or conduct of prospective TWU graduates, the only defensible exercise of the LSUC’s statutory discretion in this case would have been for it to approve TWU’s proposed law school. It follows that the exercise of the LSUC’s statutory discretion to deny accreditation to TWU was taken for an improper purpose, and is therefore invalid.

The *LSA* limits the scope of the LSUC’s mandate to the regulation of legal practice starting at (but not before) the licensing process. The functions, duties and powers set out by the *LSA* relate only to the governance of the LSUC itself, to the provision of legal services by lawyers, law firms and lawyers of other jurisdictions, and to the regulation of articled students and licensing applicants. *By-Law 4* made pursuant to s. 62(0.1)4.1 of the *LSA*, which provides for the making of by-laws “governing the licensing of persons to practise law in Ontario”, sets requirements for individual licensing, one being that applicants obtain a degree from an accredited law

school. The *By-law*'s scope cannot be extended beyond the limits of the LSUC's mandate. The crux of *By-Law 4* is individual licensing; the accreditation of law schools is only incidental to this purpose. Law school accreditation only acts as a proxy for ascertaining whether graduates from that school are presumptively fit for licensing. Also, while s. 62(0.1)23 of the *LSA* empowers the LSUC to make by-laws "respecting legal education, including programs of pre-licensing education or training", it does not grant the LSUC the power to regulate law schools, including their admission policies. Ensuring equal access to and diversity in the legal profession does not fall within the LSUC's mandate to ensure competence in the legal profession. The LSUC is mandated to set minimum standards; this statutory objective relates to competence rather than merit.

Moreover, the decision not to accredit TWU's proposed law school is a profound interference with the TWU community's freedom of religion. It interferes with that community's expression of religious belief through the practice of creating and adhering to a biblically grounded covenant. Even were the public interest to be understood broadly, accreditation of TWU's proposed law school would not be inconsistent with the LSUC's statutory mandate. In a liberal and pluralist society, the public interest is served, and not undermined, by the accommodation of difference. The unequal access resulting from the Covenant is a function not of condonation of discrimination, but of accommodating religious freedom. Only a decision to accredit TWU's proposed law school would reflect a proportionate balancing of *Charter* rights and the statutory objectives which the LSUC sought to pursue.

## Cases Cited

By Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ.

**Applied:** *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32; *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395; *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613; **referred to:** *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. c. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256.

By McLachlin C.J.

**Applied:** *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32.

By Rowe J.

**Applied:** *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; **referred to:** *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869; *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3.

By Côté and Brown JJ. (dissenting)

*Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229.

### **Statutes and Regulations Cited**

*By-Law 4 — Licensing*, made under the *Law Society Act*, R.S.O. 1990, c. L.8, ss. 7, 9(1).

*Canadian Charter of Rights and Freedoms*, ss. 2(a), 15, 32(1).

*Degree Authorization Act*, S.B.C. 2002, c. 24.

*Human Rights Code*, R.S.O. 1990, c. H.19.

*Law Society Act*, R.S.O. 1990, c. L.8, ss. 4.1, 4.2, 13(1), 26, 26.1(1), 27(1), 35(1)6, 44(1)6, 60(1), (2), 62.

*Trinity Western University Act*, S.B.C. 1969, c. 44, s. 3(2).

## **Authors Cited**

Smith, Charles C. “Tuition fee increases and the history of racial exclusion in Canadian legal education”, Ontario Human Rights Commission, 2004 (online: <http://www.ohrc.on.ca/en/book/export/html/8976>; archived version: [https://www.scc-csc.ca/cso-dce/2018SCC-CSC33\\_1\\_eng.pdf](https://www.scc-csc.ca/cso-dce/2018SCC-CSC33_1_eng.pdf)).

APPEAL from a judgment of the Ontario Court of Appeal (MacPherson, Cronk and Pardu JJ.A.), 2016 ONCA 518, 131 O.R. (3d) 113, 349 O.A.C. 163, 398 D.L.R. (4th) 489, 359 C.R.R. (2d) 41, 4 Admin. L.R. (6th) 73, 35 C.C.E.L. (4th) 26, [2016] O.J. No. 3472 (QL), 2016 CarswellOnt 10465 (WL Can.), affirming a decision of the Divisional Court (Marrocco A.C.J. and Then and Nordheimer JJ.), 2015 ONSC 4250, 126 O.R. (3d) 1, 336 O.A.C. 265, 387 D.L.R. (4th) 149, 337 C.R.R. (2d) 295, 89 Admin L.R. (5th) 101, [2015] O.J. No. 3492 (QL), 2015 CarswellOnt 10273 (WL Can.). Appeal dismissed, Côté and Brown JJ. dissenting.

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*John Norris and Breese Davies*, for the intervener the Criminal Lawyers' Association (Ontario).

*Derek Ross and Deina Warren*, for the intervener the Christian Legal Fellowship.

*Peter J. Barnacle and Immanuel Lanzaderas*, for the intervener the Canadian Association of University Teachers.

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*Tim Gleason and Sean Dewart*, for the intervener the United Church of Canada.

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*Gwendoline Allison* and *Philip Horgan*, for the interveners the Roman Catholic Archdiocese of Vancouver, the Catholic Civil Rights League and the Faith and Freedom Alliance.

*Avnish Nanda* and *Balpreet Singh Boparai*, for the intervener the World Sikh Organization of Canada.

The following is the judgment delivered by

ABELLA, MOLDAVER, KARAKATSANIS, WAGNER AND GASCON JJ. —

I. Overview

[1] Trinity Western University (TWU), an evangelical Christian postsecondary institution, seeks to open a law school that requires its students and faculty to adhere to a religiously based code of conduct prohibiting “sexual intimacy that violates the sacredness of marriage between a man and a woman”.

