



SUPREME COURT OF CANADA

CITATION: Law Society of British Columbia v. Trinity Western University, 2018 SCC 32 **APPEAL HEARD:** November 30, December 1, 2017
JUDGMENT RENDERED: June 15, 2018
DOCKET: 37318

BETWEEN:

Law Society of British Columbia
Appellant

and

Trinity Western University and Brayden Volkenant
Respondents

- and -

Lawyers' Rights Watch Canada, National Coalition of Catholic School Trustees' Associations, International Coalition of Professors of Law, Christian Legal Fellowship, Canadian Bar Association, Advocates' Society, Association for Reformed Political Action (ARPA) Canada, Canadian Council of Christian Charities, Canadian Conference of Catholic Bishops, Canadian Association of University Teachers, Law Students' Society of Ontario, Seventh-day Adventist Church in Canada, BC LGBTQ Coalition, Evangelical Fellowship of Canada, Christian Higher Education Canada, British Columbia Humanist Association, Egale Canada Human Rights Trust, Faith, Fealty & Creed Society, Roman Catholic Archdiocese of Vancouver, Catholic Civil Rights League, Faith and Freedom Alliance, Canadian Secular Alliance, West Coast Women's Legal Education and Action Fund 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 106)

CONCURRING REASONS: McLachlin C.J.
(paras. 107 to 151)

**REASONS CONCURRING IN THE
RESULT:** Rowe J.
(paras. 152 to 259)

JOINT DISSENTING REASONS: Côté and Brown JJ.
(paras. 260 to 342)

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LAW SOCIETY OF B.C. v. TRINITY WESTERN UNIVERSITY

Law Society of British Columbia

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v.

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Brayden Volkenant**

Respondents

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International Coalition of Professors of Law,
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Canadian Council of Christian Charities,
Canadian Conference of Catholic Bishops,
Canadian Association of University Teachers,
Law Students' Society of Ontario,
Seventh-day Adventist Church in Canada,
BC LGBTQ Coalition,
Evangelical Fellowship of Canada,
Christian Higher Education Canada,
British Columbia Humanist Association,
Egale Canada Human Rights Trust,
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Interveners

Indexed as: Law Society of British Columbia v. Trinity Western University

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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 BRITISH COLUMBIA

Law of professions — Barristers and solicitors — Law society — Approval of law school — Law society denying approval 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 and to hold referendum of members in deciding whether to approve proposed law school — Law Society Rules, r. 2-27 — Legal Profession Act, S.B.C. 1998, c. 9, s. 13.

Administrative law — Judicial review — Standard of review — Law society — Administrative decision engaging Charter protections — Law society denying approval 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) — Legal Profession Act, S.B.C. 1998, c. 9, s. 3.

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 British Columbia (“LSBC”) is the regulator of the legal profession in British Columbia. The Benchers of the LSBC voted to hold a referendum of its members on the issue of the approval of TWU’s proposed law school and agreed to be bound by the results. The members voted to implement a resolution declaring that TWU’s proposed law school was not an approved faculty of law because of its mandatory Covenant. The Benchers therefore passed the resolution. TWU and V, a graduate of TWU’s undergraduate program who would have chosen to attend TWU’s proposed law school, successfully brought judicial review proceedings to the Supreme Court of British Columbia, arguing that the LSBC’s decision not to approve TWU’s proposed law school violated religious rights protected by s. 2(a) of the *Charter*. The Court of Appeal dismissed the appeal.

Held (Côté and Brown JJ. dissenting): The appeal should be allowed. The resolution of the LSBC to declare that TWU's proposed law school not be approved is restored.

Per Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ.: The LSBC's decision not to approve TWU's proposed law school represents a proportionate balance between the limitation on the religious protections under s. 2(a) of the *Charter* and the statutory objectives that the LSBC sought to pursue. The LSBC's decision was therefore reasonable.

The LSBC was entitled under its enabling statute to consider TWU's admissions policies, apart from the academic qualifications and competence of individual graduates, in determining whether to approve TWU's proposed law school under Rule 2-27 of the *Law Society Rules*. The LSBC's enabling statute requires the Benchers to consider the overarching objective of upholding and protecting the public interest in the administration of justice in determining the requirements for admission to the profession, including whether to approve a particular law school. As the governing body of a self-regulating profession, the LSBC's determination of the manner in which its broad public interest mandate will best be furthered is entitled to deference. The public interest is a broad concept and what it requires will depend on the particular context.

The LSBC in this case interpreted its duty to uphold and protect the public interest as precluding the approval of TWU's proposed law school because the

requirement that students sign the Covenant as a condition of admission effectively imposes inequitable barriers on entry to the school and ultimately, inequitable barriers on entry to the profession. It was reasonable for the LSBC to conclude that promoting equality by ensuring equal access to the legal profession, supporting diversity within the bar, and preventing harm to LGBTQ law students were valid means to pursue the public interest. The LSBC has an overarching interest in protecting the values of equality and human rights in carrying out its functions. Approving or facilitating inequitable barriers to the profession could undermine public confidence in the LSBC's ability to regulate in the public interest.

Also, the LSBC Benchers were entitled to hold a referendum of members on the question of TWU's proposed law school. Section 13 of the *Legal Profession Act* does not limit the circumstances in which the Benchers can elect to be bound to implement the results of such a referendum. The legal profession in British Columbia is self-governing; the majority of Benchers are elected by the LSBC membership and make decisions on behalf of the LSBC as a whole. It is consistent with this statutory scheme that the Benchers may decide that certain decisions they take would benefit from the guidance or support of the membership as a whole. This is no less the case where a decision implicates the *Charter* and raises questions as to the best means to pursue the LSBC's statutory objectives.

The LSBC was not required to give reasons formally explaining why the decision to refuse to approve TWU's proposed law school amounted to a

proportionate balancing of freedom of religion with the LSBC's statutory objectives. Not all administrative decision-making requires the same procedure. In this context, the vast majority of Benchers serve as elected representatives, and reached their decision by a majority vote. It is clear from the speeches that the LSBC Benchers made during their meetings that they were alive to the question of the balance to be struck. Reviewing courts may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

Administrative decisions that engage the *Charter* are reviewed based on the framework set out in the binding precedents of the Court of *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. Under the *Doré/Loyola* framework, if the administrative decision engages the *Charter* by limiting its protections — both rights and values — 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 and the relevant statutory mandate.

Section 2(a) of the *Charter* is limited, or engaged, when the claimant demonstrates that he or she sincerely believes in a practice or belief that has a nexus with religion, and that the impugned state conduct interferes, in a manner that is more than trivial, with his or her ability to act in accordance with that practice or belief. If s. 2(a) is not engaged, there is nothing to balance. In this case, it is clear from the

record that evangelical members of the TWU community sincerely believe that studying in an environment defined by religious beliefs in which members follow particular religious rules of conduct contributes to their spiritual development. Precluding the approval of TWU's law school governed by the mandatory Covenant limits the ability of members of the TWU community to enhance their spiritual development through studying law in an environment defined by their religious beliefs. Accordingly, their religious rights were limited, and therefore engaged, by the LSBC's decision.

Where an administrative decision engages a *Charter* protection, the reviewing court should apply a robust proportionality analysis consistent with administrative law principles, instead of a literal s. 1 analysis. The administrative decision will be reasonable if it reflects a proportionate balancing of the *Charter* protection with the relevant statutory mandate. This approach recognizes that an administrative decision-maker is generally in the best position to weigh the *Charter* protections with his or her statutory mandate in light of the specific facts of the case. It follows that deference is warranted when a reviewing court is determining whether the decision reflects a proportionate balance.

For a decision to be proportionate, it is not enough for the decision-maker to simply balance the statutory objectives with the *Charter* protection in making its decision. 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.

The LSBC was faced with only two options — to approve or reject TWU's proposed law school. Given the LSBC's statutory mandate, approving TWU's proposed law 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 LSBC's decision also reasonably balanced the severity of the interference against the benefits to its statutory objectives. The LSBC's decision did not limit religious freedom to a significant extent 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 their spiritual growth.

On the other side of the scale, it is clear that the decision not to approve TWU's proposed law school significantly advanced the LSBC's statutory objectives by maintaining equal access to and diversity in the legal profession and by preventing the risk of significant harm to LGBTQ people. The public confidence in the administration of justice could be undermined by the LSBC's decision to approve a law school that forces some to deny a crucial component of their identity in the most

private and personal of spaces for three years in order to receive a legal education.

Freedom of religion protects the rights of religious adherents to hold and express beliefs through both individual and communal practices. Where a religious practice impacts others, however, this can be taken into account at the balancing stage. In this case, the effect of the mandatory Covenant is to restrict the conduct of others. The LSBC's decision prevents the risk of significant harm to LGBTQ people who feel they have no choice but to attend TWU's proposed law school. These individuals would have to deny who they are for three years to receive a legal education. Being required by someone else's religious beliefs to behave contrary to one's sexual identity is degrading and disrespectful.

Given the significant benefits to the relevant 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 same objectives, the decision to refuse to approve TWU's proposed law school represents a proportionate balance. The decision was reasonable.

Per McLachlin C.J.: There is agreement with the majority that the jurisdiction and decision-making process of the LSBC are reviewable on a standard of reasonableness. Where legislatures delegate regulation of the legal profession to a law society, the law society's interpretation of the public interest is owed deference.

There is also agreement with the majority that *Charter*-infringing administrative decisions are reviewed according to the *Doré/Loyola* framework. This framework has two discrete steps. The reviewing court must first determine if the decision limits a *Charter* right, and then determine whether the limitation of the right is proportionate in light of the state's objective, and hence is justified as a reasonable measure in a free and democratic society under s. 1 of the *Charter*. In most cases, the ultimate question will be whether the decision under review balances the negative effects on the right against the benefits derived from the decision in a proportionate way.

However, certain gaps and omissions in the framework must be addressed. To adequately protect the *Charter* right, the initial focus must be on whether the claimant's constitutional right has been infringed. *Charter* values may play a role in defining the scope of rights; it is the right itself, however, that receives protection under the *Charter*. Also, the scope of the guarantee of the *Charter* right must be given a consistent interpretation regardless of the state actor, and it is the task of the courts on judicial review of a decision to ensure this. Since this is a matter of justification of a rights infringement under s. 1, the onus is on the state actor that made the rights-infringing decision to demonstrate that the limits its decisions impose on the rights of the claimants are reasonable and demonstrably justifiable in a free and democratic society. Finally, relying on the language of deference and reasonableness as does the majority in this case may be unhelpful. Where an administrative

decision-maker renders a decision that has an unjustified and disproportionate impact on a *Charter* right, it will always be unreasonable.

In this case, the first step of the *Doré/Loyola* framework is satisfied, because the LSBC's decision not to approve TWU's proposed law school limits the freedom of religion of members of the TWU community. The LSBC's denial of accreditation precludes members of the TWU community from engaging in the practice of providing legal education in an environment that conforms to their religious beliefs, deprives them of the ability to express those beliefs in institutional form, and prevents them from associating in the manner they believe their faith requires. While it may not be necessary to conduct a separate analysis for the guarantees of freedom of expression and freedom of association, the Court must include them in the ambit of the guarantee of freedom of religion.

As for the second step of the *Doré/Loyola* framework, the LSBC has shown its infringement of TWU's freedom of religion to be justified under s. 1. No one suggests that there was not an objective capable of overriding the *Charter* right to freedom of religion. Moreover, the decision was minimally impairing. The LSBC was faced with the choice of either accrediting the law school or denying that accreditation. Therefore, the analysis comes down to the final stage of weighing the benefit achieved by the infringing decision against its negative impacts on the right.

Contrary to the majority's analysis, the negative impacts of the LSBC's denial of accreditation on the religious, expressive and associational rights of the

TWU community are not of minor significance. If the community wishes to operate a law school, it must relinquish the mandatory Covenant it says is core to its religious beliefs, with the attendant ramifications on religious practices. However, the LSBC cannot condone a practice that discriminates by imposing burdens on LGBTQ people on the basis of sexual orientation, with negative consequences for the LGBTQ community, diversity and the enhancement of equality in the profession. It was faced with an either-or decision on which compromise was impossible — either allow the mandatory Covenant in TWU’s proposal to stand, and thereby condone unequal treatment of LGBTQ people, or deny accreditation and limit TWU’s religious practices. Ultimately, the LSBC concluded that the imperative of refusing to condone discrimination and unequal treatment on the basis of sexual orientation outweighed TWU’s claims to freedom of religion. This decision of the LSBC represents a proportionate balancing of freedom of religion, on the one hand, and the avoidance of discrimination, on the other. The decision was therefore reasonable.

Per Rowe J.: There is agreement with the majority that the LSBC acted within its jurisdiction when it considered the discriminatory effect of the Covenant on prospective law students at TWU. With the privilege of self-government granted to the LSBC comes a corresponding duty to self-regulate in the public interest. The LSBC was entitled to interpret its public interest mandate as including consideration of the effect of the Covenant on prospective law students. The fact that the Covenant is a statement of religious rules and principles does not insulate it from such scrutiny.

There is disagreement, however, with the majority's approach to assessing whether the decision of the LSBC infringed the *Charter* rights raised by TWU. This appeal raises issues that call for clarification of the *Doré/Loyola* framework. First, when courts review administrative decisions for compliance with the *Charter*, *Charter* rights must be the focus of the inquiry — not *Charter* values. *Charter* values have no independent function in the administrative context and their scope is often undefined in the jurisprudence. This lack of clarity is an impediment to applying a structured and consistent approach to adjudicating *Charter* claims.

Second, the adjudication of *Charter* claims needs to follow a structured two-step analysis. Under the *Doré/Loyola* framework, the initial burden is on the claimant to demonstrate that the decision infringes his or her *Charter* rights. This first step requires that the reviewing court possess a proper understanding of the scope of the rights at issue. An approach that skims over the proper delineation of rights and freedoms runs the risk of distorting the relationship between s. 1 of the *Charter* and the protections guaranteed by the *Charter*. This approach can lead to situations whereby certain rights are routinely said to be infringed only for the claimant to be told that the infringement is justified by any number of countervailing considerations. This erodes the seriousness of finding *Charter* violations. It increases the role of policy considerations in the adjudication of *Charter* claims by shifting the bulk of the analysis to s. 1. And it distorts the proper relationship between the branches of government by unduly expanding the policy making role of the judiciary. The result is an unstructured, somewhat conclusory exercise that ignores the framing of the

Charter and departs fundamentally from the Court's foundational *Charter* jurisprudence. On judicial review, as in other proceedings, *Charter* claims demand analytical rigour. This starts with the correct delineation of the scope of the rights and freedoms at issue.

Once the claimant has demonstrated that an administrative decision infringes his or her *Charter* rights, the second step of the *Doré/Loyola* framework requires the state actor to demonstrate that the infringement is justified. The *Doré/Loyola* framework does not shift this justificatory burden onto rights claimants. The justificatory burden must remain where the *Charter* places it, on the state actor. For the administrative state, this is no more than what s. 1 requires.

The *Doré/Loyola* framework does not deviate fundamentally from the principles set out in *Oakes* for assessing the reasonableness of a limit on a *Charter* right under s. 1. All the stages of the *Oakes* test have a role to play in the judicial review of administrative decisions for compliance with the *Charter*. Often, however, the main hurdle for the state will be the final stages of the *Oakes* test: minimal impairment and balancing. The fact that most statutes reviewed under *Oakes* have failed at the minimal impairment or balancing stages does not mean that the rational connection stage and consideration of the pressing and substantial objective cease to be relevant. Similarly, in the administrative context, the fact that most decisions will be rationally connected to an identified statutory objective does not mean that the inquiry need not be carried out. It means only that this component of the analysis will

often readily be met.

The main *Charter* right at issue in this appeal is the freedom of religion guaranteed by s. 2(a). The freedom of religion protected by s. 2(a) is premised on two principles: the exercise of free will and the absence of constraint. From this perspective, religious freedom aims to protect individuals from interference with their religious beliefs and practices. While this focus on the individual choice of believers does not detract from the communal aspect of religion, it must be underscored that religious freedom is premised on the personal volition of individual believers. Although religious communities may adopt their own rules and membership requirements, the foundation of the community remains the voluntary choice of individual believers to join together on the basis of their common faith.

The alleged infringement of s. 2(a) in this case — namely, that the decision of the LSBC interferes with the claimants' ability to attend an accredited law school at TWU with its mandatory Covenant — does not fall within the scope of freedom of religion. The religious belief or practice at issue relates to the religious proscription of sexual intimacy outside heterosexual marriage and the importance of imposing this proscription by means of the mandatory Covenant on all students attending the proposed law school at TWU. At the first stage of the s. 2(a) analysis, it does not suffice that the claimants sincerely believe that studying in a community defined by religious beliefs contributes to their spiritual development. Rather, the claimants must show that they sincerely believe that doing so is a practice required by

their religion. The question of whether a belief or practice is objectively required by official religious dogma or is in conformity with the position of religious officials is irrelevant. All that matters is that the claimant sincerely believes that their religion compels them to act, regardless of whether that line of conduct is objectively or subjectively obligatory. Much of the affidavit evidence relied upon by the majority undermines the view that the claimants have advanced a sincere belief or practice that is required by their religion. Despite this concern, it is assumed that the claimants sincerely believe in the importance of studying in an environment where all students abide by this Covenant.

At the second stage of the s. 2(a) analysis, the proper delineation of the scope of s. 2(a) comes into play. Where the protection of s. 2(a) is sought for a belief or practice that constrains the conduct of nonbelievers — those who have freely chosen not to believe — the claim falls outside the scope of the freedom. Therefore, interference with such a belief or practice is not an infringement of s. 2(a) because the coercion of nonbelievers is not protected by the *Charter*.

The student body at TWU is not coextensive with the religious community of evangelical Christians who attend TWU. Although TWU teaches from a Christian perspective, its statutory mandate requires that its admission policy not be restricted to Christian students. The Covenant is a commitment to enforcing a religiously-based code of conduct, not just in respect of one's own behaviour, but also in respect of others, including members of other religions and nonbelievers. Given

that the coercion of nonbelievers is not protected by the *Charter*, TWU's claim falls outside the scope of freedom of religion as protected by s. 2(a).

Given the absence of a *Charter* infringement, the decision of the LSBC must be reviewed under the usual principles of judicial review rather than the *Doré/Loyola* framework. Reviewed under the standard of reasonableness, the decision of the LSBC will command deference if it meets the criteria set out in *Dunsmuir*.

The LSBC is a self-governing entity. Therefore, with respect to process, the LSBC had discretion in determining how to carry out its duty to regulate the legal profession in the public interest. There is agreement with the majority that the LSBC's enabling statute does not preclude the Benchers from holding a referendum or choosing to be bound by the results of such a referendum. Consequently, the procedure employed by the Benchers is not fatal to the reasonableness of their decision.

As to the substance of the decision, reasonableness does not always require the decision-maker to give formal reasons. In some cases, a reviewing court may look to the record to assess the reasonableness of the decision. In this appeal, the range of possible outcomes was informed by the LSBC's mandate to regulate the legal profession in the public interest and by the binary choice available to the Benchers. Given the deference owed to the LSBC, it was open to the LSBC to conclude that it should not accredit the proposed law school given the Covenant's

imposition of discriminatory barriers to admission. It was also open to for the LSBC to conclude that its mandate included promoting equal access to the legal profession, supporting diversity within the bar and preventing harm to LGBTQ law students. It was in this context that the LSBC declined to accredit the proposed law school. This decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law. It was therefore reasonable.

Per Côté and Brown JJ. (dissenting): Under the LSBC's enabling statute, the only proper purpose of a law faculty approval decision is to ensure that individual graduates are fit to become members of the legal profession because they meet minimum standards of competence and ethical conduct. Given the absence of any concerns relating to the fitness of prospective TWU law graduates, the only defensible exercise of the LSBC's statutory discretion would have been to approve TWU's proposed law school.

Under Rule 2-27(4.1) of the *Law Society Rules*, the LSBC's authority to approve law schools acts only as a proxy for determining whether a law school's graduates, as individual applicants to the LSBC, meet the standards of competence and conduct required to become licensed. Rule 2-27(4.1) does not grant the LSBC authority to regulate law schools or to guarantee equal access to law schools. So long as a law school's admissions policies do not raise concerns over its graduates' fitness to practise law, the LSBC is simply not statutorily empowered to scrutinize them. The LSBC is properly concerned with competence, not with merit. This interpretation is

consistent with the purpose of the *Legal Profession Act (LPA)* as a whole and respects the express limits to the LSBC's rule-making powers under s. 11 to the regulation of the legal profession and its constituent parts, extending no further than the licensing process — the doorway to the profession. Although s. 3 states the LSBC's overarching object and duty includes upholding and protecting the public interest in the administration of justice by “preserving and protecting the rights and freedoms of all persons”, it does not empower the LSBC to police human rights standards in law schools. Any harms to marginalized communities in the context of legal education are considered by provincial human rights tribunals, by legislatures, and by members of the executive, which grant such institutions the power to confer degrees.

The LSBC violated its statutory duty by adopting the results of a referendum affecting *Charter* rights without engaging in the process of balancing *Charter* rights and statutory objectives required by the *Doré/Loyola* framework. The results of the referendum were adopted with no further discussion and therefore no substantive debate. The LSBC's decision is therefore completely devoid of any reasoning. And yet, the majority of the Court has replaced the (non-) reasons of the LSBC with its own reasons and made the outcome the sole consideration. Although such a serious error would normally require that the LSBC's decision be quashed and returned for a proper determination, it now falls to this Court to determine the proportionate balance in this case.

The majority's lack of rationale for insisting on a distinct framework for

judicial review of *Charter*-infringing administrative decisions is troubling, particularly in light of the fact that the application of the *Oakes* test is already context-specific. The orthodox test — the *Oakes* test — must apply to justify state infringements of *Charter* rights, regardless of the context in which they occur. Holding otherwise subverts the promise of the Constitution that the rights and freedoms guaranteed by the *Charter* will be subject only to “such reasonable limits prescribed by law as can be demonstrably justified”. Under the *Doré/Loyola* framework, *Charter* rights are guaranteed only so far as they are consistent with the objectives of the enabling statute. Section 1 of the *Charter* does not guarantee certain rights and freedoms subject only to the limits imposed by statutory objectives, but to limits that are “demonstrably justified in a free and democratic society”. Further, the Court has been silent on who bears the burden to justify a rights limitation in the administrative context, leaving a conspicuous and serious lacuna in the framework. The burden must rest with the state actor.

The majority’s continued reliance on values protected by the *Charter* as equivalent to rights is similarly troubling. Resorting to *Charter* values as a counterweight to constitutionalized and judicially defined *Charter* rights is a highly questionable practice. *Charter* values are unsourced, amorphous and, just as importantly, undefined. The majority’s preferred value of equality is, without further definition, too vague a notion on which to ground a claim to equal treatment in any and all concrete situations, such as admission to a law school. A value of equality is, therefore, a questionable notion against which to balance the exercise by the TWU

community of its *Charter*-protected rights.

The LSBC's decision not to approve TWU's proposed law school infringes the religious freedom of members of the TWU community. The freedom of religion under s. 2(a) of the *Charter*, interpreted broadly and purposively, captures the freedom of members of the TWU community to express their religious beliefs through the Covenant — a code of conduct protected by provincial human rights legislation — and to associate with one another in order to study law in an educational community which reflects their religious beliefs. The LSBC's decision is a profound interference with religious freedom, and is contrary to the state's duty of religious neutrality. It is substantively coercive in nature.

The LSBC's statutory objective in rendering an approval decision is to ensure that individual applicants are fit for licensing. Accordingly, the justification under s. 1 of the *Charter* of a restriction on freedom of religion requires evidence of a detrimental impact in the form of the unfitness of future graduates of TWU's proposed law school's to practise law. As the fitness of future graduates of TWU's proposed law school was not in dispute, this statutory objective cannot justify any limitations on the TWU community's s. 2(a) rights.

Even if the LSBC's statutory mandate had permitted the consideration of broader public interest concerns, the LSBC's decision would not be justified, since withholding approval substantially interferes with the TWU community's freedom of religion and approving TWU's proposed law school was not against the public

interest. Accommodating religious diversity is in the public interest, broadly understood, and approving the proposed law school does not condone discrimination against LGBTQ persons. The purpose of TWU's admissions policy is not to exclude LGBTQ persons, or anybody else, but to establish a code of conduct which ensures the vitality of its religious community. No one group is singled out, and many others (notably unmarried heterosexual persons) would be bound by it. The unequal access resulting from the Covenant is a function of accommodating religious freedom, which itself advances the public interest by promoting diversity in a liberal, pluralist society. The state and state actors — not private institutions like TWU — are constitutionally bound to accommodate difference in order to foster pluralism in public life. Equating approval to condonation turns the protective shield of the *Charter* into a sword by effectively imposing *Charter* obligations on private actors.

Accommodating diverse beliefs and values is a precondition to the secularism and the pluralism that is needed to protect and promote the *Charter* rights of all Canadians. State neutrality requires that the state neither favour nor hinder any particular belief, and the same holds true for non-belief. Either way, state neutrality must prevail. Tolerance and accommodation of difference serve the public interest and foster pluralism. Approving TWU's proposed law school was the only decision reflecting a proportionate balancing between *Charter* rights and the LSBC's statutory objectives.

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

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Peter A. Gall, Q.C., Donald R. Munroe, Q.C., Benjamin J. Oliphant and Deborah Armour, for the appellant.

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Eugene Meehan, Q.C., and Marie-France Major, for the intervener the International Coalition of Professors of Law.

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

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

Chris Paliare, Joanna Radbord and Monique Pongracic-Speier, for the intervener the Advocates' Society.

André Schutten and John Sikkema, for the intervener the Association for Reformed Political Action (ARPA) Canada.

Barry W. Bussey and Philip A. S. Milley, for the intervener the Canadian Council of Christian Charities.

William J. Sammon and Amanda M. Estabrooks, for the intervener the Canadian Conference of Catholic Bishops.

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

Kristine Spence, for the intervener the Law Students' Society of Ontario.

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

Karey Brooks and Elin Sigurdson, for the intervener the BC LGBTQ Coalition.

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

Wesley J. McMillan and Kaitlyn Meyer, for the intervener the British Columbia Humanist Association.

Adriel Weaver, for the intervener Egale Canada Human Rights Trust.

Michael Sobkin and E. Blake Bromley, for the intervener the Faith, Fealty & Creed Society.

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.

Tim Dickson and Catherine George, for the intervener the Canadian Secular Alliance.

Robyn Trask and Rajwant Mangat, for the intervener the West Coast Women’s Legal Education and Action Fund.

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] At issue in this appeal is a decision of the Law Society of British Columbia (LSBC) not to recognize 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, successfully brought judicial review proceedings to the Supreme Court of British Columbia, arguing that the LSBC’s decision violated religious rights protected by s. 2(a) of the *Canadian Charter of Rights and Freedoms*.

The Court of Appeal for British Columbia found that the LSBC should have approved the law school.

[3] In our respectful view, the LSBC's decision not to recognize TWU's proposed law school represents a proportionate balance between the limitation on the *Charter* right at issue and the statutory objectives governing the LSBC. The LSBC's decision was therefore reasonable.

II. Background

A. *The Parties*

[4] TWU is a privately funded evangelical Christian university located in Langley, British Columbia. It offers around 40 undergraduate majors and 17 graduate programs spanning an array of academic disciplines and subjects, all taught from a Christian perspective. Its object is "to provide for young people of any race, colour, or creed university education in the arts and sciences with an underlying philosophy and viewpoint that is Christian" (*Trinity Western University Act*, S.B.C. 1969, c. 44, s. 3(2)).

[5] Its approach to Christian education is set out in its mission statement:

The mission of Trinity Western University, as an arm of the Church, is to develop godly Christian leaders: positive, goal-oriented university graduates with thoroughly Christian minds; growing disciples of Christ

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

(A.R., vol. I, at p. 119)

[6] Evangelical Christians believe in the authority of the Bible, the commitment to sharing the Christian message through evangelism, and sexual moral purity which requires sexual abstention outside marriage between a man and a woman. TWU's curriculum is developed and taught in a manner consistent with its religious worldview. The foundational beliefs of evangelical Christianity are also reflected in TWU's Community Covenant Agreement (Covenant). The Covenant requires TWU community members to "voluntarily abstain" from a number of actions, including harassment, lying, cheating, plagiarism, and the use or possession of alcohol on campus. At the heart of this appeal, however, is the Covenant's prohibition on "sexual intimacy that violates the sacredness of marriage between a man and a woman" (A.R., vol. III, at p. 403).

[7] All TWU students and faculty must sign and abide by the Covenant as a condition of attendance or employment. The behavioural expectations set out in the Covenant apply to conduct both on and off campus. A student's failure to comply with the Covenant may result in disciplinary measures including suspension or permanent expulsion. Students are expected to hold each other accountable for complying with the Covenant; disciplinary processes may be initiated as a result of a complaint by a TWU student regarding another student's behaviour.

[8] While a large proportion of the students who enroll at TWU identify as Christian, TWU says that its students may, and in fact do, hold and express diverse opinions on moral, ethical and religious issues and are encouraged to debate different viewpoints inside and outside the classroom.

[9] Brayden Volkenant is a graduate of TWU's undergraduate program, who identifies as an evangelical Christian. He deposed that at the time he was applying to attend law school, TWU's proposed law school would have been his "top choice".

[10] The LSBC is the regulator of the legal profession in British Columbia. The LSBC's structure, object and powers are set out in its governing statute, the *Legal Profession Act*, S.B.C. 1998, c. 9 (*LPA*). The LSBC has the statutory authority to determine who may be admitted to the British Columbia bar (see *LPA*, ss. 19 to 21).

B. *TWU's Proposed Law School*

[11] Over two decades ago, TWU decided that it wished to establish a faculty of law and to add a three-year juris doctor (J.D.) common law degree program to its degree offerings. In June 2012, TWU submitted its proposal to British Columbia's Minister of Advanced Education for the approval required to be able to grant law degrees, pursuant to the Minister's authority under the *Degree Authorization Act*, S.B.C. 2002, c. 24, s. 4(1).

[12] TWU also submitted its proposal to the Federation of Law Societies of Canada, which received delegated authority from each of the provincial law societies in 2010 to ensure that new Canadian common law degree programs meet established national requirements. In December 2013, the Federation granted preliminary approval to TWU's proposed law school program. The following day, the Minister granted approval to TWU's proposed law school, authorizing TWU to grant law degrees to its graduates.

C. *The LSBC's Decision Not to Approve TWU's Proposed Law School*

[13] Under the LSBC's Rules, adopted pursuant to the *LPA*, enrollment in the LSBC's bar admission program requires proof of "academic qualification". Under Rule 2-27 (now Rule 2-54 of the *Law Society Rules 2015*), this requirement is met with a bachelor of laws or equivalent degree issued by an "approved" common law faculty of law in a Canadian university.

[14] A common law faculty of law is "approved" for the purposes of Rule 2-27 if it has been approved by the Federation "unless the Benchers adopt a resolution declaring that it is not or has ceased to be an approved faculty of law".

[15] Therefore, when the Federation granted its preliminary approval to TWU's law school on December 16, 2013, the law school became an "approved" faculty of law under the LSBC's Rule 2-27, unless the Benchers declared that it was not.

[16] At their meeting of February 28, 2014, the LSBC Benchers confirmed that they would vote on whether to adopt the following resolution at a meeting scheduled for April 11, 2014:

Pursuant to Law Society Rule 2-27(4.1), the Benchers declare that, notwithstanding the preliminary approval granted to Trinity Western University on December 16, 2013 by the Federation of Law Societies' Canadian Common Law Program Approval Committee, the proposed School of Law at Trinity Western University is not an approved faculty of law.

(A.R., vol. VII, at p. 1136)

Ahead of the scheduled vote, the Benchers received written submissions and other information from TWU, submissions from the profession and the public, and various legal opinions. At the April 11, 2014 meeting, the resolution failed, and TWU's proposed law school remained approved under Rule 2-27.

[17] This prompted a considerable response from members of British Columbia's legal profession. LSBC members requisitioned a Special General Meeting pursuant to what was then Rule 1-9(2) (now Rule 1-11(2) of the *Law Society Rules 2015*) to consider and vote on a resolution that would direct the Benchers to declare that TWU's law school not be an approved faculty of law under Rule 2-27. The members were provided with, and encouraged to review, the material that had been provided to the Benchers before their April 11, 2014 meeting, and to review the webcast or transcript of that meeting.

[18] The Special General Meeting was held on June 10, 2014. By a vote of 3210 members for and 968 members against, the members voted to adopt the proposed resolution not approving the law school.

[19] At a meeting held on September 26, 2014, the Benchers considered their response, debating among three alternative means of proceeding. The first was to hold a referendum of members on the question of whether the Benchers should be required to implement the resolution. The second was for the Benchers to immediately implement the resolution by declaring that TWU's proposed law school was not approved. The third was for the Benchers to postpone consideration of the issue until the release of a trial decision in any one of the three parallel litigation proceedings relating to recognition of TWU's law school then taking place in British Columbia, Ontario and Nova Scotia.

[20] The Benchers chose the first option, voting to hold a referendum on the issue of TWU's law school approval. The Benchers agreed to be bound by the results only if one-third of members voted in the referendum and two-thirds of the votes were in favour of implementing the June 10, 2014 resolution.

[21] The referendum of all members was conducted by mail-in ballot in October 2014: 5951 members voted to implement the resolution through a declaration that TWU's proposed law school was not an approved faculty of law, while 2088 members voted against the resolution.

[22] On October 31, 2014, the Benchers passed a resolution declaring that TWU's law school was not an approved faculty of law. The resolution was passed with 25 votes in favour, one against, and four abstentions. On December 11, 2014, the Minister withdrew his approval of TWU's proposed law school under the *Degree Authorization Act*.

III. Prior Decisions

A. *Judicial Review — 2015 BCSC 2326, 392 D.L.R. (4th) 722 (Hinkson C.J.)*

[23] TWU and Mr. Volkenant applied to the Supreme Court of British Columbia for judicial review of the LSBC's decision, arguing that it failed to appropriately take into account their freedom of religion under s. 2(a).

[24] The court concluded that while refusing TWU's proposed faculty of law based on its admissions policy was within the LSBC's statutory mandate, by putting the issue to a referendum, the Benchers had improperly fettered their discretion. The court further concluded that the Benchers were obligated to consider and balance TWU's and Mr. Volkenant's s. 2(a) *Charter* rights with the equality rights of current and prospective LSBC members, particularly the LGBTQ community. Since the LSBC had proceeded by referendum, this balancing had not taken place. The court quashed the LSBC's decision and restored the results of the April 11, 2014 vote whereby TWU's proposed law school remained "approved" under Rule 2-27.

B. *Court of Appeal — 2016 BCCA 423, 405 D.L.R. (4th) 16 (Bauman C.J. and Newbury, Groberman, Willcock and Fenlon J.J.A.)*

[25] The Court of Appeal for British Columbia dismissed the appeal. The court was of the view that the Benchers had improperly fettered their discretion by binding themselves to the referendum results. As the Benchers were aware that the *Charter* was implicated by the decision, they were required to balance any potential infringement of *Charter* rights with the relevant statutory objectives.

[26] In any case, the Court of Appeal also concluded that the decision not to approve TWU's law school did not represent a proportionate balance between the LSBC's statutory objectives and the relevant *Charter* protections. Applying *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, the court found that the impact on TWU's religious freedom was severe, while any practical effect on access to the legal profession for LGBTQ persons was insignificant. The Court of Appeal therefore concluded that the LSBC's decision not to approve TWU's law school was unreasonable.

IV. Analysis

A. *Questions on Appeal*

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

[28] In reviewing this decision, we must consider the following issues: whether the LSBC was entitled under its enabling statute to consider TWU's admissions policies and to hold a referendum of its members in deciding whether to approve its proposed law school; whether the LSBC'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 LSBC's Statutory Mandate*

[29] This appeal requires us to address the scope of the LSBC's statutory mandate. At issue in this case is the LSBC's decision not to approve TWU's proposed law school as a route of entry to the legal profession in British Columbia — a decision that falls within the core of the LSBC's role as the gatekeeper to the profession. A question that arises is whether the LSBC was entitled to consider factors apart from the academic qualifications and competence of individual graduates in making this decision to deny approval to TWU's proposed law school.

[30] TWU argues that the LSBC is only entitled to consider a law school's academic program, rather than its admissions policies, in deciding whether to approve

it. It submits that Rule 2-27, the LSBC Rule under which the decision not to approve TWU's law school was made, was passed pursuant to the Benchers' statutory authority to make rules to "establish requirements, including academic requirements, and procedures" for enrolment of articled students and for admission to the bar, set out in ss. 20(1)(a) and 21(1)(b) of the *LPA*. However, ss. 20(1)(a) and 21(1)(b) of the *LPA* both explicitly allow the Benchers to "establish requirements, including academic requirements". TWU's argument also ignores the Benchers' authority, under s. 11(1) of the *LPA*, to "make rules for the governing of the society, lawyers, law firms, articled students and applicants, and for the carrying out of [the *LPA*]". This authority is explicitly "not limited by any specific power or requirement to make rules given to the benchers" elsewhere in the *LPA* (see *LPA*, s. 11(2)).

[31] In our view, the *LPA* requires the Benchers to consider the overarching objective of protecting the public interest in determining the requirements for admission to the profession, including whether to approve a particular law school.

[32] The legal profession in British Columbia, as in other Canadian jurisdictions, has been granted the privilege of self-regulation. In exchange, the profession must exercise this privilege in the public interest (*Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at para. 36, quoting D. A. A. Stager and H. W. Arthurs in *Lawyers in Canada* (1990), at p. 31). The statutory object of the LSBC is, broadly, to uphold and protect the public interest in the

administration of justice. That object is set out in s. 3 of the *LPA*, which reads as follows:

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

[33] The LSBC's overarching statutory object in s. 3 of the *LPA* — to uphold and protect the public interest in the administration of justice — is stated in the broadest possible terms. While the provisions of s. 3 set out means by which this overarching objective is to be achieved, those means are framed expansively and include “regulating the practice of law” and “preserving and protecting the rights and freedoms of all persons”. Section 3 of the *LPA*, read as a whole, manifests the legislature's intention to “leave the governance of the legal profession to lawyers” (see *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, at p. 888).

[34] As the governing body of a self-regulating profession, the LSBC's determination of the manner in which its broad public interest mandate will best be furthered is entitled to deference. The public interest is a broad concept and what it requires will depend on the particular context.

[35] This Court most recently considered the self-regulation of the legal profession in *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360. There, Wagner J. repeatedly noted the deference owed to law societies' interpretation of "public interest": that they have "broad discretion to regulate the legal profession on the basis of a number of policy considerations related to the public interest" (para. 22); that they must be afforded "considerable latitude in making rules based on [their] interpretation of the 'public interest' in the context of [their] enabling statute" (para. 24); and that they have "particular expertise when it comes to deciding on the policies and procedures that govern the practice of their professions" (para. 25).