[2] This appeal concerns the decision of the Law Society of Upper Canada (LSUC), made through a resolution of its Benchers, to deny accreditation to TWU’s proposed law school. TWU and Brayden Volkenant, a graduate of TWU’s undergraduate program who would have chosen to attend TWU’s proposed law school, sought judicial review of the LSUC’s decision on the basis that it violated religious rights protected by s. 2(a) of the *Canadian Charter of Rights and Freedoms*. TWU and Mr. Volkenant were unsuccessful in their application for judicial review in the Ontario Divisional Court and in their subsequent appeal to the Court of Appeal for Ontario. They now appeal to this Court.

[3] We would dismiss the appeal. In our respectful view, the LSUC’s decision not to accredit TWU’s proposed law school represents a proportionate

balance between the limitation on the *Charter* right at issue and the statutory objectives the LSUC sought to pursue. The LSUC's decision was therefore reasonable.

## II. Background

[4] This appeal and the companion appeal, *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 (*Law Society of B.C.*), arise in part from a common set of facts. The factual background common to both appeals — concerning TWU, its proposed law school, its Community Covenant Agreement, and Mr. Volkenant — is set out in the companion decision of *Law Society of B.C.*, at paras. 4-9 and 11-12.

[5] The LSUC<sup>1</sup> is the regulator of the legal profession in Ontario. The LSUC has the statutory authority under the *Law Society Act*, R.S.O. 1990, c. L.8 (*LSA*), to determine who can be licensed to practise law in Ontario, and to set the conditions of such licences (ss. 26.1(1) and 27(1)). In accordance with this statute, the law society has established certain education requirements which must be met before a person can be licensed to practise law in Ontario. One of these requirements is a bachelor of laws or J.D. degree from a Canadian law school accredited by the LSUC, or in the alternative, a certificate of qualification from the National Committee on Accreditation (*LSUC By-Law 4 — Licensing*, ss. 7 and 9(1)).

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<sup>1</sup> As of January 1, 2018, the Law Society of Upper Canada has been renamed the Law Society of Ontario.

[6] In January 2014, TWU asked the LSUC to accredit its proposed faculty of law. This issue proved to be contentious in the legal community due to the mandatory requirement in the Covenant to abstain from sexual intimacy outside marriage, or, even in marriage, in same-sex relationships.

[7] The LSUC received and considered written submissions on the issue from TWU, the profession, and the public, in addition to reports from the Federation of Law Societies of Canada and several legal opinions concerning the *LSA*, the *Charter*, and the *Human Rights Code*, R.S.O. 1990, c. H.19. The accreditation matter was discussed and debated at length at the Benchers' Convocation on April 10, 2014, where TWU representatives attended as observers, and at Convocation on April 24, 2014, where a TWU representative made oral submissions. At the end of this second meeting, the Benchers voted not to accredit TWU's law school, by a vote of 28 to 21, with one abstention.

### III. Prior Decisions

A. *Judicial Review — 2015 ONSC 4250, 126 O.R. (3d) 1 (Marrocco A.C.J. and Then and Nordheimer JJ.)*

[8] TWU and Mr. Volkenant sought judicial review of the LSUC's decision in the Ontario Divisional Court. The court dismissed TWU's application, finding that the LSUC's decision demonstrated a proportionate balance of the *Charter* rights engaged and did not warrant intervention.

[9] The Divisional Court first noted that the LSUC had reasonably interpreted the notion of equal access as a fundamental part of its public interest mandate. Based on the framework set out in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, the Divisional Court concluded that the LSUC’s decision demonstrated a proportionate balance between freedom of religion and the competing equality interests, and was therefore reasonable.

B. *Court of Appeal — 2016 ONCA 518, 131 O.R. (3d) 113 (MacPherson J.A., Cronk and Pardu J.J.A. concurring)*

[10] The Court of Appeal for Ontario dismissed TWU and Mr. Volkenant’s appeal. Writing for a unanimous panel, MacPherson J.A. accepted that the religious rights of both Mr. Volkenant and TWU were engaged. However, in light of the LSUC’s obligation to govern the legal profession in accordance with the public interest, and its statutory mandate to promote a diverse profession without inequitable barriers, he concluded that the LSUC’s decision represented a proportionate balance between its statutory objectives and the limit on religious freedom in accordance with the *Doré* framework. MacPherson J.A. noted that TWU’s admissions policy was “deeply discriminatory” (para. 119) to the LGBTQ community, and that the Benchers were entitled to consider whether these inequitable impacts precluded accreditation. He concluded that the Benchers demonstrated a fair engagement with the conflicting rights and that the LSUC’s decision not to accredit TWU’s proposed law school was reasonable.

#### IV. Analysis

##### A. *Questions on Appeal*

[11] At the outset, it is important to identify what the LSUC actually decided when denying accreditation to TWU's proposed law school. The LSUC did not deny graduates from TWU's proposed law school admission to the LSUC; rather, the LSUC denied accreditation to TWU's proposed law school with a mandatory covenant.

[12] In reviewing this decision, we must consider the following issues: whether the LSUC was entitled under its enabling statute to consider TWU's admissions policies; whether the LSUC's decision limited a *Charter* protection; and if so, whether that decision reflected a proportionate balance of the *Charter* protection and the statutory objectives.