[36] *Green* affirmed a long history of deference to law societies when they self-regulate in the public interest. For many years, this Court has recognized that law societies self-regulate in the public interest (*Canada (Attorney General) v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 (*Canada (A.G.)*), at pp. 335-36; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at pp. 187-88; *Pearlman*, at p. 887; *Ryan*, at para. 36). As Iacobucci J. explained in *Pearlman*, the regulation of professional practice through a system of licensing is directed toward the protection of vulnerable interests — those of clients and third parties.

[37] To that end, where a legislature has delegated aspects of professional regulation to the professional body itself, that body has primary responsibility for the development of structures, processes, and policies for regulation. This delegation recognizes the body's particular expertise and sensitivity to the conditions of practice. This delegation also maintains the independence of the bar; a hallmark of a free and democratic society (*Canada (A.G.)*, at pp. 335-36). Therefore, where a statute manifests a legislative intent to leave the governance of the legal profession to lawyers, "unless judicial intervention is clearly warranted, this expression of the legislative will ought to be respected" (*Pearlman*, at p. 888). As Iacobucci J. later explained in *Ryan*, we give deference to law society decisions to "giv[e] effect to the legislature's intention to protect the public interest by allowing the legal profession to be self-regulating" (para. 40).

[38] In sum, where legislatures delegate regulation of the legal profession to a law society, the law society's interpretation of the public interest is owed deference. This deference properly reflects legislative intent, acknowledges the law society's institutional expertise, follows from the breadth of the "public interest", and promotes the independence of the bar.

[39] The LSBC in this case interpreted its duty to uphold and protect the public interest in the administration of justice as precluding the approval of TWU's proposed law school because the requirement that students sign the Covenant as a condition of admission effectively imposes inequitable barriers on entry to the school.

The LSBC 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 LSBC determined that the approval of TWU's proposed law school with a mandatory covenant would negatively impact equitable access to and diversity within the legal profession and would harm LGBTQ individuals, and would therefore undermine the public interest in the administration of justice.

[40] In our view, it was reasonable for the LSBC to conclude that promoting equality by ensuring equal access to the legal profession, supporting diversity within the bar, and preventing harm to LGBTQ law students were valid means by which the LSBC could pursue its overarching statutory duty: upholding and maintaining the public interest in the administration of justice, which necessarily includes upholding a positive public *perception* of the legal profession. We arrive at this conclusion for the following reasons.

[41] Limiting access to membership in the legal profession on the basis of personal characteristics, unrelated to merit, is inherently inimical to the integrity of the legal profession. This is especially so in light of the societal trust placed in the legal profession and the explicit statutory direction that the LSBC should be concerned with "preserving and protecting the rights and freedoms of all persons" as a means to upholding the public interest in the administration of justice (*LPA*, s. 3(a)). Indeed, the LSBC, as a public actor, has an overarching interest in protecting the

values of equality and human rights in carrying out its functions. As Abella J. wrote in *Loyola*, at para. 47, “shared values — equality, human rights and democracy — are values the state always has a legitimate interest in promoting and protecting”. Constitutional and *Charter* values have been recognized as an important tool in judicial decision making since *R. v. Oakes*, [1986] 1 S.C.R. 103 (p. 136), affirmed in subsequent jurisprudence (see e.g. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 64-66; *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at para. 25; *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477). Far from controversial, these values are accepted principles of constitutional interpretation. In the administrative context, this Court has recognized that “any exercise of statutory discretion must comply with the *Charter* and its values” (*R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 41. See also G. Régimbald, *Canadian Administrative Law* (2nd ed. 2015), at pp. 94-100). There is no reason why *Charter* values should be seen as less significant in the context of administrative decision-making.

[42] Eliminating inequitable barriers to legal education, and thereby, to membership in the legal profession, also promotes the competence of the bar and improves the quality of legal services available to the public. The LSBC is statutorily mandated to ensure the competence of lawyers as a means of upholding and protecting the public interest in the administration of justice (*LPA*, s. 3(b)). The LSBC is not limited to enforcing minimum standards of competence for the individual lawyers it licenses; it is also entitled to consider how to promote the competence of the bar as a whole.

[43] As well, the LSBC was entitled to interpret the public interest in the administration of justice as being furthered by promoting diversity in the legal profession — or, more accurately, by avoiding the imposition of additional impediments to diversity in the profession in the form of inequitable barriers to entry. A bar that reflects the diversity of the public it serves undeniably promotes the administration of justice and the public’s confidence in the same. A diverse bar is more responsive to the needs of the public it serves. A diverse bar is a more competent bar (see *LPA*, s. 3(b)).

[44] The LSBC’s statutory objective of “protect[ing] the public interest in the administration of justice by . . . preserving and protecting the rights and freedoms of all persons” entitles the LSBC to consider harms to some communities in making a decision it is otherwise entitled to make, including a decision whether to approve a new law school for the purposes of lawyer licensing. In the context of its decision whether to approve TWU’s proposed law school, the *LPA*’s direction that the LSBC should be concerned with the rights and freedoms of all persons in our view permitted the LSBC to consider potential harm to the LGBTQ community as a factor in its decision making.

[45] That the LSBC considered TWU’s admissions policies in deciding whether to approve its proposed law school does not amount to the LSBC regulating law schools or confusing its mandate for that of a human rights tribunal. As explained above, the LSBC considered TWU’s admissions policies in the context of its decision

whether to approve the proposed law school for the purposes of lawyer licensing in British Columbia, in exercising its authority as the gatekeeper to the legal profession in that province. The LSBC did not purport to make any other decision governing TWU's proposed law school or how it should operate.

[46] Respectfully, we disagree with the suggestion that in making a decision about whether to approve a law school for the purposes of lawyer licensing in British Columbia, the LSBC was purporting to exercise a free-standing power to seek out conduct which it finds objectionable. Nor did the LSBC usurp the role of a human rights tribunal in considering the inequitable barriers to entry posed by the Covenant in making its decision: the LSBC did not purport to declare that TWU was in breach of any human rights legislation or issue a remedy for any such breach. Its consideration of equality values is consistent with law societies historically acting “to remove obstacles . . . 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” (*Trinity Western University v. Law Society of Upper Canada*, 2015 ONSC 4250, 126 O.R. (3d) 1, at para. 96). In any case, it should be beyond dispute that administrative bodies other than human rights tribunals may consider fundamental shared values, such as equality, when making decisions within their sphere of authority — and may look to instruments such as the Charter or human rights legislation as sources of these values, even when not directly applying these instruments (see e.g. *Trinity Western University v. British Columbia College of*

Teachers, 2001 SCC 31, [2001] 1 S.C.R. 772 (*TWU 2001*), at paras. 12-14 and 26-28). This is what the LSBC, quite properly, did.

[47] Thus, there can be no question that the LSBC was entitled to consider an inequitable admissions policy in determining whether to approve the proposed law school. Its mandate is broad. In promoting the public interest in the administration of justice and, relatedly, public confidence in the legal profession, the LSBC was entitled to consider an admissions policy that imposes inequitable and harmful barriers to entry. Approving or facilitating inequitable barriers to the profession could undermine public confidence in the LSBC's ability to self-regulate in the public interest.

C. *The Referendum Procedure Adopted by the LSBC*

[48] TWU argues that the LSBC's decision not to approve TWU's proposed law school should be set aside because the LSBC Benchers improperly fettered their discretion by holding a referendum of members on the issue. We reject this argument.

[49] The Benchers concluded that they were authorized under the *LPA* to proceed as they did. Section 13 of the *LPA* provides that the *LSBC members* can elect to bind the Benchers to implement the results of a referendum of members in certain circumstances. This provision indicates the legislature's intent that the LSBC's decisions be guided by the views of its full membership, at least in some circumstances. However, s. 13 does not limit the circumstances in which *the*

Benchers can elect to be bound to implement the results of a referendum of members. The Benchers were therefore not precluded from holding a referendum merely because all of the circumstances described in s. 13 were not present.

[50] The Court of Appeal held that the Benchers violated their statutory duties by holding a referendum on the approval of TWU's proposed law school because the issue implicated the *Charter*. That a decision may implicate the *Charter* does not, by itself, render the referendum procedure otherwise available under the *LPA* inappropriate. The legal profession in British Columbia is self-governing; the majority of Benchers are elected by the LSBC membership and make decisions on behalf of the LSBC as a whole. It is consistent with this statutory scheme that the Benchers may decide that certain decisions they take would benefit from the guidance or support of the membership as a whole. This is no less the case where a decision implicates the *Charter* and raises questions as to the best means to pursue the LSBC's statutory objectives. The LSBC Benchers were entitled to proceed as they did in this case.

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

[51] As previously noted, the LSBC gave no formal reasons. The British Columbia Court of Appeal held that where *Charter* protections are implicated in an administrative decision, the decision-maker is required to balance the potential *Charter* limitation against the statutory objectives (para. 80). The court found that, in voting to affirm the results of the binding referendum, the Benchers failed to follow

the “procedure to be adopted by a tribunal in balancing statutory objectives against *Charter* values”, and did not “engage in any exploration of how the *Charter* values at issue in this case could best be protected in view of the objectives of the *Legal Profession Act*” (paras. 84-85).

[52] We disagree. It is true that reasonableness review is concerned *both* with “the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome” (*Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 S.C.R. 80, at para. 18). To be reasonable, a decision must “fal[l] within a range of possible, acceptable outcomes” (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47) *and* exhibit “justification, transparency and intelligibility within the decision-making process” (*Dunsmuir*, at para. 47).

[53] However, not all administrative decision making requires the same procedure. Reasonableness “takes its colour from the context” (*Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 18) and the requirements of process will “vary with the context and nature of the decision-making process at issue” (*Catalyst*, at para. 29). In *Catalyst*, which involved the review of a by-law passed by a municipality, the Court held that there was no duty to give formal reasons in a context where the decision was made by elected representatives pursuant to a democratic process.

[54] The decision in this case was made in similar circumstances. The vast majority of LSBC Benchers serve as elected representatives and they reached their

decision to refuse to approve TWU's proposed law school by a majority vote. As this Court noted in *Green*, at para. 23:

. . . many of the benchers of the Law Society are elected by and accountable to members of the legal profession. . . . Thus, McLachlin C.J.'s comments in *Catalyst Paper* in the context of municipal bylaws are apt here as well: . . . "reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable" (para. 19).

[55] Given this context, the LSBC was not required to give reasons formally explaining why the decision to refuse to approve TWU's proposed law school amounted to a proportionate balancing of freedom of religion with the statutory objectives of the *LPA*. It is clear from the speeches that the LSBC Benchers made during the April 11, 2014 and September 26, 2014 meetings that they were alive to the question of the balance to be struck between freedom of religion and their statutory duties.

[56] As the Benchers were alive to the issues, we must then assess the reasonableness of their decision. Reasonableness review requires "a respectful attention to the reasons offered or which could be offered in support of a decision" (*Dunsmuir*, 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). As we will explain, the Benchers came to a decision that reflects a proportionate balancing.

E. *Review of the LSBC's Decision Under the Doré/Loyola Framework*

[57] Having concluded that the LSBC had authority to consider factors outside of the competence of individual law graduates of TWU's proposed law school, the question now becomes whether the LSBC's decision to deny approval to TWU's proposed law school was reasonable. Discretionary administrative decisions that engage the *Charter* are reviewed based on the administrative law framework set out by this Court in *Doré* and *Loyola*. Delegated authority must be exercised "in light of constitutional guarantees and the values they reflect" (*Doré*, at para. 35). In *Loyola*, this Court explained that under the *Doré* framework, *Charter* values are "those values that underpin each right and give it meaning" and which "help determine the extent of any given infringement in the particular administrative context and, correlatively, when limitations on that right are proportionate in light of the applicable statutory objectives" (para. 36, citing *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 88). 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.

[58] 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 so, 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). The extent of the impact on the *Charter* protection must be proportionate in light of the statutory objectives.

[59] *Doré* and *Loyola* are binding precedents of this Court. Our reasons explain why and how the *Doré/Loyola* framework applies here. Since *Charter* protections are implicated, the reviewing court must be satisfied that the decision reflects a proportionate balance between the *Charter* protections at play and the relevant statutory mandate. This is the analysis we adopt.

(1) Whether Freedom of Religion Is Engaged

[60] In this case, the first issue is whether, in applying its statutory public interest mandate — including the goals of equal access to and diversity within the legal profession — to the approval of TWU’s proposed law school, the LSBC engaged the religious freedom of the TWU community.

[61] TWU is a private religious institution created to support the collective religious practices of its members. For the reasons set out below, we find that the religious freedom of members of the TWU community is limited by the LSBC’s

decision. It is unnecessary to determine whether TWU, as an institution, possesses rights under s. 2(a) of the *Charter*.

[62] This Court has adopted a broad and purposive approach to interpreting freedom of religion under the *Charter*. This encompasses “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” (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 336).

[63] Section 2(a) of the *Charter* is limited when the claimant demonstrates two things: first, that he or she sincerely believes in a practice or belief 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.

[64] Although this Court’s interpretation of freedom of religion reflects the notion of personal choice and individual autonomy and freedom, religion is about both religious beliefs and religious relationships (*Amselem*, at para. 40; *Loyola*, at para. 59, quoting Justice LeBel in *Hutterian Brethren*, at para. 182). The protection of individual religious rights under s. 2(a) must therefore account for the socially

embedded nature of religious belief, as well as the “deep linkages between this belief and its manifestation through communal institutions and traditions” (*Loyola*, at para. 60). In other words, religious freedom is individual, but also “profoundly communitarian” (*Hutterian Brethren*, at para. 89). The ability of religious adherents to come together and create cohesive communities of belief and practice is an important aspect of religious freedom under s. 2(a).

[65] On the sincerity of the belief, the respondents have articulated the religious interest at stake in various ways. In their factum, they contend that “[t]he sincere beliefs of evangelical Christians include ‘the belief in the importance of being in an institution with others who either share that belief or are prepared to honour it in their conduct’” (para. 96, quoting *Trinity Western University v. Nova Scotia Barristers’ Society*, 2015 NSSC 25, 381 D.L.R. (4th) 296, at para. 235). Elsewhere they argue that evangelicals believe “they should carry their beliefs into educational communities” and in the value of educating the whole person with a Christian ethos (para. 113).

[66] The affidavit evidence from TWU students focusses primarily on the spiritual growth that is engendered by studying law in a religious learning environment.

[67] There is no doubt evangelical Christians believe that studying in a religious environment can help them grow spiritually. Evangelical Christians carry

their religious beliefs and values beyond their private lives and into their work, education, and politics.

[68] TWU seeks to foster this spiritual growth. It was founded on religious principles and was intended to be a religious community, primarily serving Christians. Indeed, the university teaches from a Christian perspective and aims to develop “godly Christian leaders” (R.R., vol. I, at p. 119). TWU’s purpose statement further provides that TWU seeks to promote “total student development through . . . deepened commitment to Jesus Christ and a Christian way of life” (p. 120).

[69] Several alumni of TWU emphasized the spiritual benefits of receiving an education from a Christian perspective in an environment infused with evangelical Christian values. According to Mr. Volkenant, completing his undergraduate studies at TWU gave him “an appreciation for the importance of integrating [his] Christian faith into all areas of [his] life” (R.R., vol. I, at p. 68). For another alumna, Ms. Jody Winter, attending TWU was about more than obtaining a university education; it was a time of spiritual formation.

[70] Because s. 2(a) protects beliefs which are sincerely held by the claimant, the court must “ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice” (*Amselem*, at para. 52; see also *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 35). It is clear from the record that evangelical members of TWU’s community sincerely believe that studying in a community defined by

religious beliefs in which members follow particular religious rules of conduct contributes to their spiritual development. In our view, this is the religious belief or practice implicated by the LSBC's decision.

[71] This belief is, in turn, supported through the universal adoption of the Covenant. The Covenant “reflects both historic patterns of evangelical practice and widely accepted contemporary evangelical theological convictions” (R.R., vol. IV, at p. 89). A core value at TWU is “obeying the authority of Scripture” (R.R., vol. I, at 121), and the Covenant promotes this compliance. Specifically, it requires TWU community members to “encourage and support other members of the community in their pursuit of these values and ideals” (A.R., vol. III, at p. 402). Thus, the mandatory Covenant helps create an environment in which TWU students can grow spiritually. According to the Covenant:

The University is an interrelated academic community rooted in the evangelical Protestant tradition; it is made up of Christian administrators, faculty and staff who, along with students choosing to study at TWU, covenant together to form a community that strives to live according to biblical precepts, believing that this will optimize the University's capacity to fulfil its mission and achieve its aspirations. [Emphasis added.]

(A.R., vol. III, at p. 401)

[72] Members of the TWU community have noted that the mandatory Covenant “makes it easier” for them to adhere to their faith, and it creates an environment where their moral discipline is not constantly tested. The relationship

between the Covenant and the religious environment at TWU is succinctly set out by

Ms. Winter:

I am grateful that students at TWU were asked to refrain from behaviour that was against my religious beliefs. It was easier for me to remain committed to my religious values living in a community like TWU's, where guidelines were put in place in respect to student behaviour.

(R.R., vol. I, at pp. 59-60)

[73] To summarize, it is clear from this evidence that evangelical Christians believe that studying in an environment defined by religious beliefs in which members follow particular religious rules of conduct enhances the spiritual growth of members of that community. And the Covenant supports the practice of studying in an environment infused with evangelical beliefs.

[74] The next question is whether the LSBC's decision not to approve TWU's law school limits the ability of TWU's community members to act in accordance with these beliefs and practices in a manner that is more than trivial or insubstantial (*Amselem*, at para. 74; *Ktunaxa*, at para. 68). Was this decision "capable of interfering with religious belief or practice" (*R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 759; *Hutterian Brethren*, at para. 34)? This is an objective analysis that looks at the impact on the claimants, rather than the impact of the implicated practices or beliefs *on others* (*S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235, at paras. 23-24; *Ktunaxa*, at para. 70).

[75] By interpreting the public interest in a way that precludes the approval of TWU's law school governed by the mandatory Covenant, the LSBC has interfered with TWU's ability to maintain an approved law school as a religious community defined by its own religious practices. The effect is a limitation on the right of TWU's community members to enhance their spiritual development through studying law in an environment defined by their religious beliefs in which members follow certain religious rules of conduct. Accordingly, their religious rights were engaged by the decision.

(2) Overlapping Charter Protections

[76] Three other *Charter* protections are potentially implicated in this case, namely free expression (s. 2(b)); free association (s. 2(d)); and equality (s. 15).

[77] The factual matrix underpinning a *Charter* claim in respect of any of these protections is largely indistinguishable. Further, the parties themselves have almost exclusively framed the dispute as centring on religious freedom. In our view, the religious freedom claim is sufficient to account for the expressive, associational, and equality rights of TWU's community members in the analysis.

[78] Put differently, whether the *Charter* protections of prospective students of TWU's proposed law school are articulated in terms of their freedom to engage in the religious practice of studying law in a learning environment that is infused with the community's religious beliefs, their freedom to express and associate in a community

infused with those beliefs, or their protection from discrimination based on the enumerated ground of religion, such limitations were, as we explain next, proportionately balanced against the LSBC's critical public interest mandate.

(3) Proportionate Balancing

[79] In *Doré* and *Loyola*, this Court held that where an administrative decision engages a *Charter* protection, the reviewing court should apply “a *robust* proportionality analysis consistent with administrative law principles” instead of “a literal s. 1 approach” (*Loyola*, at para. 3). Under the *Doré* framework, the administrative decision 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). *Doré*'s approach recognizes that an administrative decision-maker, exercising a discretionary power under his or her home statute, typically brings expertise to the balancing of a *Charter* protection with the statutory objectives at stake (*Loyola*, at para. 42; *Doré*, at para. 54). Consequently, the decision-maker is generally in the best position to weigh the *Charter* protections with his or her statutory mandate in light of the specific facts of the case (*Doré*, at para. 54). It follows that deference is warranted when a reviewing court is determining whether the decision reflects a proportionate balance. *Doré* recognizes that there may be more than one outcome that strikes a proportionate balance between *Charter* protections and statutory objectives (*Loyola*, at para. 41). As long as the decision “falls within a range of possible, acceptable outcomes”, it will be reasonable (*Doré*, at para. 56). As

this Court noted in *Doré*, “there is . . . conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a ‘margin of appreciation’, or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives” (para. 57).