##### B. *The Scope of the LSUC's Statutory Mandate*

[13] The LSUC has the statutory authority to establish requirements for the issuance of a licence to practise law in Ontario. In this context, it has set out a procedure whereby it accredits law schools for the purpose of recognizing degrees that will satisfy one of the requirements for a licence. This appeal requires us to address the scope of the LSUC's statutory mandate. At issue in this case is the LSUC's decision not to accredit TWU's proposed law school as a route of entry to

the legal profession in Ontario — a decision falling within the core of the LSUC’s role as the gatekeeper to the profession. A question that arises is whether the LSUC was entitled to consider factors apart from the academic qualifications and competence of individual graduates in making this decision to deny accreditation to TWU’s proposed law school.

[14] In our view, the *LSA* requires the Benchers to consider the overarching objective of protecting the public interest in determining the requirements for admission to the profession, including whether a particular law school should be accredited.

[15] The LSUC’s functions, and the principles it must apply in carrying out its functions, are partially set out in ss. 4.1 and 4.2 of the *LSA*:

### **Function of the Society**

**4.1** It is a function of the Society to ensure that,

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

### **Principles to be applied by the Society**

**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. The Society has a duty to protect the public interest.
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.

[16] The LSUC is therefore tasked with, among other things, regulating the legal profession in Ontario, ensuring standards of professionalism and competence among lawyers, and fulfilling its various functions in accordance with its duty to protect the public interest.

[17] Section 4.1 of the *LSA* establishes that ensuring standards of professional competence and their application to lawyers and paralegals is a function of the LSUC. However, the very language of that provision indicates this to be “a function”, not “the function” or “the only function” of the LSUC. That the LSUC’s mandate is not confined to the function set out in s. 4.1 is confirmed by the language of s. 4.2, which refers to the “functions, duties and powers” of the LSUC. The breadth of the LSUC’s mandate is further confirmed by the nature of the principles in s. 4.2, which task the LSUC with advancing the cause of justice, the rule of law, access to justice, and protection of the public interest.



[18] By the clear terms of s. 4.2 of the *LSA*, the LSUC must have regard to the principles set out in that section — including its duty to protect the public interest — in carrying out all of its “functions, duties and powers” under the *LSA*. The LSUC, as a regulator of the self-governing legal profession, is owed deference in its determination as to how these principles can best be furthered in the context of a particular discretionary decision (see *Law Society of B.C.*, at paras. 32 and 34-38).

[19] In this case, the LSUC interpreted its duty to uphold and protect the public interest as precluding the approval of TWU’s proposed law school because the mandatory Covenant effectively imposes inequitable barriers on entry to the school. The LSUC was entitled to be concerned that inequitable barriers on entry to law schools would effectively impose inequitable barriers on entry to the profession and risk decreasing diversity within the bar. Ultimately, the LSUC determined that the approval of TWU’s law school, as proposed, would negatively affect equitable access to and diversity within the legal profession and would harm LGBTQ individuals, which would be inconsistent with the public interest.

[20] In our view, the LSUC was entitled to conclude that equal access to the legal profession, diversity within the bar, and preventing harm to LGBTQ law students were all within the scope of its duty to uphold the public interest in the accreditation context, which necessarily includes upholding a positive public *perception* of the legal profession.

[21] To begin, it is inimical to the integrity of the legal profession to limit access on the basis of personal characteristics. This is especially so in light of the societal trust enjoyed by the legal profession. As a public actor, the LSUC has an overarching interest in protecting the values of equality and human rights in carrying out its functions (see *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613, at para. 47).

[22] As well, eliminating inequitable barriers to legal training and the profession generally promotes the competence of the bar as a whole. The LSUC is not limited to enforcing minimum standards with respect to the individual competence of the lawyers it licenses; it is also entitled to consider whether accrediting law schools with inequitable admissions policies promotes the competence of the bar as a whole.

[23] The LSUC was also entitled to interpret the public interest as being furthered by promoting a diverse bar. Access to justice is facilitated where clients seeking legal services are able to access a legal profession that is reflective of a diverse population and responsive to its diverse needs. Accordingly, ensuring a diverse legal profession, which is facilitated when there are no inequitable barriers to those seeking to access legal education, furthers access to justice and promotes the public interest.

[24] The LSUC's determination that it was entitled to promote equal access to and diversity within the bar is supported by the fact that it has consistently done so throughout its history. Since its formation in 1797, the LSUC has had exclusive

control over who could join the legal profession in Ontario. The Divisional Court considered the LSUC's long history and was satisfied that, in carrying out its mandate, the LSUC has "acted to remove obstacles based on considerations, other than ones based on merit, such as religious affiliation, race, and gender" (Div. Ct. reasons, at para. 96). That the LSUC has historically sought to uphold principles of diversity and equal access to the legal profession supports the LSUC's pursuit of similar objectives in its decision to deny accreditation to TWU's proposed law school.

[25] The LSUC is also entitled to consider preventing potential harm to the LGBTQ community in making a decision it is otherwise entitled to make, including a decision whether to accredit a new law school for the purposes of lawyer licensing. In the context of its decision whether to accredit TWU's proposed law school, the *LSA*'s direction that the LSUC should be concerned with maintaining and advancing the cause of justice in our view permitted the LSUC to consider potential harms to the LGBTQ community as a factor in its decision making.

[26] The LSUC's consideration of TWU's admissions policy in deciding whether to accredit its proposed law school does not amount to the LSUC regulating law schools. The LSUC considered that policy in the context of its decision to accredit the law school for the purpose of lawyer licensing in Ontario in exercising its authority as the gatekeeper to the legal profession in that province. The LSUC did not

purport to make any other decision governing TWU's proposed law school or how it should operate.

[27] In our view, it is clear that the LSUC was entitled to consider TWU's admissions policy to determine whether to accredit the proposed law school. In promoting the public interest and public confidence in the legal profession, the LSUC was required to consider an admissions policy that potentially imposes inequitable barriers to entry and a harmful learning environment. Approving or facilitating these requirements could undermine public confidence in the LSUC's ability to self-regulate in the public interest. It was therefore within the scope of its mandate under the *LSA*.

C. *Reasonableness Review in the Absence of Formal Reasons*

[28] For the same reasons given in *Law Society of B.C.*, there was no requirement on the part of the LSUC to give reasons which provided formal explanation for why the decision to refuse to accredit TWU's proposed law school amounted to a proportionate balancing of freedom of religion with the statutory objectives of the *Law Society Act* (paras. 52-54). The speeches the LSUC Benchers made during the Convocations of April 10 and 24, 2014 demonstrate that the Benchers were alive to the question of the balance to be struck between freedom of religion and their statutory duties.

[29] Reasonableness review requires “a respectful attention to the reasons offered or which could be offered in support of a decision” (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 48 (emphasis added); see also *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 11). Reviewing courts “may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome” (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at para. 52, quoting *Newfoundland Nurses*, at para. 15). In our view, the Benchers came to a decision that reflected a proportionate balance.

D. *Review of the LSUC’s Decision Under the Doré/Loyola Framework*

[30] Administrative decisions that engage the *Charter* are reviewed based on the framework set out in *Doré* and *Loyola*. The *Doré/Loyola* framework is concerned with ensuring that *Charter* protections are upheld to the fullest extent possible given the statutory objectives within a particular administrative context. In this way, *Charter* rights are no less robustly protected under an administrative law framework.

[31] Under the precedent established by this Court in *Doré* and *Loyola*, the preliminary question is whether the administrative decision engages the *Charter* by limiting *Charter* protections — both rights and values (*Loyola*, at para. 39). If *Charter* protections are engaged, the question becomes “whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the

statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play” (*Doré*, at para. 57; *Loyola*, at para. 39).

(1) Whether Freedom of Religion Is Engaged

[32] The first issue is whether, in applying its public interest mandate to the accreditation of TWU’s proposed law school, the LSUC engaged the religious freedom of the TWU community. To demonstrate a limitation of 2(a) of the *Charter*, a claimant must show first that he or she has a sincere belief or practice that has a nexus with religion and second, that the impugned state conduct interferes, in a manner that is more than trivial or insubstantial, with his or her ability to act in accordance with that practice or belief (*Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 65; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386, at para. 68). If, based on this test, s. 2(a) is not engaged, there is nothing to balance.

[33] For the reasons discussed in the companion case, *Law Society of B.C.*, we conclude that the decision not to accredit TWU’s proposed law school represented a limitation on the religious freedom of members of the TWU religious community. Evangelical members of TWU’s community have a sincere belief that studying in a community defined by religious beliefs in which members follow particular religious rules of conduct contributes to their spiritual development. This belief is supported through the universal adoption of the Covenant, which helps to create an environment in which TWU students can grow spiritually. By interpreting the public interest in a

way that precludes the accreditation of TWU's law school governed by the mandatory Covenant, the LSUC has interfered with these beliefs and practices in a way that is more than trivial or insubstantial. The result is that the religious rights of TWU's community members were limited, and therefore engaged, by the LSUC's decision.

[34] Although TWU also made *Charter* submissions based on free expression, free association, and equality rights, we are of the view that the religious freedom claim is sufficient to account for these protections in the analysis (see *Law Society of B.C.*, at paras. 76-78).

(2) Proportionate Balancing

[35] Under the *Doré/Loyola* framework, an administrative decision which engages a *Charter* right will be reasonable if it reflects a proportionate balancing of the *Charter* protection with the statutory mandate (see *Doré*, at para. 7; *Loyola*, at para. 32). The reviewing court must be satisfied that the decision "gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate (*Loyola*, at para. 39). In other words, the *Charter* protection must be "affected as little as reasonably possible in light of the state's particular objectives" (*Loyola*, at para. 40). When a decision engages the *Charter*, reasonableness and proportionality become synonymous. Simply put, a decision that has a disproportionate impact on *Charter* rights is not reasonable.

[36] The reviewing court must consider whether there were other reasonable possibilities that would give effect to *Charter* protections more fully in light of the objectives, always asking whether the decision falls within a range of reasonable outcomes (*Doré*, at para. 57; *Loyola*, at para. 41, citing *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160). If there was an option or avenue *reasonably* open to the decision-maker that would reduce the impact on the protected right while still permitting him or her to sufficiently further the relevant objectives, the decision would not fall within a range of reasonable outcomes. The reviewing court must also consider how substantial the limitation on the *Charter* protection was compared to the benefits to the furtherance of the statutory objectives in this context (*Doré*, at para. 56; *Loyola*, at para. 68). In the context of a challenge to an administrative decision where the constitutionality of the statutory mandate itself is not in issue, the question is whether the administrative decision-maker has furthered his or her statutory mandate in a manner that is proportionate to the resulting limitation on the *Charter* right.

[37] In this case, the LSUC only had two options — to accredit, or not accredit, TWU’s proposed law school. Given the LSUC’s interpretation of the public interest, accrediting TWU’s proposed school would not have advanced the relevant statutory objectives, and therefore was not a reasonable possibility that would give effect to *Charter* protections more fully in light of the statutory objectives.



[38] The LSUC's decision also reasonably balanced the severity of the interference with the benefits to the statutory objectives. In our view, the LSUC did not limit religious freedom to a significant extent. As discussed in the companion appeal, the LSUC's decision only interferes with TWU's ability to operate a law school governed by the *mandatory* Covenant. This limitation is of minor significance because a mandatory covenant is not absolutely required to study law in a Christian environment in which people follow certain religious rules of conduct, and attending a Christian law school is preferred, not necessary, for prospective TWU law students.