[80] The framework set out in *Doré* and affirmed in *Loyola* is not a weak or watered-down version of proportionality — rather, it is a robust one. As this Court explained in *Loyola*, at para. 38:

The *Charter* enumerates a series of guarantees that can only be limited if the government can justify those limitations as proportionate. As a result, in order to ensure that decisions accord with the fundamental values of the *Charter* in contexts where *Charter* rights are engaged, reasonableness requires proportionality: *Doré*, at para. 57. As Aharon Barak noted, “Reasonableness in [a strong] sense strikes a proper balance among the relevant considerations, and it does not differ substantively from proportionality”. [Emphasis added; text in brackets in original.]

For a decision to be proportionate, it is not enough for the decision-maker to simply balance the statutory objectives with the *Charter* protection in making its decision. Rather, the reviewing court must be satisfied that the decision *proportionately* balances these factors, that is, that it “gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate” (*Loyola*, at para. 39). Put another way, the *Charter* protection must be “affected as little as reasonably possible” in light of the applicable statutory 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.

[81] 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. This does not mean that the administrative decision-maker must choose the option that limits the *Charter* protection *least*. The question for the reviewing court is always 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). However, 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 statutory objectives, the decision would not fall within a range of reasonable outcomes. This is a highly contextual inquiry.

[82] 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 (*Loyola*, at para. 68; *Doré*, at para. 56). The *Doré* framework therefore finds “analytical harmony with the final stages of the *Oakes* framework used to assess the reasonableness of a limit on a *Charter* right under s. 1: minimal impairment and balancing” (*Loyola*, at para. 40). In working “the same justificatory muscles” as the *Oakes* test (*Doré*, at para. 5), the *Doré* analysis ensures that the pursuit of objectives is proportionate. In the context of a challenge to an

administrative decision where the constitutionality of the statutory mandate itself is not at issue, the proper inquiry is whether the decision-maker has furthered his or her statutory mandate in a manner that is proportionate to the resulting limitation on the *Charter* right.

[83] We now turn to whether the limitation on the religious freedom of the members of the TWU community is a proportionate one in light of the LSBC's statutory mandate.

[84] The LSBC was faced with only two options — to approve or reject TWU's proposed law school. Given the LSBC's interpretation of its statutory mandate, approving TWU's proposed law 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.

[85] The LSBC's decision also reasonably balanced the severity of the interference with the *Charter* protection against the benefits to its statutory objectives. To begin, the LSBC's decision did not limit religious freedom to a significant extent. The LSBC did not deny approval to TWU's proposed law school in the abstract; rather, it denied a specific proposal that included the mandatory Covenant. Indeed, when the LSBC asked TWU whether it would "consider" amendments to its Covenant, TWU expressed no willingness to compromise on the mandatory nature of the Covenant. The decision therefore only prevents TWU's community members

from attending an approved law school at TWU that is governed by a *mandatory* covenant.

[86] The Court of Appeal described the limitation in this case as “severe” because it precludes graduates of TWU’s proposed law school from practising law in British Columbia (para. 168). However, the LSBC’s decision does not prevent any graduates from being able to practise law in British Columbia. Furthermore, it does not prohibit any evangelical Christians from adhering to the Covenant or associating with those who do. The interference is limited to preventing prospective students from studying law at TWU with a mandatory covenant.

[87] First, the limitation in this case is of minor significance because a mandatory covenant is, on the record before us, not absolutely required for the religious practice at issue: namely, to study law in a Christian learning environment in which people follow certain religious rules of conduct. The decision to refuse to approve TWU’s proposed law school with a mandatory covenant only prevents prospective students from studying law in their *optimal* religious learning environment where everyone has to abide by the Covenant.

[88] Second, the interference in this case is limited because the record makes clear that prospective TWU law students view studying law in a learning environment infused with the community’s religious beliefs as preferred (rather than necessary) for their spiritual growth. As McLachlin C.J. explained in *Hutterian Brethren*, at para. 89:

There is no magic barometer to measure the seriousness of a particular limit on a religious practice. Religion is a matter of faith, intermingled with culture. It is individual, yet profoundly communitarian. Some aspects of a religion, like prayers and the basic sacraments, may be so sacred that any significant limit verges on forced apostasy. Other practices may be optional or a matter of personal choice. Between these two extremes lies a vast array of beliefs and practices, more important to some adherents than to others. [Emphasis added.]

[89] Attending TWU's proposed law school is said to make it "easier" to practise evangelical beliefs. That attending law at TWU, with a mandatory covenant, is a preference is clear from TWU's own affiants who, like Mr. Volkenant, expressed a desire to attend TWU's proposed law school:

I do not know if I would have chosen to attend TWU law school, but I certainly would have appreciated the option. [Emphasis added.]

(R.R., vol. I, at p. 154)

I am familiar with TWU's proposal for its School of Law. Had this option existed when I was considering law schools, I likely would have applied to it. [Emphasis added.]

(R.R., vol. I, at p. 7)

. . . I am familiar with the proposal put forward by TWU in respect to its School of Law and believe I would have considered attending had this option been available to me. [Emphasis added.]

(R.R., vol. I, at p. 143)

[90] Our point is that, on the record before us, prospective TWU law students effectively admit that they have much less at stake than claimants in many other cases that have come before this Court (see e.g. *Multani*, at para. 3; *Amselem*, at para. 6; and *Hutterian Brethren*, at para. 7; and *Reference re Same-Sex Marriage*, 2004 SCC

79, [2004] 3 S.C.R. 698, at para. 58). Put otherwise, denying someone an option they would merely appreciate certainly falls short of “forced apostasy” (*Hutterian Brethren*, at para. 89).

[91] On the other side of the scale is the extent to which the LSBC’s decision furthered its statutory objectives. As the regulator of the legal profession in British Columbia, its decision must represent a reasonable balance between the benefits to its statutory objectives and the severity of the limitation on *Charter* rights at stake.

[92] It is clear that the decision not to approve TWU’s proposed law school significantly advanced the LSBC’s statutory objectives — to promote and protect the public interest in the administration of justice by preserving and protecting the rights and freedoms of all persons and ensuring the competence of the legal profession (see *LPA*, ss. 3(a) and 3(b)).

[93] First, the decision advances the LSBC’s relevant statutory objectives by maintaining equal access to and diversity in the legal profession. While TWU submits that it “is open to all academically qualified people wishing to live and learn in its religious community” (R.F., at para. 10), the reality is that most LGBTQ people will be deterred from applying to its proposed law school because of the Covenant’s prohibition on sexual activity outside marriage between a man and a woman. As this Court acknowledged in *TWU 2001*, “[a]lthough the Community Standards are expressed in terms of a code of conduct rather than an article of faith, we conclude that a homosexual student would not be tempted to apply for admission, and could

only sign the so-called student contract at a considerable personal cost” (para. 25). It follows that the 60 law school seats created by TWU’s proposed law school will be effectively closed to the vast majority of LGBTQ students. This barrier to admission may discourage qualified candidates from gaining entry to the legal profession.

[94] TWU submits that even if LGBTQ people are deterred from attending TWU’s law school, there are many other options open to LGBTQ people who wish to attend law school (R.F., at para. 175). Even further, TWU asserts that its law school will result in an overall increase in law school seats, which expands choices for all students (para. 138). The British Columbia Court of Appeal accepted this argument, finding that the negative impact on access to law school by LGBTQ students would be “insignificant in real terms” (para. 179).

[95] Such arguments fail to recognize that even if the net result of TWU’s proposed law school is that more options and opportunities are available to LGBTQ people applying to law school in Canada — which is certainly not a guarantee — this does not change the fact that an entire law school would be closed off to the vast majority of LGBTQ individuals on the basis of their sexual identity. Those who are able to sign the Covenant will be able to apply to 60 *more* law school seats per year, whereas those 60 seats remain effectively *closed* to most LGBTQ people. In short, LGBTQ individuals would have fewer opportunities relative to others. This undermines true equality of access to legal education, and by extension, the legal profession. Substantive equality demands more than just the availability of options

and opportunities — it prevents “the violation of essential human dignity and freedom” and “eliminate[s] any possibility of a person being treated in substance as ‘less worthy’ than others” (*Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, at para. 138). The public confidence in the administration of justice may be undermined if the LSBC is seen to approve a law school that effectively bars many LGBTQ people from attending.

[96] Second, the decision furthers the statutory objective — protecting the public interest in the administration of justice by preserving rights and freedoms — by preventing the risk of significant harm to LGBTQ people who attend TWU’s proposed law school. The British Columbia Court of Appeal accepted that if LGBTQ students signed the Covenant to gain access to TWU “they would have to either ‘live a lie to obtain a degree’ and sacrifice important and deeply personal aspects of their lives, or face the prospect of disciplinary action including expulsion” (para. 172). TWU’s Covenant prevents students who are not married to members of the opposite sex from engaging in sexual activity in the privacy of their own bedrooms. It requires non-evangelical LGBTQ students, whom TWU welcomes to its school, to comply with conduct requirements even when they are off-campus, in the privacy of their own homes. Attending TWU’s law school would mean that LGBTQ students would have to deny a crucial component of their identity in the most private and personal of spaces for three years in order to receive a legal education (I.F., *Egale Canada Human Rights Trust* (file No. 37318), at para. 14; *Start Proud and OUTlaws* (file No. 37209), at para. 6).

[97] Despite this, TWU asserts that LGBTQ students will suffer no harm to their dignity or personal identity while enrolled at TWU because the Covenant requires all members of TWU's community to "treat all persons with dignity, respect and equality, regardless of personal differences" (R.F., at para. 92). However, as this Court recognized in *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, it is not possible "to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood" (para. 123, quoting L'Heureux-Dubé J. in *TWU 2001* in dissent (though not on this point), at para. 69).

[98] LGBTQ students enrolled at TWU's law school may suffer harm to their dignity and self-worth, confidence and self-esteem, and may experience stigmatization and isolation (see evidence of Dr. Ellen Faulkner in A.R., vol. V, at pp. 828-29 and 834; Dr. Catherine Taylor in A.R., vol. V, at p. 904; Dr. Mary Bryson in A.R., vol. V, at pp. 967-68). The public confidence in the administration of justice may be undermined by the LSBC's decision to approve a law school that forces some to deny a crucial component of their identity for three years in order to receive a legal education.

[99] The TWU community has the right to determine the rules of conduct which govern its members. Freedom of religion protects the rights of religious adherents to hold and express beliefs through both individual and communal

practices. Where a religious practice impacts others, however, this can be taken into account at the balancing stage. The Covenant is a commitment to *enforcing* a religiously based code of conduct, not just in respect of one's own behaviour, but also in respect of other members of the TWU community (D. Pothier, "An Argument Against Accreditation of Trinity Western University's Proposed Law School" (2014), 23:1 *Const. Forum Const.* 1, at p. 2). The effect of the mandatory Covenant is to restrict the conduct of others.

[100] The limitation on religious freedom in this case must be understood in light of the reality that conflict between the pursuit of statutory objectives and individual freedoms may be inevitable. As this Court has held, state interferences with religious freedom "must be considered in the context of a multicultural, multi-religious society where the duty of state authorities to legislate for the general good inevitably produces conflicts with individual beliefs" (*Hutterian Brethren*, at para. 90; see also *Loyola*, at para. 47). Accordingly, minor 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.

[101] In saying this, we do not dispute that "[d]isagreement and discomfort with the views of others is unavoidable in a free and democratic society" (C.A. reasons, at para. 188), and that a secular state cannot interfere with religious freedom unless it conflicts with or harms overriding public interests (para. 131, citing *Loyola*, at para. 43). But more is at stake here than simply "disagreement and discomfort"

with views that some will find offensive. This Court has held that religious freedom can be limited where an individual's religious beliefs or practices have the effect of "injur[ing] his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own" (*Big M*, at p. 346). Likewise, in *Multani*, the Court held that state interference with religious freedom can be justified "when a person's freedom to act in accordance with his or her beliefs may cause harm to or interfere with the rights of others" (para. 26). Being required by someone else's religious beliefs to behave contrary to one's sexual identity is degrading and disrespectful. Being required to do so offends the public perception that freedom of religion includes freedom from religion.

[102] In the end, it cannot be said that the denial of approval is a serious limitation on the religious rights of members of the TWU community. The LSBC's decision does not suppress TWU's religious difference. Except for the limitation we have identified, no evangelical Christian is denied the right to practise his or her religion as and where they choose.

[103] The refusal to approve the proposed law school means that members of the TWU religious community are not free to impose those religious beliefs on fellow law students, since they have an inequitable impact and can cause significant harm. The LSBC chose an interpretation of the public interest in the administration of justice which mandates access to law schools based on merit and diversity, not exclusionary religious practices. The refusal to approve TWU's proposed law school

prevents *concrete*, not abstract, harms to LGBTQ people and to the public in general. The LSBC's decision ensures that equal access to the legal profession is not undermined and prevents the risk of significant harm to LGBTQ people who feel they have no choice but to attend TWU's proposed law school. It also maintains public confidence in the legal profession, which could be undermined by the LSBC's decision to approve a law school that forces LGBTQ people to deny who they are for three years to receive a legal education.

[104] Given the significant benefits to the relevant statutory objectives and the minor significance of the limitation on the *Charter* rights at issue on the facts of this case, and given the absence of any reasonable alternative that would reduce the impact on *Charter* protections while sufficiently furthering those same objectives, the decision to refuse to approve TWU's proposed law school represents a proportionate balance. In other circumstances, a more serious limitation may be entitled to greater weight in the balance and change the outcome. But that is not this case.

[105] In our view, the decision made by the LSBC "gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate" (*Loyola*, at para. 39). Therefore, the decision amounted to a proportionate balancing and was reasonable.

V. Disposition

[106] The resolution of the LSBC to declare that TWU’s proposed law school not be approved is restored. As a result, the appeal from the Court of Appeal for British Columbia is allowed, with costs.

The following are the reasons delivered by

THE CHIEF JUSTICE —

[107] Can a law society 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 (“Covenant”) prohibiting sexual intimacy except between married heterosexual couples? That is the issue in this appeal.

[108] I agree with the majority, Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ., that the decision of the Law Society of British Columbia (“LSBC”) to deny accreditation to Trinity Western University’s (“TWU”) proposed law school represents a proportionate balancing of freedom of religion, on the one hand, and the avoidance of discrimination, on the other. I would therefore allow the appeal. I differ from the majority, however, on certain aspects of the analysis.

1. *Standard of Review*

[109] The LSBC was exercising power delegated by the Province under the *Legal Profession Act*, S.B.C. 1998, c. 9. As such, it is a state actor, and its decisions, if challenged, are subject to judicial review.

[110] I agree with the majority that the jurisdiction and decision-making process of the LSBC are reviewable on a standard of reasonableness. Where legislatures delegate regulation of the legal profession to a law society, the law society's interpretation of the public interest is owed deference. This reflects the legislature's intent that the LSBC decide, on its behalf, who should be admitted to the practice of law. The LSBC has made graduation from an accredited law school one of the conditions of admission to the practice of law. That choice was within its delegated power.

2. *Judicial Review of Charter-Infringing Administrative Decisions*

[111] I agree with the majority that discretionary administrative decisions that engage the *Canadian Charter of Rights and Freedoms* are reviewed 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. However, the framework's contours continue to elicit comment from scholars and

judges.¹ In what follows, I suggest how to address some of the gaps and omissions in the framework set out in those decisions.

[112] This framework has two discrete steps, in my view. The reviewing court must: (1) determine if the decision limits a *Charter* right; and (2) determine whether the limitation of the right is proportionate in light of the state's objective, and hence is justified as a reasonable measure in a free and democratic society under s. 1 of the *Charter*.

[113] Judicial review of the justifiability of a rights-infringing administrative decision will often put the emphasis on the later stages of the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103. In *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, LeBel J. stated that not all its steps must be followed when reviewing an individualized decision. Rather, “[t]he issue becomes one of proportionality or, more specifically, minimal limitation of the guaranteed right, having regard to the context in which the right has been infringed” (para. 155). In the same vein, the majority of this Court wrote in *Loyola*: “A *Doré* proportionality analysis finds analytical harmony with the final stages of the *Oakes*

¹ *E.T. v. Hamilton-Wentworth District School Board*, 2017 ONCA 893, at paras. 108-25 (CanLII); E. Fox-Decent and A. Pless, “The Charter and Administrative Law: Cross-Fertilization or Inconstancy?”, in C. M. Flood and L. Sossin, eds., *Administrative Law in Context* (2nd ed. 2013), 407; .H. L. Kong, “*Doré*, Proportionality and the Virtues of Judicial Craft” (2013), 63 *S.C.L.R.* (2d) 501; P. Daly, “Prescribing Greater Protection for Rights: Administrative Law and Section 1 of the *Canadian Charter and Rights of Freedoms*” (2014), 65 *S.C.L.R.* (2d) 249; C. D. Bredt and E. Krajewska, “*Doré*: All That Glitters Is Not Gold” (2014), 67 *S.C.L.R.* (2d) 339; A. Macklin, “Charter Right or Charter-Lite? Administrative Discretion and the Charter” (2014), 67 *S.C.L.R.* (2d) 561; T. Hickman, “Adjudicating Constitutional Rights in Administrative Law” (2016), 66 *U.T.L.J.* 121; M. Liston, “Administering the *Charter*, Proportioning Justice: Thirty-five Years of Development in a Nutshell” (2017), 30 *Can. J. L. Admin. & Prac.* 211, at pp. 242-46.

framework used to assess the reasonableness of a limit on a *Charter* right under s. 1: minimal impairment and balancing” (para. 40). In short, if *Oakes* continues to inspire the framework, *Doré* and *Loyola* tell us that there may be a greater emphasis on later steps of the analysis in the administrative context.

[114] I agree with the majority that on judicial review of a rights-infringing administrative decision, the analysis usually comes down to proportionality, and particularly the final stage of weighing the benefit achieved by the infringing decision against its negative impact on the right (para. 58). Proportionality requires that the state objective capable of overriding a right be rationally connected to the decision; in the administrative context, where the decision falls within the scope of an unchallenged law, usually this is the case. Minimal impairment — whether the administrative decision infringes a *Charter* right more than necessary or is broader than reasonably required — arises, but the question is not whether “the law” catches more conduct than it should, as under *Oakes*, but whether an alternative less-infringing decision was possible. Particularly where the decision is a choice between only two options (for example, to accredit or not), this step will also easily be met. This leaves the final stage of the proportionality inquiry — assessing the actual impact of the decision. It follows that in reviewing administrative decisions, the analysis almost invariably comes down to looking at the effects of the decision and asking whether the negative impact on the right imposed by the decision is proportionate to its objective.

[115] However, I would add four comments. First, to adequately protect the right, the initial focus must be on whether the claimant's constitutional right has been infringed. *Charter* values may play a role in defining the scope of rights; it is the right itself, however, that receives protection under the *Charter*.

[116] Second, the scope of the guarantee of the *Charter* right must be given a consistent interpretation regardless of the state actor, and it is the task of the courts on judicial review of a decision to ensure this. A decision based on an erroneous interpretation of a *Charter* right will be unreasonable. Canadians should not have to fear that their rights will be given different levels of protection depending on how the state has chosen to delegate and wield its power.

[117] Third, since this is a matter of justification of a rights infringement under s. 1 of the *Charter*, the onus is on the state actor that made the rights-infringing decision (in this case the LSBC) to demonstrate that the limits their decisions impose on the rights of the claimants are reasonable and demonstrably justifiable in a free and democratic society.

[118] Finally, I would note that relying on the language of "deference" and "reasonableness" in this context may be unhelpful. Quite simply, where an administrative decision-maker renders a decision that has an unjustified and disproportionate impact on a *Charter* right, it will always be unreasonable.

[119] To summarize, in judicial review of administrative decisions for compliance with the *Charter*, the focus is on proportionality. The first question is whether the decision infringes a *Charter* right. If so, the state actor that made the infringing decision bears the onus of showing that the infringement is justified under s. 1 of the *Charter*. In most cases, the ultimate question will be whether the decision under review in the particular case balances the negative effects on the right against the benefits derived from the decision in a proportionate way.

3. *Does the Decision of the LSBC Limit Charter Rights?*

[120] I agree with the majority that the LSBC's decision not to approve TWU's proposed law school limits the freedom of religion of members of the Trinity Western community (paras. 60-75). TWU bore the onus of satisfying the two-part test of a sincere religious belief or practice that has a nexus with religion and that is more than trivially or insubstantially interfered with by the impugned state conduct (*Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 65; *Multani*, at para. 34; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 384, at para. 68). This test is met.

[121] The question at the second stage of the test is whether the LSBC's decision was "capable" of interfering with religious belief or practice (*R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 759). At the stage of defining the right, we are not concerned with cataloguing the severity of the detrimental impact on the

religious right of the challenged decisions; that is for the s. 1 analysis. The task at this stage is to determine whether the claims fall within the scope of the right.

[122] I agree with the majority that the LSBC decision limits, or infringes, the s. 2(a) *Charter* guarantee of freedom of religion. I would add this, however. The majority finds it unnecessary to consider the guarantees of freedom of expression and freedom of association. While it may not be necessary to conduct a separate analysis of these guarantees, the Court must, in my view, include them in the ambit of the guarantee of freedom of religion. TWU's insistence on its Community Covenant Agreement *expresses* its believers' religious commitment and their desire *to associate* with people who commit to practices that accord with their religious beliefs. In *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772 ("*TWU 2001*"), this Court held that a decision not to approve TWU's teacher training program limited expressive and associational freedoms which may receive separate protection in the *Charter* but are also part of freedom of religion (paras. 34 and 93). The same is true here.

[123] TWU also advances a s. 15(1) *Charter* equality claim. The majority does not decide this question. On the record before us, I would reject this claim. Even if members of the TWU community could show that the LSBC's decision creates a distinction on the enumerated ground of religion, it does not arise from any prejudice or stereotype and effects no discrimination on religious grounds but, rather, ensures equal access to all prospective law students (*Alberta v. Hutterian Brethren of Wilson*

Colony, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 108). Ultimately, the substance of TWU’s claim is better dealt with as an infringement of its members’ freedom of religion.

[124] At this point, one must define the claim to freedom of religion. TWU says the LSBC’s denial of accreditation limits its right to freedom of religion: (1) by impinging on its beliefs and practices; (2) by limiting its expression of its religious beliefs and practices; and (3) by limiting its right to associate as required by its religious beliefs and practices. I will briefly describe each of these claims.

[125] First, the alleged limit on belief and practice. TWU says that as a community of evangelical Christians, it adheres to “the belief in the importance of being in an institution with others who either share [its beliefs on the wrongness of sex outside heterosexual marriage] or are prepared to honour it in their conduct” (R.F., at para. 96, quoting *Trinity Western University v. Nova Scotia Barristers’ Society*, 2015 NSSC 25, 381 D.L.R. (4th) 296, at para. 235). TWU concedes that eliminating the mandatory Covenant, which is the basis of the LSBC decision, would not prevent any believing member of the community from adhering to his or her beliefs. But, it alleges that the LSBC’s insistence that it withdraw the Covenant is an interference in its members’ belief that they must be in an institution with others who share or respect their practices on sexual relations. For TWU, providing education in this environment is a practice required by that belief. It says this is “core to [its] ‘religious beliefs and way of life . . . and its community of evangelical Christians’”

(R.F., at para. 96, quoting C.A. reasons, 2016 BCCA 423, 405 D.L.R. (4th) 16, at para. 103). Requiring TWU to withdraw the mandatory Covenant would not prevent the TWU community members from believing in and practising their sexual mores. But it would prevent them from carrying out a practice flowing from that belief about the environment in which TWU would offer a legal education.

[126] The limits on expression of religious beliefs and practices and on associational values flow from this description of beliefs. The Covenant expresses to the community and the public TWU's beliefs on sexual practices. And it reflects its religious-based belief that education should be conducted in a community of people, joined together in association, who accept these beliefs and practices or are prepared to respect and conform to them.

4. *The Negative Impact of the Denial of Accreditation on Freedom of Religion*

[127] Having established that the LSBC decision limits TWU's freedom of religion, we come to the question of whether the LSBC has shown its infringement of that right to be justified under s. 1 of the *Charter*. In this case, no one suggests that there was not an objective capable of overriding the *Charter* right to freedom of religion. Moreover, I agree with the majority that the decision was minimally impairing. The LSBC was faced with the choice of either accrediting the law school or denying that accreditation. The central question, therefore, is whether, at the final

stage of the proportionality analysis, the negative impacts on the *Charter* right are proportionate to the positive benefits flowing from the impugned decision.

[128] The majority concludes that the negative impact on the freedom of religion of members of the TWU community is “of minor significance”, for two reasons: (1) the Covenant is “not absolutely required for the religious practice at issue” (para. 87); and (2) TWU students view the environment created by the Covenant as “preferred (rather than necessary) for their spiritual growth” (para. 88).

[129] With respect, I cannot agree that the impact of the decision on the freedom of religion of members of the TWU community is “of minor significance”. The decision places a burden on the TWU community’s freedom of religion: (1) by interfering with a religious practice (a learning environment that conforms to its members’ beliefs); (2) by restricting their right to express their beliefs through that practice; and (3) by restricting their ability to associate as required by their beliefs.

[130] These are not minor matters. Canada has a tradition dating back at least four centuries of religious schools which are established to allow people to study at institutions that reflect their faith and their practices. To say, as the majority does at para. 87, that the infringement is of minor significance because it “only prevents prospective students from studying law in their *optimal* religious learning environment” (emphasis in original), is to deny this lengthy and passionately held tradition. The majority seems to characterize the religious practice at issue in this case narrowly as “studying in a religious environment” (para. 67). In my view, the

religious right at issue in this case is broader than that. It is not about merely studying in a religious environment — it is about studying in a religious environment where all members of the community have agreed, through the Covenant, to live in a certain way.

[131] The first reason the majority says the impact on the religious right is of minor significance is that the mandatory Covenant is “not absolutely required for the religious practice at issue” (para. 87). The issue here is that the majority fails to acknowledge the significance that all members abiding by the same code of conduct has for a religious community. Moreover, the majority’s argument amounts to saying that where, in the view of a reviewing judge, it seems practically possible to give up a religious practice but an adherent refuses to do so, it will only be a minor infringement. We cannot, on the one hand, acknowledge the deep sincerity of the belief in a religious practice and then, on the other, doubt that sincerity by calling the practice relatively insignificant.

[132] The second reason the impact on the right is said to be of minor significance is that it is optional (majority’s reasons, at para. 88). I accept that optional practices, which allow the individual to *stay true to his or her religious practices* by adopting a different course, may reduce the degree of impairment of the right. This was the case in *Hutterian Brethren*. But the argument put forward by the majority would require members of the TWU community to *give up* the expressive

and associational aspects of the religious practice. The fact that some individuals may be prepared to give up the religious practice does not make it a minor infringement.

[133] Finally, I cannot accept that the mandatory Covenant should be devalued because it compels non-believers to follow TWU's practices. There is a deep tradition in religious schools of welcoming non-adherents as students, provided they agree to abide by the norms of the community. This has been the case at least since the Jesuits opened their first institutions more than four centuries ago. Students who do not agree with the religious practices do not need to attend these schools. But if they want to attend, for whatever reason, and agree to the practices required of students, it is difficult to speak of compulsion.

[134] In my view, the limits the LSBC's decision imposes on the freedom of religion of members of the TWU community cannot be characterized as minor. I acknowledge that it does not prevent members from believing in, and themselves following, the Covenant. But, it precludes members of the TWU community from engaging in the practice of providing legal education in an environment that conforms to their religious beliefs, deprives them of the ability to express those beliefs in institutional form, and prevents them from associating in the manner they believe their faith requires.

5. *The Objectives of the LSBC*

[135] The majority states that the decision advances the LSBC's statutory objectives (1) by maintaining equal access and diversity in the legal profession (paras. 93-95) and (2) by preventing significant harm to LGBTQ people who might attend TWU's proposed law school (paras. 96-99).

[136] I agree that the decision of the LSBC may advance these objectives. That said, questions arise as to how much more diversity will be obtained as a result of refusal to accredit a TWU law school (particularly given its comparatively high tuition fees), and how many, if any, LGBTQ students will be forced to go to TWU as a school of last resort.

[137] In my view, the most compelling law society objective is the imperative of refusing to condone discrimination against LGBTQ people, pursuant to the LSBC's statutory obligation to protect the public interest.

[138] Because TWU is a private institution, the *Charter* does not apply and the Covenant does not constitute legally actionable discrimination. However, TWU's insistence on the mandatory Covenant is a discriminatory practice. It imposes burdens on LGBTQ people on the sole basis of their sexual orientation. Married heterosexual law students can have sexual relations, while married LGBTQ students cannot. The Covenant singles out LGBTQ people as less worthy of respect and dignity than heterosexual people, and reinforces negative stereotypes against them. It puts them to a choice — attend TWU or enjoy equal treatment. Those LGBTQ students who insist on equal treatment will have less access to law school and hence the practice of law

than heterosexual students — heterosexual students can choose from all law schools without discrimination, while one law school, the TWU law school, would only be available to LGBTQ students willing to endure discrimination.

[139] In determining who should be admitted to the practice of law and thus whether a particular law school should be accredited, the LSBC is required by statute to consider the public interest. Section 3 of British Columbia’s *Legal Profession Act* states that “[i]t is the object and duty of the society to uphold and protect the public interest” and subsection (a) states that it must do so by “preserving and protecting the rights and freedoms of all persons”. The LSBC is also bound to consider the *Charter* and provincial human rights laws (*TWU 2001*, at para. 27) and to promote diversity within the legal profession.

[140] The LSBC is under a duty to protect the public interest and preserve and protect the rights and freedoms of everyone, including LGBTQ people. As the collective face of a profession bound to respect the law and the values that underpin it, it is entitled to refuse to condone practices that treat certain groups as less worthy than others.

[141] TWU seeks to counter this valid justification by arguing that it is beyond the statutory mandate of the LSBC to consider the effect the Covenant would have on the LGBTQ community. It argues that the public interest mandate of law societies is limited to ensuring that law students meet standards of learning and competence, and does not extend to the policies of a private institution. This ignores the broad public

interest mandate the legislature has conferred on the LSBC, for reasons explored by the majority.

[142] I add that a broad public interest mandate finds support in this Court's decision in *TWU 2001*. Although the Court found in favour of TWU in that case, it did not hesitate to acknowledge that the British Columbia College of Teachers did not err "in considering equality concerns pursuant to its public interest jurisdiction" (para. 26).

6. Are the Negative Impacts on the Right Proportionate to the Statutory Objective of the LSBC?

[143] This brings me to the ultimate question: Was the decision of the LSBC to deny accreditation to the proposed TWU law faculty unreasonable because it fails to reflect a proportionate balancing of the respective interests?

[144] The LSBC bears the onus of showing that the negative impacts on the *Charter* rights of the TWU community are proportionate to the benefits secured by its decision. At the same time, the Court must approach this question with deference to the LSBC's interpretation of its broad duty to protect the public interest and in light of the legislature's choice to confer on it the mandate to decide who should be admitted to the practice of law.

[145] The negative impacts of the LSBC's denial of accreditation on the religious, expressive and associational rights of the TWU community are not of minor significance. If the community wishes to operate a law school, it must relinquish the mandatory Covenant it says is core to its religious beliefs, with the attendant ramifications on religious practices.

[146] On the other hand, there is great force in the LSBC's contention that it cannot condone a practice that discriminates by imposing burdens on LGBTQ people on the basis of sexual orientation, with negative consequences for the LGBTQ community, diversity and the enhancement of equality in the profession. It was faced with an either-or decision on which compromise was impossible — either allow the mandatory Covenant in TWU's proposal to stand, and thereby condone unequal treatment of LGBTQ people, or deny accreditation and limit TWU's religious practices. In the end, after much struggle, the LSBC concluded that the imperative of refusing to condone discrimination and unequal treatment on the basis of sexual orientation outweighed TWU's claims to freedom of religion.

[147] In a case like *Multani*, the claimant was vindicated because the school board could not show that it would be unable to ensure its mandate of public safety. In *Loyola*, we found that the limitation at issue did nothing to advance the ministerial objectives of instilling understanding and respect for other religions. This case is very different. The LSBC cannot abide by its duty to combat discrimination and accredit TWU at the same time.

[148] The question we must answer is whether the decision of the LSBC was proportionate, and therefore reasonable. Despite the forceful claims made by TWU, I cannot conclude that the decision of the LSBC was unreasonable.

[149] In arriving at this conclusion, I am mindful of the fact that this Court has held that a decision to deny accreditation to TWU's school of education was unreasonable: *TWU 2001*. That case, however, is distinguishable from the one before us. There, the College of Teachers based its claim on the concern that teachers trained at TWU would bring discrimination into the classroom. The LSBC here has not impugned the competence of potential graduates from TWU. Instead, it is concerned with upholding its own mandate by seeking to avoid condoning or even appearing to condone discrimination.

[150] On judicial review, each decision must be assessed for reasonableness (and where a *Charter* right is at issue — proportionality) on its own merits. This is a different case than *TWU 2001*, involving different state regulators weighing different arguments and considerations. The LSBC operates under a unique statutory mandate — a mandate that imposes a heightened duty to maintain equality and avoid condoning discrimination.

7. *Conclusion*

[151] I would allow the appeal.

The following are the reasons delivered by

ROWE J. —

I. Introduction

[152] This appeal concerns the decision of the Law Society of British Columbia (“LSBC”) to withdraw its approval of the proposed law program at Trinity Western University (“TWU”). Along with Brayden Volkenant — a prospective student of the proposed law school — TWU sought judicial review of this decision before the British Columbia courts. The applicants argued, *inter alia*, that the decision was based on considerations outside the mandate of the LSBC and that the LSBC had failed to consider a number of relevant rights under the *Canadian Charter of Rights and Freedoms*. The British Columbia Supreme Court and the Court of Appeal agreed with TWU and held that the decision of the LSBC was unreasonable.

[153] This appeal is not about whether TWU can establish a law school with a mandatory covenant like the Community Covenant Agreement at issue in this case. Rather, the question is whether the LSBC infringed the *Charter* by withdrawing its accreditation of the proposed law school at TWU because of the effect of the Covenant on prospective law students. For the reasons that follow, I conclude that it did not.

[154] First, I adopt the statement of facts set out by my colleagues in the majority, Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ., as well as their account of the decisions below: Majority Reasons (“M.R.”), at paras. 4-26.

[155] Second, I agree with the majority and with the Chief Justice that it was within the statutory mandate of the LSBC to consider the effect of the Covenant on prospective law students as part of its accreditation decision. The LSBC has a broad mandate to regulate the legal profession in the public interest: M.R., at para. 31. As this Court has affirmed on numerous occasions, deference is called for when 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. The LSBC was justified in considering the impact of the Covenant on prospective applicants to the proposed law school and, more generally, in considering the role of law schools as the first point of entry to the legal profession.

[156] Third, I respectfully differ from the majority in its approach to assessing whether *Charter* rights have been infringed by the decision of the LSBC. In my view, this appeal raises issues that call for clarification of 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. I agree with the

majority that this analysis has two steps, but, like the Chief Justice and Côté and Brown JJ., I would offer precisions to this approach.

[157] Fourth, I disagree with the analysis of my colleagues relative to s. 2(a) of the *Charter*. Rather than accepting the infringement as alleged at face value and proceeding to the balancing analysis, a review of the jurisprudence leads me to the conclusion that s. 2(a) is not infringed in this case. I also conclude that no other *Charter* infringements have been made out on the record in this appeal.

[158] Finally, given the absence of a *Charter* infringement, the decision of the LSBC must be reviewed under the usual principles of judicial review rather than the framework set out in *Doré* and *Loyola*. 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.

[159] The decision of the LSBC will call for deference if it meets the criteria set out in *Dunsmuir*. In my view, the decision of the LSBC was reasonable. Accordingly, I would allow the appeal and affirm the decision of the LSBC.

II. The Jurisdiction of the Law Societies

[160] I agree with the majority and the Chief Justice that the LSBC acted within its jurisdiction when it considered the discriminatory effect of the Covenant on prospective law students at TWU. With the privilege of self-government granted to the LSBC comes a corresponding duty to self-regulate in the public interest: *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at para. 36. In carrying out this duty, the LSBC was entitled to interpret its public interest mandate as including consideration of practices that are discriminatory in nature. For this reason, it was open to the LSBC to take the view that the “public interest in the administration of justice” (*Legal Profession Act*, S.B.C. 1998, c. 9 (“LPA”), s. 3) included consideration of the effect of the Covenant on prospective law students at TWU. The fact that the Covenant is a statement of religious rules and principles does not insulate it from such scrutiny.

[161] Given that the LSBC acted within its jurisdiction in considering the effect of the Covenant, the next step is to ascertain whether its decision infringes any of the *Charter* rights raised by the applicants. Before proceeding to the *Charter* analysis, I would note that TWU has raised several concerns relating to the proper approach to adjudicating *Charter* claims in the administrative context. What follows in the next section is my response to these concerns.

III. The Proper Approach to *Charter* Rights

[162] This Court employs a structured analysis for adjudicating *Charter* claims: see *R. v. Oakes*, [1986] 1 S.C.R. 103. This analysis has two steps. The first is to

determine whether the government has infringed any rights guaranteed by the *Charter*. The claimant bears the burden of demonstrating such infringement. Once the court is persuaded that a right has been infringed, the second step is to determine whether the government can justify this infringement under s. 1 of the *Charter*. This requires the government to show that the infringement is a reasonable limit that is both prescribed by law and demonstrably justified in a free and democratic society.

[163] This appeal raises issues that call for clarification of the application of this approach to the review of administrative decisions. Since *Doré*, this Court has applied the principles of judicial review to determine whether “the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives”: *Doré*, at para. 58. When the decision-maker strikes a proportionate balance, the decision under review is deemed reasonable. The implication is that proportionate balancing justifies the *Charter* infringement arising from the impugned administrative decision.

[164] In this appeal and in its appeal from the decision of the Law Society of Upper Canada, *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33, TWU raised concerns about the application of this framework to the review of the law societies’ decisions. TWU questioned, *inter alia*, the applicability of reasonableness review to the adjudication of *Charter* claims. This raises concerns about whether *Doré* provides a similarly rigorous protection of *Charter* rights as does *Oakes*: A.F., file No. 37209, at para. 40. TWU argued that there should be a single framework for examining compliance with the *Charter*, regardless of whether the

source of the alleged infringement is a statute, regulation, or discretionary decision: R.F., file No. 37318, at para. 51. To this end, it proposed that the *Doré* framework reflect the more structured *Oakes* analysis, which defines with clarity who bears the burden of justification and what that burden entails: A.F., file No. 37209, at paras. 53-55.