[39] On the other side of the scale is the extent to which the LSUC's decision furthered the statutory objective. In our view, the decision significantly advanced the statutory objectives by ensuring equal access to and diversity in the legal profession and preventing the risk of significant harm to LGBTQ people. The reality is that most LGBTQ individuals will be deterred from attending TWU's proposed law school, and those who do attend will be at the risk of significant harm.

[40] Limits on religious freedom are often an unavoidable reality of a decision-maker's pursuit of its statutory mandate in a multicultural and democratic society. Religious freedom can be limited where an individual's beliefs or practices harm or interfere with the rights of others (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at pp. 346-47; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 26).

[41] Except for the interference identified above, no evangelical Christian is denied the right to practise his or her religion as and where they choose. The LSUC's decision means that TWU's community members cannot impose those religious beliefs on fellow law students, since they have an inequitable impact and can cause significant harm. The LSUC chose an interpretation of the public interest which mandates access to law schools based on merit and diversity, rather than exclusionary religious practices. This decision prevents *concrete*, not abstract, harms to LGBTQ people and to the public in general.

[42] Given the significant benefits to the statutory objectives and the minor significance of the limitation on the *Charter* rights at issue, and given the absence of any reasonable alternative that would reduce the impact on *Charter* protections while sufficiently furthering those objectives, in our view, the decision made by the LSUC represented a proportionate balance. The decision "gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate". Therefore, the decision was reasonable.

## V. Disposition

[43] The decision of the LSUC not to accredit TWU's proposed law school is upheld. As a result, the appeal from the Court of Appeal for Ontario is dismissed, with costs.

The following are the reasons delivered by

THE CHIEF JUSTICE —

[44] As in this appeal's companion case, *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, the central issue before the Court is whether a law society can deny students from a religious-based law school the right to practise law, on the basis that the school discriminates against same-sex LGBTQ couples by requiring students to sign the Community Covenant Agreement prohibiting sexual intimacy except between married heterosexual couples.

[45] I agree with the majority, Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ., that the Law Society of Upper Canada had jurisdiction to make this decision pursuant to its delegated authority under ss. 4.1 and 4.2 of the *Law Society Act*, R.S.O. 1990, c. L.8, and that the decision should be upheld.

[46] I adopt my reasons in the companion appeal regarding my disagreement with the majority on the framework for administrative decisions that infringe the *Canadian Charter of Rights and Freedoms*, the severity of the infringement, and the reasons for which the decision is justified.

[47] I would dismiss the appeal.

The following are the reasons delivered by

ROWE J. —

[48] I concur with my colleagues in the majority, Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ., that the Law Society of Upper Canada (“LSUC”) had the jurisdiction to consider the effect of the mandatory Community Covenant Agreement in refusing to accredit the proposed law school at Trinity Western University (“TWU”). Like the Law Society of British Columbia in the companion appeal, *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, the LSUC has a broad public mandate to regulate the legal profession in the public interest. Based on ss. 4.1 and 4.2 of the *Law Society Act*, R.S.O. 1990, c. L.8, this mandate includes “ensuring standards of professionalism and competence among lawyers, and fulfilling its various functions in accordance with its duty to protect the public interest”: Majority Reasons (“M.R.”), at para. 16. I agree that the breadth of this mandate is “further confirmed by the nature of the principles in s. 4.2, which task the LSUC with advancing the cause of justice, the rule of law, access to justice, and protection of the public interest”: M.R., at para. 17.

[49] The LSUC is tasked with self-regulating in the public interest. As this Court has often affirmed, deference is required whenever courts review the decisions of law societies as they self-regulate in the public interest: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at pp. 187-88; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, at p. 887; *Green v. Law Society of*

*Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360, at paras. 24-25. In this case, the LSUC interpreted its mandate as precluding the approval of the proposed law school at TWU because of the effect of the mandatory Covenant on prospective law students. For the Benchers who voted against accreditation, the Covenant imposed a discriminatory barrier to legal education by effectively precluding LGBTQ students from studying law at TWU. Given the deference to which the LSUC is entitled, I agree with the majority that in taking its decision to deny accreditation, the LSUC did not err in considering the effect of the TWU Covenant.

[50] For the reasons set out in the companion appeal, I find that this decision did not infringe any of the rights under the *Canadian Charter of Rights and Freedoms* raised by the appellants. The decision of the LSUC must consequently be reviewed under the usual principles of judicial review. In this case, the standard of review is reasonableness, as the decision under review falls within the category of cases where deference is presumptively owed to decision-makers who interpret and apply their home statutes: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 54; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 34; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 46.

[51] Reviewed under the standard of reasonableness, the decision of the LSUC will command deference if it meets the criteria set out in *Dunsmuir* — namely, if the process by which it was reached provides for “justification, transparency and

intelligibility” and if the outcome it provides falls “within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”: *Dunsmuir*, at para. 47.

[52] As explained by the majority (at paras. 28-29), reasonableness does not always require the decision-maker to give formal reasons. The deference owed in applying the standard of reasonableness rather requires “respectful attention to the reasons offered or which could be offered in support of a decision”: *Dunsmuir*, at para. 48, quoting D. Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy”, in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286. As in the companion appeal, this case requires the Court to look to the record to assess the reasonableness of the decision under review.

[53] With regard to process, the record of the Benchers’ deliberations provides an account of the manner in which the decision was reached and the reasons why the Benchers voted to refuse to accredit the proposed law school.

[54] With regard to substance, I agree with the majority that “the LSUC only had two options — to accredit, or not accredit, TWU’s proposed law school”: para. 37. Given its interpretation of its statutory mandate, the LSUC’s decision falls “within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”. For these reasons, I conclude that the decision to deny accreditation was reasonable.