[165] I agree with TWU thus far: the *Doré* framework leaves many questions unanswered. As the Chief Justice notes, “the framework’s contours continue to elicit comment from scholars and judges”: Chief Justice’s Reasons (“C.J.R.”), at para. 111 (footnote omitted.) In what follows, I propose three clarifications to the framework.

A. *The Problem With Charter Values*

[166] My first concern relates to the use of *Charter* values in the adjudication of *Charter* claims in the administrative context. In this, I share the view of the Chief Justice (C.J.R., at para. 115) and Justices Côté and Brown (Dissenting Reasons, at para. 307). When courts review administrative decisions for compliance with the *Charter*, *Charter* rights must be the focus of the inquiry — not *Charter* values. While *Doré* was intended to clarify the relationship between the *Charter* and administrative action, its reliance on values rather than rights has muddled the adjudication of *Charter* claims in the administrative context.

[167] The concept of *Charter* values first appears in cases where the *Charter* had no direct application. In *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573,

this Court held that, by virtue of s. 32 of the *Charter*, the *Charter* did not apply to litigation between private parties. As a limit on “the Parliament and government of Canada” and “the legislature and government of each province”, its application was limited to the legislative and executive branches of government, as well as administrative agencies. Nonetheless, the Court held in *Dolphin Delivery* that courts must “apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution” (p. 603). This Court has since had regard to *Charter* values in the development of common law principles in a number of cases: *R. v. Salituro*, [1991] 3 S.C.R. 654; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157; *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420; *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640.

[168] This approach makes good sense in cases where the *Charter* has no direct application. Rather than subject common law rules to a s. 1 analysis, the concept of *Charter* values allows the courts to move the common law toward coherence with the *Charter*: M. Horner, “Charter Values: The Uncanny Valley of Canadian Constitutionalism” (2014), 67 *S.C.L.R.* (2d) 361, at p. 365. Where the *Charter* applies by virtue of s. 32, however, there is no need to have recourse to *Charter* values.

[169] *Charter* values — as opposed to *Charter* rights — have no independent function in the administrative context. As some commentators have noted, “it is not

clear how consideration of Charter values fits within the constitutional requirements to respect Charter rights”: E. Fox-Decent and A. Pless, “The Charter and Administrative Law Part II: Substantive Review”, in C. M. Flood and L. Sossin, eds., *Administrative Law in Context* (3rd ed. 2018), 507, at p. 515.

[170] That said, *Charter* values have played a supporting role in the adjudication of *Charter* claims. In *Loyola*, for instance, the majority employed *Charter* values as a guide to *Charter* adjudication. As Justice Abella wrote, “*Charter* values — those values that underpin each right and give it meaning — help determine the extent of any given infringement in the particular administrative context and, correlatively, when limitations on that right are proportionate in light of the applicable statutory objectives”: para. 36, citing *Alberta Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 88; L. Sossin and M. Friedman, “Charter Values and Administrative Justice” (2014), 67 *S.C.L.R.* (2d) 391, at pp. 403-4. This passage suggests that *Charter* values can assist in the adjudication of claims that are based on *Charter* rights.

[171] Confusion arises, however, when *Charter* values are used as a standalone basis for the adjudication of *Charter* claims. This is because the scope of *Charter* values is often undefined in the jurisprudence. In some cases, a *Charter* value aligns with a particular *Charter* right. In other cases, the value does not line up with earlier *Charter* jurisprudence. This lack of clarity heightens the potential for unpredictable

reasoning. As Lauwers and Miller J.J.A. recently noted in their concurring reasons in *Gehl v. Canada (Attorney General)*, 2017 ONCA 319, 138 O. R. (3d) 52, at para. 79:

Charter values lend themselves to subjective application because there is no doctrinal structure to guide their identification or application. Their use injects a measure of indeterminacy into judicial reasoning because of the irremediably subjective — and value laden — nature of selecting some *Charter* values from among others, and of assigning relative priority among *Charter* values and competing constitutional and common law principles. The problem of subjectivity is particularly acute when *Charter* values are understood as competing with *Charter* rights.

(See also *E.T. v. Hamilton-Wentworth District School Board*, 2017 ONCA 893, 397 C.R.R. (2d) 231, at paras. 103-4.)

[172] This lack of clarity is an impediment to applying a structured and consistent approach to adjudicating *Charter* claims. At the outset, it is more difficult to ascertain whether a *Charter* value has been infringed: see A. Macklin, “Charter Right or Charter-Lite? Administrative Discretion and the Charter” (2014), 67 *S.C.L.R.* (2d) 561, at p. 571. This difficulty extends throughout the analysis. This is because the existence and severity of the infringement is informed by the scope of the value at issue. Without a proper understanding of the scope, it is “difficult if not impossible to apply” the proportionality analysis required by *Doré* and *Loyola*: C. D. Bredt and E. Krajewska, “*Doré*: All That Glitters Is Not Gold” (2014), 67 *S.C.L.R.* (2d) 339, at p. 353.

[173] In this appeal, the majority employs the term *Charter* “protections” — meaning “both rights and values” — to refer to the constitutional guarantees of the

Charter: M.R., at para. 58, citing *Loyola*, at para. 39. With respect, this language does little to clarify the role of *Charter* values in the adjudication of *Charter* claims. By equating “rights and values” under the umbrella term of “*Charter* protections”, the majority undermines the view that rights and values are distinct in scope and function.

[174] Where an infringement of *Charter* rights is alleged, there is no reason to depart from an approach based on those *Charter* rights. A claimant bringing a *Charter* challenge is entitled to a determination of whether his or her *Charter* rights have been infringed. If the claimant succeeds, the government then must have the opportunity to argue that this limit on *Charter* rights is justified under s. 1. This follows from the structure of the *Charter* itself.

[175] The point is this. In cases where *Charter* rights are plainly at stake, courts and other decision-makers have a constitutional obligation to address the rights claims as such and to do so explicitly. An analysis based on *Charter* values should not eclipse or supplant the analysis of whether *Charter* rights have been infringed. Where *Charter* rights have been infringed by administrative actors, reviewing courts must determine whether the state meets the burden of justifying the infringement according to s. 1. This is not a matter of doctrinal preference. It is a constitutional obligation imposed by the *Charter*.

B. *The Scope of Charter Rights*

[176] My next concern relates to the interpretation of *Charter* rights. As the majority reasons show, the *Doré/Loyola* framework follows a two-step analysis for adjudicating *Charter* claims. Under this approach, the initial burden is on the claimant to demonstrate that the impugned decision infringes his or her *Charter* rights. This requires that the reviewing court possess a proper understanding of the scope of the rights at issue in order to determine whether the *Charter* has been infringed. Accordingly, the proper delineation of the scope of *Charter* rights, based on the purposive approach set out in our jurisprudence, remains an essential step in all *Charter* adjudication, including under the *Doré/Loyola* framework.

[177] This delineation precedes any decision as to whether there has been a limitation of the guaranteed right or freedom: e.g. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 967; *R. v. Singh*, 2007 SCC 48, [2007] 3 S.C.R. 405, at paras. 42-48; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386, at para. 61. In many cases, this step may be implied or conclusory, especially where the infringement of the right or freedom is evident. In others, an explicit delineation of the right or freedom determines the outcome of the *Charter* claim. In all cases, it remains a logically necessary — if from time to time unspoken — step in the analysis. In plain terms, there is no need for justification if there is no infringement, and there can be no infringement if the claim falls outside the scope of the right at issue.

(1) Purposive Delineation

[178] Like most constitutional documents, the *Charter* is phrased in open-textured terms that allow for adaptation to changing circumstances. Its interpretation calls for a broad and purposive approach: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 156; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 509; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 53; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Figuroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at para. 20.

[179] This approach requires courts to favour generous interpretations of the *Charter* and to avoid narrow or technical ones that could “subvert the goal of ensuring that right holders enjoy the full benefit and protection of the *Charter*”: *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 23. It also recognizes that the rights and freedoms guaranteed by the *Charter* “must . . . be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers”: *Hunter*, at p. 155. As part of this approach, the Court has cautioned against undue attention to the historical meaning of rights and freedoms as understood when the *Charter* was enacted. This allows the *Charter* to keep pace with societal change and ensures that its protections are not “frozen in time”: *B.C. Motor Vehicle*, at p. 509; see also *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at paras. 61-62; *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698.

[180] The foundational case in defining this approach is *Big M*, in which Justice Dickson (as he then was) held that the language of the *Charter* must be read with a view to its purpose:

This Court has already, in some measure, set out the basic approach to be taken in interpreting the *Charter*. In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts. [Emphasis added; p. 344.]

[181] Several points can be drawn from this passage. The first is that the purposive approach, like other approaches to constitutional language, creates a framework for elucidating meaning from general wording. Purpose defines the boundaries of this framework and is used to draw the line between valid and invalid interpretation.

[182] The second point is that courts need to be mindful of extending the meaning of constitutional text beyond “the limits of reason” so as not to “overshoot the actual purpose of the right or freedom in question”: *Hunter*, at p. 156; *Big M*, at p. 344; *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, at para. 24; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157, at paras. 19-20. Such unreasonable extensions are not hard to envisage. Liberty as guaranteed by s. 7 of the *Charter*, for instance, could be read as barring all restrictions on the free choice of individuals. As one author explains, “[s]uch interpretations may be senseless, in that every law would presumptively violate the Charter and require a section 1 justification, but they are not precluded by the words [of the Charter] as such and are more ‘broad’ and ‘generous’ than the interpretations given to these terms by the courts”: B. Oliphant, “Taking Purposes Seriously: The Purposive Scope and Textual Bounds of Interpretation Under the Canadian Charter of Rights and Freedoms” (2015), 65:3 *U.T.L.J.* 239, at p. 253 (emphasis deleted).

[183] This explains the central role of purpose in our interpretive approach. As this Court noted in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 17, “[w]hile the twin principles of purposive and generous interpretation are related and sometimes conflated, they are not the same. The purpose of a right must always be the dominant concern in its interpretation; generosity of interpretation is subordinate to and constrained by that purpose” (citing P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at pp. 36-30 and 36-31).

[184] The aim of *Charter* interpretation, then, is to define the scope of protected rights and freedoms by reference to their purpose. This requires courts to ascertain the purpose of the *Charter* right or freedom so as to protect activity that comes within that purpose and exclude activity that does not: Hogg, *Constitutional Law of Canada*, at pp. 36-30 and 36-31. As discussed, this does not mean that the historical intention of those who drafted the *Charter* is determinative: *B.C. Motor Vehicle*, at p. 509. Rather, the focus is on the interests the *Charter* is meant to protect: *Big M*, at p. 344. In ascertaining the purpose of a right or freedom, the courts consider a number of indicators, including the text of the *Charter*; the context and overall purpose of the *Charter*; the historical and philosophical roots of the right or freedom, which provide insight into the interests that the *Charter* was intended to protect; the common law and pre-*Charter* jurisprudence dealing with similar rights; and, of course, the *Charter* jurisprudence as it has developed: see e.g. *Hunter*, at pp. 154-60; *Oakes*, at pp. 119-34; *Big M*; *Andrews*; *R. v. Therens*, [1985] 1 S.C.R. 613; *R. v. Smith*, [1987] 1 S.C.R. 1045; *Irwin Toy*; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141.

[185] This approach is meant to operate within and give effect to the structure of the *Charter*. Guided by a purposive reading, courts must delineate *Charter* rights based on considerations that are intrinsic to the rights themselves. If a claimant demonstrates an infringement, s. 1 then allows the court to consider extrinsic factors to determine whether the infringement is justified. These extrinsic factors do not affect the scope of the right. These steps — the delineation and infringement analysis,

followed by the justification analysis — are conceptually distinct. On occasion, however, this Court has departed from this distinction.

(2) Delineation Through Justification

[186] This Court has from time to time favoured an approach to *Charter* rights that avoids delineation and relies instead on s. 1 to ensure that rights are exercised within proper bounds. The rationale put forward for this approach is that, in contrast to an internal delineation followed by a distinct justification, jumping ahead to an analysis under s. 1 allows the Court to consider the full range of relevant factors, including the context in which the right operates in the circumstances of the case.

[187] A number of cases have followed this approach. One example is the decision of Justice La Forest in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, who noted that “[t]his Court has consistently refrained from formulating internal limits to the scope of freedom of religion in cases where the constitutionality of a legislative scheme was raised; it rather opted to balance the competing rights under s. 1 of the *Charter*” (para. 109).

[188] There are implications to adopting such an approach, some of which appear advantageous. The most obvious is that it allows claimants to discharge their burden of proof of infringement with relative ease, moving the analysis readily to s. 1. This shifts the burden of justification onto the government, which, intuitively, seems fair given its position of power relative to individual claimants. This approach also

resolves ambiguity in favour of a broad scope for rights and freedoms. As Justice La Forest explained in *B. (R.)*, “[n]ot only is this consistent with the broad and liberal interpretation of rights favoured by this Court, but s. 1 is a much more flexible tool with which to balance competing rights” (para. 110). Subsequent expressions of this approach have relied primarily on the argument that s. 1, in contrast to “internal limits”, allows for a more fulsome consideration of competing rights and interests: *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at paras. 24-31.

[189] Whatever the advantages of giving this type of reading to rights and freedoms, an interpretive approach that blurs the distinction between infringement and justification ignores the architecture of the *Charter*. As discussed, the adjudication of *Charter* claims needs to follow a structured two-step process. A preference for reconciling competing rights and interests under s. 1 does not obviate the need for an initial determination of whether a *Charter* right has been infringed in the first place. This step — which requires defining the scope of the particular right — is anterior to and conceptually distinct from the consideration of extrinsic factors that may or may not justify limiting the exercise of that right in the circumstances of the case. These extrinsic factors come into play during the analysis of s. 1. They are, however, not relevant to the delineation of the right itself.

[190] An approach that skims over the proper delineation of rights and freedoms runs the risk of distorting the relationship between s. 1 and the protections guaranteed by the *Charter*. As Chief Justice Dickson stated in *Oakes*, at p. 135:

It is important to observe at the outset that s. 1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the *Constitution Act, 1982*) against which limitations on those rights and freedoms must be measured. Accordingly, any s. 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms — rights and freedoms which are part of the supreme law of Canada. [Emphasis added.]

[191] The two functions of s. 1 operate in tandem. Because of the seriousness of finding an infringement of a *Charter* right — which, in essence, declares the breach of a constitutional guarantee — the delineation of these rights must be carried out with care corresponding to the gravity of the matter. If infringements are too readily found on the basis of activities that fall outside of the protective scope of the rights, then courts may well too readily find that the government has met the justificatory burden set out in *Oakes*. As Professor Hogg suggests, “[t]here is a close relationship between the standard of justification required under s. 1 and the scope of the guaranteed rights. If the courts give to the guaranteed rights a broad interpretation that extends beyond their purpose, it is inevitable that the court[s] will relax the standard of justification under s. 1 in order to uphold legislation limiting the extended right”: *Constitutional Law of Canada*, at p. 38-6 (footnote omitted); see also P. W. Hogg,

“Interpreting the Charter of Rights: Generosity and Justification” (1990), 28 *Osgoode Hall L.J.* 817.

[192] This can lead to situations whereby certain rights are routinely said to be infringed only for the claimant to be told that the infringement is justified by any number of countervailing considerations. As Professor Newman puts it, “[t]he situation becomes one in which the *prima facie* violation of rights by the state becomes a routine condition precisely because no distinctions are drawn between legitimate and illegitimate claims”: D. Newman, “Canadian Proportionality Analysis: 5½ Myths” (2016), 73 *S.C.L.R.* (2d) 93, at p. 99. This has a number of worrisome implications. It erodes the seriousness of finding *Charter* violations. It increases the role of policy considerations in the adjudication of *Charter* claims by shifting the bulk of the analysis to s. 1. And it distorts the proper relationship between the branches of government by unduly expanding the policy making role of the judiciary.

[193] Taken to its logical end, this approach pushes the entire adjudication of *Charter* claims towards balancing, whereby rights and justifications are considered in a type of blended analysis. The result is an unstructured, somewhat conclusory exercise that ignores the framing of the *Charter* and departs fundamentally from the foundational *Charter* jurisprudence of this Court.

[194] The adjudication of *Charter* claims involves questions of constitutional law. The fact that *Charter* rights are implicated in the work of administrative decision-makers on a day-to-day basis does not change this fact. On judicial review,

as in other proceedings, *Charter* claims demand analytical rigour. This starts with the correct delineation of the scope of the rights and freedoms at issue. Such delineation provides to the reviewing court the framework within which the *Charter* claim is to be adjudicated. It determines, *inter alia*, the relevance of evidence adduced by the claimant and the standard against which the government conduct is to be evaluated. The aim is not to produce an unduly restrictive reading of the right or freedom at issue. Rather, it is to ensure that the rest of the analysis does not go off the rails because the right has been given an erroneous definition.

C. *The Burden of Proof in Charter Litigation*

[195] My final concern relates to the burden of proof in *Charter* adjudication and what that burden entails. Under the usual rules of judicial review, it falls to the applicant to demonstrate that the impugned decision should be overturned. By contrast, under the approach set out in *Oakes*, it is government that bears the burden of justification once the claimant has demonstrated an infringement of his or her *Charter* rights. The *Doré/Loyola* framework lies at the intersection of administrative and constitutional law but it has remained conspicuously silent on where the burden of proof lies.

[196] It is difficult to conclude that *Doré* changed the burden of proof for the adjudication of *Charter* claims in the administrative context in the absence of an explicit discussion to that effect. Thus, once the claimant has demonstrated that an administrative decision infringes his or her *Charter* rights, it remains incumbent on

the state actor to demonstrate that the infringement is justified. In other words, if the claimant can demonstrate that an administrative decision infringes his or her *Charter* rights, the decision is presumptively unreasonable and the state must explain why this infringement is a reasonable limit. The reviewing court must ensure that the state actor has discharged this burden before upholding the impugned decision.

[197] The majority states that “*Charter* rights are no less robustly protected under an administrative law framework”: M.R., at para. 57. As discussed, however, the usual rules of administrative law require *the applicant* to demonstrate that an impugned decision should be overturned. It is unclear whether this burden persists under an administrative law framework once *Charter* rights are at stake. The majority is silent on this issue. One could infer from this that an impugned decision should be treated as presumptively reasonable *unless* the claimant demonstrates that the decision is not the result of proportionate balancing. This would provide for less robust protection of *Charter* rights. For the administrative law framework to provide for the *same* protection of *Charter* rights as the *Oakes* framework, the justificatory burden must remain on the government once an infringement of rights is demonstrated.

[198] Such an approach follows from first principles. The administrative state is a statutory creation. As legislation must comply with the *Charter*, it follows that decisions taken pursuant to legislation must also comply with the *Charter*: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Ross v. New Brunswick*

School District No. 15, [1996] 1 S.C.R. 825; *Eldridge; Multani; Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, at para. 117.

[199] The *Constitution Act, 1982* gives normative primacy to the rights and freedoms guaranteed by the *Charter*. By virtue of s. 1, any limit on these guarantees is presumptively unconstitutional. This means that rights infringements can stand *only* if the limit complies with the requirements of s. 1 (or, in some cases, if the government invokes the override provision in s. 33 of the *Charter*). These are the *only* options: the government either justifies the infringement, exempts the infringement from constitutional scrutiny, or the infringement is remedied by the court.

[200] Where the government opts for justification, it faces successive hurdles. Under the *Oakes* framework, to establish that an infringement is reasonable and demonstrably justified in a free and democratic society, the state must, first, identify an objective of sufficient importance to warrant overriding a constitutionally protected right or freedom. Second, the state must show that the infringement passes a “proportionality test”: *Oakes*, at p. 139. This entails showing that the measure is rationally connected to the identified objective, that the infringement is minimally impairing and that a balance is struck between the infringing effects of the measure and the importance of the objective. The *Oakes* framework expresses constitutional principles of fundamental importance — namely, that the rights and freedoms guaranteed by the *Charter* establish a minimum degree of protection that state actors

must respect, and that any violation of these guarantees will be subject to close and serious scrutiny.

[201] There is no question that these principles continue to guide our assessment of state action in the administrative context. Rather, the debate has centred on how to operationalise these principles. In this appeal, the majority explains that once an infringement has been shown, 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”: M.R., at para. 58, citing *Doré*, at para. 57, and *Loyola*, at para. 39. I do not see this framework as fundamentally deviating from the principles set out in *Oakes*. Indeed, this Court sought in *Doré* to achieve “conceptual harmony between a reasonableness review and the *Oakes* framework” (para. 57). The key to achieving this harmony is not the substitution of the principles of *Charter* review for those of administrative law. Rather, as *Loyola* makes clear, the solution is to infuse judicial review with the considerations that make up the *Oakes* analysis.

[202] All the elements in the *Oakes* test have a role to play in the judicial review of administrative decisions under *Doré*. In *Doré*, this Court said that a decision will be found reasonable if “the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives” that the decision-maker was bound to carry out (para. 58). This requires an identification of the statutory objective at issue, which corresponds to the first step under *Oakes*. Once a claimant has made

out that a decision has infringed a *Charter* right on judicial review, the state must identify a “sufficiently important objective” that could make infringing the *Charter* right reasonable: *Oakes*, at p. 141. The proportionality analysis will then be carried out in relation to *that* objective. This objective must be sufficiently pressing and substantial to justify the infringement of *Charter* rights: *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 20; *Hutterian Brethren*, at para. 42.

[203] The state must then show that the decision reflects a “proportionate balancing of the *Charter* protections at play”: *Doré*, at para. 57. This corresponds to the “proportionality test” under the second step of *Oakes*, which includes the analysis of rational connection, minimal impairment, and the balance between beneficial and deleterious effects.

[204] First, if the state cannot demonstrate that the decision-maker has rendered a decision that is rationally connected to the identified statutory objective, then the decision, of necessity, cannot be reasonable. In other words, if the decision is not *rationally connected* to the statutory objective, then the decision-maker will have acted outside its mandate. Second, as the majority has stated, the decision will be *minimally impairing* if it affects the right “as little as reasonably possible” in furthering the statutory objectives identified by the state: M.R., at para. 80, citing *Loyola*, at para. 40. Finally, the state must show that the decision strikes “a reasonable balance between the benefits to its statutory objectives and the severity of the

limitation on *Charter* rights at stake”: M.R., at para. 91. If the state can meet this proportionality test, the decision will be reasonable despite having infringed a *Charter* right.

[205] I recognize, as does the Chief Justice, that the main hurdle for the state will be the “final stages of the *Oakes* framework used to assess the reasonableness of a limit on a *Charter* right under s. 1: minimal impairment and balancing” (*Loyola*, at para. 40; C.J.R., at para. 113). However, that is not to say that the identification of statutory objectives or the rational connection step cease to be relevant. The fact that most statutes reviewed under the *Oakes* test have failed at the minimal impairment or proportionality stages does not mean that courts have stopped looking to rational connection. Nor does it mean that consideration of the pressing and substantial objective has ceased to be relevant. Similarly, in the administrative context, the fact that most administrative decisions will be rationally connected to an identified statutory objective does not mean that the inquiry need not be carried out. It means only that this component of the analysis will often readily be met.

[206] I add this. While the decision in *Doré* was motivated by a desire to streamline the review of administrative decisions for compliance with the *Charter*, its stated preference for a “robust conception of administrative law” should not have the (unquestionably unintended) effect of diluting the protection afforded to *Charter* rights (para. 34). Nor should it risk shifting the justificatory burden onto claimants once they have demonstrated an infringement of their rights. The justificatory burden

must therefore remain where the *Charter* places it; on the government, whenever a claimant demonstrates that his or her *Charter* rights have been infringed. For the administrative state, this is no more than what s. 1 of the *Charter* requires.

[207] As a final point, I do not dispute that *Doré* and *Loyola* are binding precedents: M.R., at para. 59. The suggestion that the *Doré/Loyola* framework requires clarification is in no way inconsistent with this. Whether in response to judicial, academic, or other criticism, this Court has on numerous occasions built on its jurisprudence to provide for greater clarity and consistency in the law: see e.g. *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at para. 29; *Dunsmuir*, at para. 24; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585, at para. 39. Indeed, *Doré* itself was an attempt at clarifying confusion in the jurisprudence (para. 23). These developments reflect how the common law works, through the application and, where warranted, the clarification of jurisprudence. On these matters, I can do no better than to quote Lord Denning from his book *The Discipline of Law* (1979), at p. 314:

Let it not be thought from this discourse that I am against the doctrine of precedent. I am not. It is the foundation of our system of case law. This has evolved by broadening down from precedent to precedent. By standing by previous decisions, we have kept the common law on a good course. All that I am against is its too rigid application — a rigidity which insists that a bad precedent must necessarily be followed. I would treat it as you would a path through the woods. You must follow it certainly so as to reach your end. But you must not let the path become too overgrown. You must cut out the dead wood and trim off the side branches, else you will find yourself lost in thickets and brambles. My plea is simply to keep the path to justice clear of obstructions which would impede it.

[208] Having set out what I view as the proper approach to the adjudication of *Charter* rights in the administrative context, I turn now to the main *Charter* right at issue in this appeal: freedom of religion as guaranteed by s. 2(a).

IV. Section 2(a) of the *Charter*

[209] The “freedom of conscience and religion” guaranteed by s. 2(a) is an essential part of life in Canadian society. From the most faithful believer to the most convinced atheist, it protects our right to believe in whatever we choose and to manifest those beliefs without fear of hindrance or reprisal. This freedom shields our most personal beliefs — among those that speak to the core of who we are and how we choose to live our lives — from interference by the state. Given the diversity of beliefs in our society and the manner in which those beliefs are manifested, the breadth of this freedom has the potential to create friction. Resolving this friction in a manner that reflects the purpose of s. 2(a) is, on occasion, a necessary exercise.

[210] The friction in this case arises between the religious freedom claimed by TWU and the mandate of the LSBC to regulate the legal profession in the public interest. This requires an analysis of s. 2(a) and its role in our jurisprudence. In what follows, I canvass the jurisprudence relative to s. 2(a) and I delineate the scope of its protection based on the purposive approach described above. I then have regard to the infringement alleged by the claimants. My conclusion is that the alleged infringement does not fall within the scope of freedom of religion.

A. *The Scope of Section 2(a) of the Charter*

[211] The scope of freedom of religion was first set out by Justice Dickson in *Big M*:

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. [Emphasis added; pp. 336-37.]

[212] We can draw two conclusions with respect to the nature of religious freedom under s. 2(a) from this foundational jurisprudence. The first is that religious freedom is based on the exercise of free will. This is because religion, at its core, involves a profoundly personal commitment to a set of beliefs and to various practices seen as following from those beliefs: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 759; *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 39. The focus of religious freedom, then, is personal choice:

Amselem, at para. 43. Whether this choice aligns with an official religion is not relevant. For the purposes of s. 2(a), what matters is that this choice is made freely.

[213] The second conclusion is a corollary of the first: religious freedom is also defined by the absence of constraint. From this perspective, religious freedom aims to protect individuals from interference with their religious beliefs and practices. Its character is noncoercive; its antithesis is coerced conformity. This understanding of religious freedom is rooted in the philosophical tradition that conceives of freedom in terms of the absence of interference with individual choice: see e.g. I. Berlin, *Four Essays on Liberty* (1969), at pp. 15-22. In the jurisprudence, this freedom applies to believers and nonbelievers alike as the *Charter* provides both freedom of religion and freedom from it: *Big M*, at p. 347; *Saguenay*, at para. 70.

[214] This emphasis on the free choice of the believer is reflected in the jurisprudence. In *Amselem*, for instance, the issue was whether Orthodox Jews could build succahs on the balconies of their condominium apartments for the duration of the Jewish holiday of Succot. Those who managed the apartment buildings opposed this on the basis that it violated bylaws of the condominium. While this case was decided under the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 — which applies to the conduct of private individuals — the Court was explicit in stating that its decision was equally applicable under the Canadian *Charter* (para. 37). Writing for the majority, Justice Iacobucci explained that, at the first stage of the religious freedom analysis, an individual claimant need only demonstrate a sincere

adherence to a belief or practice having a nexus with religion (para. 46). The focus of this approach was on the choice of the believer, regardless of whether the belief or practice was recognized by an official religion. Thus, it did not matter whether Orthodox Judaism objectively required the claimants to build individual succahs on their balconies. All that mattered was the claimants' sincere belief in their religious obligation to do so and their choice to act on that belief.

[215] The majority decision in *Multani* provides a further example. In that case, the issue was whether Gurbaj Singh Multani, a thirteen year old Sikh boy, could bring his kirpan to school notwithstanding the refusal of the school board to grant him an exemption from its prohibition against bringing weapons to school. As the school board had effectively forced him to choose between "leaving his kirpan at home and leaving the public school system", Multani was only required to show that his "personal and subjective belief in the religious significance of the kirpan" was sincere in order to demonstrate that the decision infringed his rights under s. 2(a) (paras. 37-41). The fact that other Sikhs might have compromised on their beliefs when faced with the prohibition was not relevant (para. 39). The only relevant factor was the personal choice by Multani to adhere to his beliefs.

[216] As a final example, the decision in *Hutterian Brethren* is illustrative. In that case, the Hutterites of Wilson Colony sought an exemption from an Alberta law that required all drivers' licences to display a photograph of the licensee. The members of the Colony sincerely believed that permitting their photo to be taken

violated the Second Commandment. Given this belief, the law forced individual Colony members to choose between their freely held religious beliefs and obtaining drivers' licences. Although a majority of this Court ultimately upheld the provincial law, the entire Bench accepted that it infringed s. 2(a).

[217] This focus on the individual choice of believers does not detract from the communal aspect of religion. For many religions, community is critical to manifesting faith. Whether through communal worship, religious education, or good works, the community is often the public face of religion. In other words, it is how the religion engages with the world. To borrow from Justice Sachs then of the South African Constitutional Court:

Certain religious sects do turn their back on the world, but many major religions regard it as part of their spiritual vocation to be active in the broader society. Not only do they proselytise through the media and in the public square, religious bodies play a large part in public life, through schools, hospitals and poverty relief. They command ethical behaviour from their members and bear witness to the exercise of power by State and private agencies; they promote music, art and theatre; they provide halls for community activities, and conduct a great variety of social activities for their members and the general public. They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution. Religion is not just a question of belief or doctrine. It is part of a way of life, of a people's temper and culture. [Footnotes omitted.]

(Christian Education South Africa v Minister of Education, [2000] ZACC 11, 2000 (4) S.A. 757, at para. 33)

[218] This communal aspect of religion is recognized in our jurisprudence. As Justice LeBel stated in *Hutterian Brethren*, “[r]eligion is about religious beliefs, but

also about religious relationships” (para. 182). This dimension of religious freedom was central to the decision of this Court in *Loyola*, where the majority held that “[r]eligious freedom under the *Charter* must therefore account for the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions” (para. 60). In this respect, I agree with the majority that “[t]he ability of religious adherents to come together and create cohesive communities of belief and practice is an important aspect of religious freedom under s. 2(a)”: M.R., at para. 64.

[219] While acknowledging this communal aspect, I underscore that religious freedom is premised on the personal volition of individual believers. Although religious communities may adopt their own rules and membership requirements, the foundation of the community remains the voluntary choice of individual believers to join together on the basis of their common faith. Therefore, in the context of this appeal, I would decline to find that TWU, as an institution, possesses rights under s. 2(a). I note that, even if TWU did possess such rights, these would not extend beyond those held by the individual members of the faith community. For the remainder of the analysis, I will employ the term “claimants” to refer to the individual claimants in this appeal: Mr. Volkenant and other members of the evangelical Christian community at TWU. This excludes TWU as an institution.

[220] To summarize, our jurisprudence defines the protection of s. 2(a) as extending to the freedom of individuals to believe in whatever they choose and to

manifest those beliefs. While s. 2(a) recognizes the communal aspects of religion, its protection remains predicated on the exercise of free will by individuals — namely, the choice of each believer to adhere to the tenets of his or her faith.

B. *The Alleged Infringement of Section 2(a)*

[221] The claimants in this appeal argue that the decision of the LSBC infringes s. 2(a) because it interferes with their ability to attend an accredited law school at TWU with its mandatory Covenant. For the claimants, the Covenant is integral to their religious identity; it provides the basis for living and learning within an academic community based on the tenets of evangelical Christianity. The LSBC, however, found that the Covenant’s mandatory proscription of certain forms of sexual intimacy conflicted with its mandate to regulate the legal profession in the public interest. The issue is whether the LSBC infringed s. 2(a) by refusing to accredit the proposed law school at TWU on this basis.

[222] To establish an infringement of freedom of religion, the claimants must demonstrate that (1) they sincerely believe in a practice or belief that has a nexus with religion, and that (2) the impugned state conduct interferes, in a manner that is nontrivial or not insubstantial, with their ability to act in accordance with that practice or belief: *Amselem*, at para. 62; *Multani*, at para. 34; *Ktunaxa*, at para. 68.

(1) Sincerity

[223] The first step of the infringement analysis requires the claimant to demonstrate that “he or she sincerely believes in a practice or belief that has a nexus with religion”: *Multani*, at para. 34; *Amsalem*, at para. 56; *Ktunaxa*, at para. 68. As this Court specified in *Multani*, “[t]he fact that different people practise the same religion in different ways does not affect the validity of the case of a person alleging that his or her freedom of religion has been infringed. What an individual must do is show that he or she sincerely believes that a certain belief or practice is required by his or her religion” (para. 35 (emphasis added)). This religious belief or practice must be asserted in good faith and must not be fictitious, capricious, or an artifice: *Amsalem*, at para. 52; *Multani*, at para. 35.

[224] The assessment of sincerity requires a precise understanding of the belief or practice at issue. In this appeal, the belief at issue is grounded in TWU’s religious roots. Founded in 1962 by the Evangelical Free Church, TWU has always sought to provide its students with an education grounded in the values and philosophy of evangelical Christianity. Since 1969, the *Trinity Western University Act* has authorized TWU “to provide for young people of any race, colour, or creed university education in the arts and sciences with an underlying philosophy and viewpoint that is Christian”: *Trinity Western University Act*, S.B.C. 1969, c. 44, s. 3(2).

[225] Part of the religious philosophy espoused by TWU includes a strong opposition to all forms of sexual intimacy outside of heterosexual marriage. This belief is reflected in the Covenant, which embodies the evangelical Christian values

to which TWU is committed. Regardless of their personal beliefs, all TWU students must read and abide by the terms of the Covenant in order to attend the university.

[226] At this point, it is useful to set out which beliefs and practices are clearly *not* at issue. The decision of the LSBC does not interfere with the claimants' freedom to believe that sexual intimacy outside heterosexual marriage "violates the sacredness of marriage between a man and a woman": TWU Covenant, A.R., vol. IV, at p. 403. The claimants remain free to hold this belief.

[227] Similarly, the LSBC does not interfere with the claimants' ability to act in accordance with their beliefs about sexual intimacy. Unlike the claimants in *Multani* and *Hutterian Brethren*, for instance, Mr. Volkenant and other members of the evangelical Christian community at TWU remain free to act according to their religious beliefs in that they can personally abide by the Covenant's proscription against sexual intimacy that "violates the sacredness of marriage between a man and a woman".

[228] What, then, is the religious belief or practice at issue? In my view, it relates to the religious proscription of sexual intimacy outside heterosexual marriage and the importance of imposing this proscription on all students attending the proposed law school at TWU. As the majority has stated, by creating an academic environment where their faith is not constantly tested, the mandatory Covenant "makes it easier" for the claimants to act according to their beliefs: M.R., at para. 72. It ensures that all students are obliged to obey "the authority of Scripture": M.R., at

para. 71. This, in turn, “helps create an environment in which TWU students can grow spiritually”: M.R., at para. 71.

[229] By virtue of being denied the opportunity of attending an accredited law school with a mandatory covenant, the claimants allege that the LSBC has infringed (1) their belief in the importance of attending an accredited law school with a mandatory covenant and, (2) more importantly, their capacity to act in accordance with that belief by attending the proposed law school at TWU: R.F., at para. 96.

[230] This stage of the analysis therefore turns on the sincerity of the claimants’ belief in the importance of attending the proposed law school with its mandatory Covenant. The majority concludes that it “is clear from the record that evangelical members of TWU community sincerely believe that studying in a community defined by religious beliefs in which members follow particular religious rules of conduct contributes to their spiritual development”: M.R., at para. 70.

[231] With respect, I question whether this conclusion misses the mark. Does it suffice for the purposes of s. 2(a) that the claimants sincerely believe that studying in a community defined by religious beliefs *contributes* to their spiritual development (M.R., at para. 70)? Or must the claimants rather show that they sincerely believe that doing so is a practice required by their religion (*Multani*, at para. 35)? The claimants have argued the former on the basis that the jurisprudence only requires that they have a belief that “calls for a particular line of conduct”, irrespective of whether that

practice is “mandatory or perceived-as-mandatory”: R.F., at para. 94, quoting *Amselem*, at paras. 47 and 56.

[232] A careful reading of the jurisprudence does not support the claimants’ position in this appeal. As this Court set out in *Amselem*, the question of whether a belief or practice is objectively required by official religious dogma is irrelevant (para. 47). It suffices that the claimant demonstrate a sincere belief, “having a nexus with religion, which calls for a particular line of conduct”, irrespective of whether that “practice or belief is required by official religious dogma or is in conformity with the position of religious officials”: *Amselem*, at para. 56 (emphasis added). All that matters, then, is that the claimant sincerely believes that their religion compels them to act, regardless of whether that line of conduct is “objectively or subjectively obligatory”: *Amselem*, at para. 56. This is reflected in *Multani*, which states that all “an individual must do is show that he or she sincerely believes that a certain belief or practice is required by his or her religion” (para. 35 (emphasis added)).

[233] If this reading is correct, then much of the affidavit evidence relied on by my colleagues undermines the view that the claimants have advanced a sincere belief or practice that is required by their religion. The majority states that “the limitation in this case is of minor significance because a mandatory covenant is, on the record before us, not absolutely required for the religious practice at issue”: M.R., at para. 87. It explains that “the interference in this case is limited because the record makes clear that prospective TWU law students view studying law in a learning environment

infused with the community's religious beliefs as preferred (rather than necessary) for their spiritual growth": M.R., at para. 88. This evidence should have been considered as part of the infringement analysis because it runs counter to the claimants showing that they sincerely believe that their religious beliefs require a certain practice, per *Multani*, at para. 35.

[234] With respect, I do not see how the majority can have it both ways. The logic of their position seems to come down to this: the claimants have a preference for a practice that is not required, but is nonetheless protected by s. 2(a); however, as the practice is not required, but only preferred, its infringement is of little consequence. In my view, this analysis reflects an overbroad delineation of the right, leading to the infringement being justified too readily.

[235] Despite this concern, I proceed on the assumption that the claimants sincerely believe in the importance of studying in an environment where all students abide by the Covenant. For the purposes of my analysis, I will assume that the first stage of the analysis is satisfied.

(2) Interference

[236] The second stage requires an objective analysis of the interference caused by the impugned state action. This interference must be more than trivial or insubstantial: *R. v. Jones*, [1986] 2 S.C.R. 284, at p. 314; *Edwards Books*, at p. 759; *Saguenay*, at para. 85; *Ktunaxa*, at para. 70. In this case, the claimants must show that

the decision of the LSBC is capable of interfering with their belief in the importance of attending law school with a mandatory covenant or with their capacity to act in accordance with that belief by attending the proposed law school at TWU.