[55] I agree with the majority in the result, in that I would dismiss the appeal and uphold the decision of the LSUC denying its accreditation of the proposed law school at TWU.

The following are the reasons delivered by

CÔTÉ AND BROWN JJ. —

I. Introduction

[56] Resolving this appeal and its companion appeal, *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 (“*Law Society of B.C.*”), entails considering who controls the door to “the public square”. In other words, who owes an obligation to accommodate difference in public life? We say that this obligation lies with the public decision-maker — here a judicially reviewable public regulator. In contrast, Trinity Western University (“TWU”), a private denominational institution, which is not subject to the *Canadian Charter of Rights and Freedoms* or to judicial review, and is exempted from provincial human rights legislation, owes no such obligation.

[57] We would therefore allow the appeal from the decision of the Court of Appeal for Ontario (2016 ONCA 518, 131 O.R. (3d) 113). The only proper purpose of a Law Society of Upper Canada (“LSUC”) accreditation decision is to ensure that

individual applicants who are graduates of the applicant institution are fit for licensing. As a consequence, the only defensible exercise of the LSUC's statutory discretion would have been to accredit TWU's proposed law school. The decision not to accredit TWU's proposed law school is, moreover, a profound interference with the TWU community's freedom of religion. Further, even were the "public interest" to be understood broadly as the LSUC and the majority (Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ.) contend, accreditation of TWU's law school would not be inconsistent with the LSUC's statutory mandate. In a liberal and pluralist society, the public interest is served, and not undermined, by the accommodation of difference. In our view, only a decision to accredit TWU's proposed law school would reflect a proportionate balancing of *Charter* rights and the statutory objectives which the LSUC sought to pursue.

## II. Analysis

### A. *The LSUC Exercised Its Discretion for an Improper Purpose and Relied on Irrelevant Considerations*

[58] As we explain in our reasons in *Law Society of B.C.*, a discretionary decision will be invalid if taken for an improper purpose or on the basis of irrelevant considerations (paras. 274-77). A careful reading of the *Law Society Act*, R.S.O. 1990, c. L. 8 ("*LSA*") and the LSUC's relevant by-laws leads us to the unavoidable conclusion that the only proper purpose of an LSUC accreditation decision is to ensure that individual applicants are fit for licensing. It follows that the exercise of



the LSUC's statutory discretion to deny accreditation to TWU was taken for an improper purpose, and is therefore invalid.

(1) The Purpose of the LSUC's Accreditation Decision Is to Ensure That Individual Applicants Are Fit for Licensing

[59] In refusing to accredit TWU, the LSUC purported to act under *By-Law 4 — Licensing*, which sets out the requirements for the issuance of all classes of licences to practice law in Ontario. For issuance of a Class L1 licence, one requirement is that applicants must have a degree from a law school accredited by the LSUC. The decision to accredit a law school is discretionary. The purpose of an accreditation decision, and the relevant considerations that may be taken into account in reaching such a decision must therefore be found in the relevant functions, duties and powers of the LSUC, as set out by the *LSA: Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at pp. 275-79. Further, they must be consistent with a contextual and purposive reading of *By-Law 4*: see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.

[60] Sections 4.1 and 4.2 of the *LSA* set out the LSUC's primary function and the principles guiding the exercise of its authority. Section 4.1 describes "a *function*" of the LSUC. This is *the only* section of the *LSA* that explicitly sets out the LSUC's functions. It describes that function as being:

- to ensure that “all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide” (s. 4.1(a)); and
- to ensure that “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” (s. 4.1(b)).

Consequently, the setting of standards for the provision of legal services in Ontario is the LSUC’s *primary* function.

[61] Section 4.2 provides that, in carrying out “its functions, duties and powers under this Act”, the LSUC shall have regard to various guiding principles, including its duty “to maintain and advance the cause of justice and the rule of law” (s. 4.2(1)), “to act so as to facilitate access to justice for the people of Ontario” (s. 4.2(2)) and “to protect the public interest” (s. 4.2(3)). The broad principles found in s. 4.2 are not stand-alone statutory purposes. We do not disagree with the majority that these principles are relevant factors for the LSUC to consider in carrying out “its functions, duties and powers” under the *LSA* (Majority Reasons, at para. 18). They must, however, be understood in light of those functions, duties and powers.

[62] The *LSA* limits the scope of the LSUC’s mandate to the regulation of legal practice. We repeat: the primary function of the LSUC, as described in s. 4.1, is the setting of standards for the provision of legal services in Ontario. More importantly, in reading the *LSA* as a whole, it becomes readily apparent that the functions, duties and powers set out therein relate only to the governance of the LSUC itself, to the provision of legal services by lawyers, law firms and lawyers of other jurisdictions, and to the regulation of articled students and licensing applicants. The LSUC’s functions, duties and powers are, in short, limited to regulating the provision of legal services, starting at (but not before) the licensing process — that is, starting at the doorway to the profession.

[63] The LSUC’s by-law making authority is similarly constrained. Each of the matters listed in s. 62 (“By-laws”), and s. 62 read as a whole, grant the LSUC by-law making powers only for matters relating to the affairs of the Society, and the governing of licensees, the provision of legal services, law firms, and applicants.

[64] These limits on the LSUC’s mandate are confirmed by s. 13(1) of the *LSA*, a provision that explicitly confines the scope of “the public interest” to the practice of the law and the provision of legal services or to any other matter covered by the Act:

**13(1)** The Attorney General for Ontario shall serve as the guardian of the public interest in all matters within the scope of this Act or having to do in any way with the practice of law in Ontario or the provision of legal services in Ontario, and for this purpose he or she may at any time require

the production of any document or thing pertaining to the affairs of the Society.

[65] We note that this limited view of the LSUC's mandate accords with its purpose as expressed by its own Role Statement — said to “defin[e] the proper role of the Society” — cited at length in a legal opinion received by the LSUC (Legal Opinion re Discretion and Public Interest, April 4, 2014, reproduced in A.R., vol. XIII, pp. 2296-2321, at p. 2307). This opinion concluded, on the basis of statements made in the Role Statement, that Convocation understood its role as being “to ensure that the people of Ontario are served by lawyers who meet high standards of learning, competence and professional and ethical conduct” (Legal Opinion re Discretion and Public Interest, at p. 2310.)

[66] In light of the LSUC's mandate, it is *crystal clear* that the provisions in *By-Law 4* relating to the accreditation of law schools are meant *only* to ensure that individual applicants are fit for licensing. The legal opinion received by the LSUC understood accreditation similarly (Legal Opinion re Discretion and Public Interest, at p. 2304). *By-Law 4* is properly understood as being made pursuant to s. 62(0.1)4.1 of the *LSA*, which provides for the making of by-laws

governing the licensing of persons to practise law in Ontario as barristers and solicitors and the licensing of persons to provide legal services in Ontario, including prescribing the qualifications and other requirements for the various classes of licence and governing applications for a licence.

It is not for this Court to extend *By-Law 4*'s scope beyond the limits of the LSUC's mandate, which is to regulate the provision of legal services in Ontario.

[67] This interpretation is consistent with a plain reading of *By-Law 4*, which sets requirements for individual licensing, one being that applicants obtain a degree from an accredited law school. The crux of *By-Law 4* is individual licensing; the accreditation of law schools is only incidental to this purpose. Law school accreditation, properly understood, only acts as a proxy for ascertaining whether graduates from that school are presumptively fit for licensing.

(2) Section 62(0.1)23 of the LSA Does Not Grant the LSUC the Authority to Regulate Law Schools

[68] The LSUC relies heavily on s. 62(0.1)23 of the *LSA*, and its history to argue that the LSUC has authority over prerequisite legal education and that law schools only operate on its behalf. As we explain at paras. 290-91 of our reasons in the companion case, by allowing the LSUC to use its by-laws to regulate law school admissions policies and to prevent harm to law students, the majority similarly distends, without any legally grounded justification, the LSUC's mandate to the context of legal education. Only a selective reading of the *LSA* could support the LSUC's position. The *LSA* does not grant the LSUC the power to regulate law schools, including their admissions policies. Nor does it state that law schools provide legal education on the LSUC's behalf. Again, the LSUC's functions, duties and powers start at the licensing process — that is, at the doorway to the legal profession,

and not at the doorway to the law school. This restriction applies to *any* law school, whether private and denominational, or not.

[69] What s. 62(0.1)23 *does* do is to empower the LSUC to make by-laws “respecting legal education, including programs of pre-licensing education or training”. While the provision is broadly worded, its text must be examined “in [its] entire context and . . . harmoniously with the [LSA’s] scheme [and] object: *Rizzo & Rizzo Shoes Ltd.*, at para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87.

[70] First, s. 62(0.1)23 must be read alongside subss. (1) and (2) of s. 60 of the LSA which, under the heading “Legal Education, Degrees”, provide respectively that “[t]he Society may operate programs of pre-licensing education or training and programs of continuing professional development” and that “[t]he Society may grant degrees in law.” Section 60(1) contains the only other reference to “pre-licensing education” in the LSA, and it explicitly limits the LSUC’s powers to programs of education operated *by the Society*. Other references to “legal education”, at ss. 35(1)6 and 44(1)6, provide for orders requiring licensees who have failed to meet standards of professional competence or who have engaged in professional misconduct to participate in specified programs of legal education. This also supports an interpretation of s. 62(0.1)23 that is linked to regulating individual competence.

[71] Secondly, s. 62(0.1)23 must be read in the context of the entirety of the LSA and in light of its purpose which, as explained above, is clearly limited to

regulating the practice of law, and does not extend beyond licensing. The *LSA* makes no reference to law schools, except in the unrelated matter of the composition of advisory council meetings convened under s. 26. Presumably, if the legislator had intended to grant the LSUC supervisory powers over law schools, such a significant grant of authority would have been explicitly provided for.

[72] Thirdly, the interpretation of s. 62(0.1)23 advanced by the LSUC ignores the fact that in this case, it is British Columbia's Minister of Advanced Education — and not the LSUC — who grants law schools the power to confer degrees in law: *Degree Authorization Act*, S.B.C. 2002, c. 24. We emphasize at this point that TWU was incorporated by the Legislative Assembly of British Columbia for the purpose of providing university education “with an underlying philosophy and viewpoint that is Christian” (*Trinity Western University Act*, S.B.C. 1969, c. 44, s. 3(2)) and that it had received approval from the Minister of Advanced Education to grant degrees in law, after having received preliminary approval from the Federation of Law Societies of Canada's Approval Committee. This is reflected in s. 9(1)1(i) of *By-Law 4*, which requires that an applicant hold a bachelor of laws or juris doctor degree from “a law school in Canada”, and not strictly from a law school in Ontario, for the issuance of a Class L1 licence.

[73] For these reasons, s. 62(0.1)23 cannot be interpreted as granting the LSUC authority over law schools. Even were, however, such authority vested in the LSUC, this authority would be limited to legal education provided in Ontario. The

LSUC's jurisdiction does not extend to British Columbia and, therefore, the LSUC would have no authority to regulate TWU.

(3) The Only Defensible Exercise of the LSUC's Statutory Discretion Would Have Been to Accredite TWU

[74] Having concluded the only proper purpose of an LSUC accreditation decision is to ensure that individual applicants are fit for licensing, the only defensible exercise of the LSUC's statutory discretion for a proper purpose would have been to accredit TWU.

[75] As expressed at paras. 336-38 of our reasons in *Law Society of B.C.*, "upholding a positive public *perception* of the legal profession" (Majority Reasons, at para. 20 (emphasis in original)) is not a valid basis for the LSUC's decision. Equating recognition of a private actor as condonation of its beliefs turns the protective shield of the *Charter* into a sword. Where *Charter* rights are involved, a court of law ought not to be concerned with public perception — such rights existing to *protect* rights-holders from majoritarian values, not to *force conformance* to those values.

[76] Nor does the objective of ensuring equal access to and diversity in the legal profession fall within the LSUC's duty to ensure competence in the legal profession (see para. 289 of our reasons in *Law Society of B.C.*). The LSUC is mandated to set minimum standards; this statutory objective relates to competence rather than merit. Indeed, were the LSUC's duty to ensure competent practice



interpreted as entitling it to consider that “inequitable barriers on entry to law schools would effectively impose inequitable barriers on entry to the profession and risk decreasing diversity within the bar” (Majority Reasons, at para. 19), the LSUC may well be not only empowered, but obliged to regulate other aspects of law school operations, such as admissions, or to regulate law school tuition fees which, arguably, create inequitable barriers to the practice of law (see C. C. Smith, “Tuition Fee Increases and the History of Racial Exclusion in Canadian Legal Education”, Ontario Human Rights Commission (2004) (online)).

[77] Given that the parties concede there are no concerns relating to competence or conduct of prospective TWU graduates, the only defensible exercise of the LSUC’s statutory discretion for a proper purpose in this case would have been for it to approve TWU’s proposed law school.

B. *Decision Below*

[78] As the majority notes in its summary (at para. 10), in dismissing TWU and Mr. Volkenant’s appeal, the Court of Appeal for Ontario viewed the balancing exercise in its review of the LSUC’s decision as involving colliding or conflicting rights (C.A. decision, at para. 113). But MacPherson J.A.’s finding 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” reveals the fundamental and serious error in the Court of Appeal’s understanding of that balancing exercise (para. 115 (emphasis added)). TWU is a

private institution. And, at the risk of stating trite law, private actors are not subject to the *Charter* (*Charter*, s. 32(1); *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 597). As the Court explained in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at pp. 262-63:

The exclusion of private activity from the *Charter* was not a result of happenstance. It was a deliberate choice which must be respected. . . .

The leading authority in this area is, of course, this Court's decision in the *Dolphin Delivery* case, *supra*, which sets forth many other considerations of this kind. In that case, McIntyre J. made it clear that the *Charter* was by s. 32 limited in its application to Parliament and the legislatures, and to the executive and administrative branches of government.

Therefore, neither the Covenant nor any other aspect of TWU's admissions policies may be found to be "contrary to s. 15 of the *Charter*", or to any other section of the *Charter*. In our view, the Court of Appeal's manifestly erroneous understanding of a basic premise, not only of our constitutional order but of the particular balancing the court was called upon to exercise in this case, taints its entire assessment of the matter.

[79] In a similar vein, the majority at this Court errs in its view that "[l]imits on religious freedom are often an unavoidable reality of a decision-maker's pursuit of its statutory mandate in a multicultural and democratic society" (para. 40). This categorical and unelaborated statement appears to be rooted in another equally fundamental misconception: that, even where the rights of others are not actually infringed because private actors do not owe obligations to refrain from infringing

them, a private actor's religious freedom will "unavoidab[ly]" be limited solely on the basis that its exercise "negatively impacts" the interests of others. But the point is this simple. The *Charter* binds state actors, like the LSUC, and *only* state actors. It does not bind private institutions, like TWU.

C. *The LSUC Decision Unjustifiably Limits the TWU Community's Section 2(a) Charter Rights*

[80] As we explain in our reasons in *Law Society of B.C.*, the LSUC decision not to approve TWU's proposed law school infringes the religious freedom of members of the TWU community. The accreditation decision interferes with the TWU community's expression of religious belief through the practice of creating and adhering to a biblically grounded covenant. Unlike our colleagues, we do not view this interference as minor. The accreditation decision disrupts the core character of the TWU community by interfering with its ability to determine the biblically grounded code of conduct by which community members will abide. Relatedly, we note the majority's statement (at para. 11) that "[t]he LSUC did not deny graduates from TWU's proposed law school admission to the LSUC; rather, the LSUC denied accreditation to TWU's proposed law school with a mandatory covenant". Such a highly formalist description of the decision under review in this appeal belies the majority's claim, underpinning its reasons in this appeal and in *Law Society of B.C.* (at para. 95), that it is applying "*substantive equality*". In *substance*, TWU is seeking accreditation of its proposed law school for the benefit of its graduates.

[81] Finally, even were we to accept the overbroad statutory “public interest” objectives which are urged by the LSUC and adopted by the majority, it would not follow that accrediting TWU is against the public interest, so understood. As we discuss in our reasons in *Law Society of B.C.* (at paras. 324-36), the public interest in fostering a liberal, pluralist society is served by accommodating religious freedom. The unequal access resulting from the Covenant is a function not of condonation of discrimination, but of accommodating religious freedom, which freedom allows religious communities to flourish and thereby promotes diversity and pluralism in the public life of our communities.

[82] The appeal should be allowed. We therefore dissent.

*Appeal dismissed with costs, CÔTÉ and BROWN JJ. dissenting.*

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