[237] In essence, the claimants have argued that the LSBC has interfered with their ability to study law in an academic environment where all students are required to abide by a set religious code of conduct. For the claimants, the rules set out in the Covenant — and, in particular, the proscription against sexual intimacy outside heterosexual marriage — must be applied to all students who attend law school at TWU. Their argument is that the refusal of the LSBC to accredit the proposed law school on this basis infringes their rights under s. 2(a). Thus, the claimants seek the protection of s. 2(a) not only for their own beliefs and the right to abide by them. They seek the protection of s. 2(a) for their effort to ensure that all students attending TWU abide by these beliefs — regardless of whether they personally share them.

[238] The majority implicitly accepts this when it writes that “[t]he Covenant is a commitment to enforcing a religiously-based code of conduct, not just in respect of one’s own behaviour, but also in respect of other members of the TWU community. The effect of the mandatory Covenant is to restrict the conduct of others”: M.R., at para. 99 (citation omitted; emphasis deleted).

[239] This is where the proper delineation of the scope of s. 2(a) comes into play. As discussed, the freedom of religion protected by s. 2(a) is premised on two principles: the exercise of free will and the absence of constraint. Where the

protection of s. 2(a) is sought for a belief or practice that constrains the conduct of nonbelievers — in other words, those who have freely chosen *not* to believe — the claim falls outside the scope of the freedom. In other words, interference with such a belief or practice is not an infringement of s. 2(a) because the coercion of nonbelievers is not protected by the *Charter*.

[240] On the record before us, the student body at TWU is not coextensive with the religious community of evangelical Christians who attend TWU. Although TWU teaches from a Christian perspective, its statutory mandate requires that its admissions policy not be restricted to Christian students. To the contrary, TWU admits students from all faiths and permits them to hold diverse opinions on moral, ethical, and religious issues. TWU itself states that it is open to “all students who qualify for admission, recognizing that not all affirm the theological views that are vital to the University’s Christian identity”: TWU Covenant, A.R., vol. IV, at p. 539.

[241] This speaks to the argument that TWU is not for everyone. To the contrary, TWU, by virtue of its enabling statute, *literally* is for everyone. Its aim is to “provide for young people of any race, colour, or creed university education in the arts and sciences with an underlying philosophy and viewpoint that is Christian”: *Trinity Western University Act*, s. 3(2). Accordingly, TWU must open the doors of its proposed law school to members of other religions as well as to nonbelievers.

[242] The claimants seek to square this circle by requiring adherence to the Covenant by all who attend the proposed law school. Their attempt to do so is not

protected by the *Charter*. This is because — by means of the mandatory Covenant — the claimants seek to require others outside their religious community to conform to their religious practices. I can find no decision by this Court to the effect that s. 2(a) protects such a right to impose adherence to religious practices on those who do not voluntarily adhere thereto.

[243] Almost every decision of this Court finding an infringement of s. 2(a) involves some interference with the *personal* capacity of rights claimants to adhere to their beliefs or practices. In these cases, claimants were either personally compelled to comply with a rule or decision that conflicted with their beliefs, or they were forced to compromise in their personal capacity to act upon them: *Big M; Edwards Books; Ross; Amselem; Multani; Hutterian Brethren; Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467; *Saguenay*.

[244] There are three possible exceptions to this, none of which undermine the principles set out above. The first is *B. (R.)*. In that case, a majority found that the decision of parents to prohibit doctors from giving their infant daughter a blood transfusion was protected by s. 2(a) because the decision was motivated by their religious beliefs as Jehovah's Witnesses. Writing for the majority, Justice La Forest held that the right of parents to choose the medical treatment of their children in accordance with their religion was a "fundamental aspect of freedom of religion" (para. 105). He consequently found that the statutory procedure that had allowed the doctors to override the parents' wishes infringed s. 2(a), only to find that this limit

could be justified under s. 1. Writing for themselves and two others, Justices Iacobucci and Major found that the statute did not infringe s. 2(a) on the basis that “a parent’s freedom of religion does not include the imposition upon the child of religious practices which threaten the safety, health or life of the child” (para. 225).

[245] The majority in *B. (R.)* relies on both parental rights and freedom of religion to find an infringement of s. 2(a). Unlike the claimants in this appeal, the claimants in *B. (R.)* had an independent legal basis on which they could seek to impose their beliefs on their child — namely, their rights as parents. It goes without saying that the claimants in this appeal have no such rights over those upon whom they seek to impose their beliefs.

[246] The second possible exception is *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772 (“*TWU 2001*”). In that case, the British Columbia College of Teachers (“the BCCT”) refused to allow TWU to take full responsibility for its teacher education program, which had, until then, been run jointly with Simon Fraser University. In withholding its approval, the BCCT was concerned with the downstream impact of the TWU Community Standards — that is, with the possibility that teachers trained at TWU would perpetuate discriminatory beliefs in the classroom.

[247] For the majority, Justices Iacobucci and Bastarache found that the issue at the heart of the appeal was “how to reconcile the religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.’s public school

system”: *TWU 2001*, at para. 28. Although they found that “[t]here is no denying that the decision of the BCCT places a burden on members of a particular religious group” (para. 32), they did not expressly find an infringement of ss. 2(a) or 15(1) nor did they conduct an analysis under s. 1. Rather, they found that “any potential conflict should be resolved through the proper delineation of the rights and values involved” given that “[n]either freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute” (para. 29). In resolving this conflict, the majority focused on the concern of the BCCT that the beliefs stated in the Community Standards pertaining to homosexuality would be transmitted to the public school system. Absent specific evidence of discrimination by TWU graduates, however, this concern was deemed insufficient to justify the decision of the BCCT (para. 38).

[248] The alleged interference with religious freedom in *TWU 2001* did not relate to the capacity of rights claimants to adhere to their beliefs. Rather, it concerned the capacity of TWU to transmit its religious values by requiring its education students to adhere to the Community Standards. The Court, however, made no finding as to whether the BCCT had infringed s. 2(a) by considering the mandatory nature of the Community Standards; rather, the appeal was resolved based on an absence of evidence regarding possible downstream effects. Thus, I do not share the view that *TWU 2001* stands for the proposition that any adverse consideration of the Community Standards (or the Covenant) by a public decision-maker amounts to an infringement of s. 2(a).

[249] The third possible exception is *Loyola*. In that case, Loyola High School applied to the Quebec Minister of Education for an exemption from teaching a compulsory “Ethics and Religious Culture” course on the basis that its own curriculum offered an equivalent course — albeit one taught from a Catholic perspective. The Minister denied the exemption on the basis that the equivalent course could only be taught from a neutral perspective. This Court found that the Minister’s insistence that Loyola teach Catholicism and Catholic ethics from a neutral perspective amounted to a serious infringement of s. 2(a).

[250] In *Loyola*, the infringement of s. 2(a) did not relate to personal capacity of rights claimants — the parents of students attending Loyola High School — to adhere to their own beliefs. It rather concerned their right to transmit these beliefs to their children through religious education. By contrast, the claimants in this appeal do not seek the accreditation of the LSBC to transmit their beliefs through religious education. Rather, they seek accreditation to provide a legal education while compelling the private conduct of adult law students, regardless of their personal beliefs. The religious education of children involves the transmission of religious beliefs; the legal education of adults does not.

[251] In the end, I agree that “a right designed to shield individuals from religious coercion cannot be used as a sword to coerce [conformity to] religious practice”: *Canadian Secular Alliance, I.F.*, at para. 11. This follows if we accept that the freedom of religion guaranteed by the *Charter* is “a function of personal

autonomy and choice”: *Amsalem*, at paras. 42. It is based on the idea “that no one can be forced to adhere to or refrain from a particular set of religious beliefs”: *Loyola*, at para. 59. For this reason, it protects against interference with profoundly personal beliefs and with the voluntary choice to abide by the practices those beliefs require. It does not protect measures by which an individual or a faith community seeks to impose adherence to their religious beliefs or practices on others who do not share their underlying faith. I therefore conclude that what the claimants seek in this appeal falls outside the scope of freedom of religion as guaranteed by the *Charter*.

V. Other Charter Claims

[252] In addition to their 2(a) claim, the claimants have alleged infringements to their expressive and associate freedom rights under ss. 2(b) and 2(d) and their equality rights under s. 15 of the *Charter*. They have not discharged their burden with respect to these claims. In this case, the claimants have provided little to go on regarding these subsidiary arguments, nor were these claims argued extensively before the courts below or before this Court. Accordingly, I would say only that their appeal based on these claims cannot succeed on the record before us.

VI. Application

[253] Given the absence of any *Charter* infringement, the decision of the LSBC must 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*, at para. 54; *Alberta Teachers*, at para. 34; *Saguenay*, at para. 46.

[254] Reviewed under the standard of reasonableness, the decision of the LSBC 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.

[255] As indicated by the majority (at para. 34), the LSBC is “the governing body of a self-regulating profession”. This means that, with respect to questions of procedure, the LSBC had discretion in determining how to carry out its duty to regulate the legal profession in the public interest. Along with the majority, I agree that the *LPA* does not preclude the Benchers from holding a referendum or choosing to be bound by the results of such a referendum. Rather, it only specifies the circumstances in which the members of the LSBC can bind the Benchers. In this case, the Benchers themselves agreed to be bound by the results of the referendum. Consequently, given the deference owed the LSBC in the interpretation of its home statute, I find that the procedure employed by the Benchers is not fatal to the reasonableness of their decision.

[256] I note in passing, however, that had I found a *Charter* infringement, I do not see how it would be possible for the LSBC to proceed by way of a majority vote while upholding its responsibilities under the *Charter*. Is not one of the purposes of the *Charter* to protect against the tyranny of the majority? I fail to see how the LSBC could achieve a “proportionate balancing of the *Charter* protections at play” (M.R., at para. 58) simply by saying that a majority of its members were in favour of denying accreditation.

[257] Turning next to the substance of the decision, the issue becomes whether the decision falls “within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”. As explained by the majority (at para. 53), 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, citing D. Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy”, in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286. Particularly in cases where no reasons are given, a reviewing court may thus look to the record to assess the reasonableness of the decision under review.

[258] In this appeal, the range of possible outcomes was informed by the mandate of the LSBC to regulate the legal profession in the public interest and by the binary choice available to the Benchers. They could either adopt the resolution

denying accreditation or not. Given the deference owed to the LSBC, it was open to the LSBC to conclude that it should not accredit the proposed law school at TWU given the Covenant's imposition of discriminatory barriers to admission. It was also reasonable for the LSBC to conclude that its mandate included promoting equal access to the legal profession, supporting diversity within the bar, and preventing harm to LGBTQ law students (M.R., at para. 40). It was in this context that the LSBC declined to accredit the proposed law school. For these reasons, I conclude that the decision of the LSBC was reasonable.

VII. Conclusion

[259] I agree with the majority in the result, in that I would allow the appeal and restore the decision of the LSBC denying its accreditation of the proposed law school at TWU.

The following are the reasons delivered by

CÔTÉ AND BROWN JJ. —

I. Introduction

[260] One way of understanding this appeal and the appeal in *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33 — and reliance was

frequently placed upon this metaphor during submissions from both sides at the hearing — is that they call upon this Court to decide who controls the door to “the public square”. In other words, accepting that the liberal state must foster pluralism by striving to accommodate difference in the public life of civil society, where does that state obligation — that is, where does that public life — begin? With a private denominational university? Or with a judicially reviewable statutory delegate charged by the provincial legislature to regulate the profession and entry thereto in the public interest?

[261] In our view, fundamental constitutional principles and the statutory jurisdiction of the Law Society of British Columbia (“LSBC”), properly interpreted, lead unavoidably to the legal conclusion that the public regulator controls the door to the public square and owes that obligation. The private denominational university, which is not subject to the *Canadian Charter of Rights and Freedoms* and is exempt from provincial human rights legislation, does not. And, in conditioning access to the public square as it has, the regulator has — on this Court’s own jurisprudence — profoundly interfered with the constitutionally guaranteed freedom of a community of co-religionists to insist upon certain moral commitments from those who wish to join the private space within which it pursues its religiously based practices. While, therefore, the LSBC has purported to act in the cause of ensuring equal access to the profession, it has effectively denied that access to a segment of Canadian society, solely on religious grounds. In our respectful view, this unfortunate state of affairs merits judicial intervention, not affirmation.

[262] We recognize, as has this Court, that “[Trinity Western University] is not for everybody; it is designed to address the needs of people who share a number of religious convictions” (*Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772 (“*TWU 2001*”), at para. 25). Prospective LGBTQ students could only sign the Covenant “at a considerable personal cost” (*TWU 2001*, at para. 25). Further, as the Ontario Divisional Court noted at para. 104, the restrictions contained in the Covenant are such that “those persons . . . who might prefer, for their own purposes, to live in a common law relationship rather than engage in the institution of marriage . . . and . . . those persons who have other religious beliefs” would also not be tempted to apply for admission (*Trinity Western University v. Law Society of Upper Canada*, 2015 ONSC 4250, 126 O.R. (3d) 1).

[263] At the same time, qualities that go to a person’s self-identity are also at stake for the members of the Trinity Western University (“TWU”) community (*R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 759; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at pp. 341 and 346; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 32). Religious freedom cases concern much more than mere belief, as Sachs J. recognized in *Christian Education South Africa v. Minister of Education*, [2000] ZACC 11, 2000 (4) S.A. 757, at para. 33: “Religion is not just a question of belief or doctrine. It is part of a way of life, of a people’s temper and culture.” In particular, religion is also about religious relationships (*Hutterian Brethren*, at para. 182, per LeBel J., dissenting in the result but agreeing with the majority on this point).

[264] These are challenging claims of right for courts to adjudicate, because the stakes for parties are sometimes not fully appreciable by those who do not share their experiences. But this does not mean that we should not try. Indeed, all who occupy judicial office and who assume its responsibilities, as well as lawyers who are called upon to represent members of a diverse public in a pluralistic society, must strive to see claims from the perspectives of all sides, and to “seek to understand groups with which they are unfamiliar” (D. Newman, “Ties that Bind: Religious Freedom and Communities” (2016), 75 *S.C.L.R.* (2d) 3, at p. 16). In a similar vein, McLachlin C.J., speaking extra-judicially, has described the “conscious objectivity” which judges must practise in fulfilling their duty of impartiality, by “recogniz[ing] the legitimacy of diverse experiences and viewpoints”, and “systematically attempt[ing] to imagine how each of the contenders sees the situation” (“Judging: the Challenges of Diversity”, Judicial Studies Committee Inaugural Annual Lecture (2012) (online), at pp. 10 and 12). For his part, Professor Benjamin L. Berger doubts the possibility of adopting a truly empathetic posture to the unfamiliar, but nonetheless finds “adjudicative virtue” in “stay[ing] the culturally forceful hand of the law” and “expand[ing] the margins of legal tolerance” by “furrow[ing one’s] brow in non-comprehension of the religious culture [while turning] an unconcerned shoulder, satisfied that the practice or commitment at stake simply does not offend the culture of Canadian constitutionalism” (*Law’s Religion: Religious Difference and the Claims of Constitutionalism* (2015), at p. 181).

[265] At the end of the day, however, a court of law, particularly when dealing with claims of constitutionally guaranteed rights including freedom of religion, must have regard to the legal principles that guide the relationship between citizen and state, between private and public. And those principles exist to *protect* rights-holders from values which a state actor deems to be “shared”, not to give licence to courts to defer to or impose those values. For the same reason, a court of law ought not in our respectful view to be concerned, as the majority (Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ.) is explicitly concerned, with the “public perception” of what freedom of religion entails (Majority Reasons, at para. 101). The role of courts in these cases is “not to produce social consensus, but to protect the democratic commitment to live together in peace” (M. A. Waldron et al., “Developments in law and secularism in Canada”, in A. J. L. Menuge, ed., *Religious Liberty and the Law: Theistic and Non-Theistic Perspectives* (2018), 106, at p. 111).

[266] We note the invitation of several intervenors to reconsider the framework of analysis 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. In the absence of full submissions on the point, we agree with the majority that this is not an appropriate case in which to reconsider these decisions. That said, we state below certain fundamental concerns we have about the *Doré/Loyola* framework which, in our view, betrays the promise of our Constitution that rights limitations must be demonstrably justified.

[267] Irrespective, however, of which analytical framework is applied — the *Doré/Loyola* framework, or the more rigorous analytical framework described in *R. v. Oakes*, [1986] 1 S.C.R. 103, that we suggest the Constitution may actually require — we would dismiss the appeal from the decision of the British Columbia Court of Appeal (2016 BCCA 423, 405 D.L.R. (4th) 16). Under the LSBC’s governing statute, the only proper purpose of a law faculty approval decision is to ensure that individual graduates are fit to become members of the legal profession because they meet minimum standards of competence and ethical conduct. As the LSBC conceded that there are no concerns relating to the fitness of prospective TWU law graduates, the only defensible exercise of the LSBC’s statutory discretion would have been to approve TWU’s proposed law school.

[268] Even if the LSBC’s statutory “public interest” mandate were to be interpreted such that it had the authority to take considerations other than fitness into account, the decision not to approve TWU’s proposed law faculty unjustifiably limited the TWU community’s freedom of religion. The decision not to approve TWU’s proposed law faculty because of the restrictions contained in the Covenant — a code of conduct protected by provincial human rights legislation — is a profound interference with religious freedom, and is contrary to the state’s duty of religious neutrality.

[269] Further, even were the “public interest” to be understood broadly, as the LSBC contends, accreditation of TWU’s proposed law school would not be

inconsistent with the public interest, so understood. Tolerance and accommodation of difference serve the public interest and foster pluralism. Acceptance by the LSBC of the unequal access effected by the Covenant would signify the accommodation of difference and of the TWU community's right to religious freedom, and not condonation of discrimination against LGBTQ persons. Approval of the proposed law school is, therefore, not inconsistent with "public interest" objectives of maintaining equal access and diversity in the legal profession, and indeed, it promotes those objectives. It follows that, in our view, approving TWU's proposed law school was the only decision reflecting a proportionate balancing between *Charter* rights and the LSBC's statutory objectives.

II. Analysis

F. *The LSBC Exercised Its Discretion for an Improper Purpose and Relied on Irrelevant Considerations*

[270] At the outset, we emphasize that neither our interpretation of the LSBC's governing statute nor the majority's suggests that the LSBC's mandate is ambiguous, such that resort to "*Charter* values" is necessary to determine the limits of the LSBC's mandate (*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 59). We do not dispute that foundational principles underlying the Constitution may aid in *its* interpretation (*Oakes*, at p. 136; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 64-66; *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at para. 25; *R. v. Comeau*, 2018 SCC 15,

at para. 52). But with respect, we fail to see what relevance “accepted principles of constitutional interpretation” (Majority Reasons, at para. 41) have to the interpretation of *the LSBC’s statutory mandate*. Even accepting, for the sake of argument, that it is “beyond dispute that administrative bodies other than human rights tribunals may consider fundamental shared values, such as equality, when making decisions within their sphere of authority” (Majority Reasons, at para. 46), it is the LSBC’s enabling statute, and not “shared values”, which delimits the LSBC’s sphere of authority.

[271] And, as to that sphere of authority, the majority concludes that the LSBC acted pursuant to the broad statutory object of upholding and protecting the public interest in the administration of justice (para. 32). This object is said to grant the LSBC latitude to uphold a positive public perception of the legal profession (para. 40), to eliminate inequitable barriers to legal education (para. 42), and to consider harms to some communities (para. 44). The majority does not, however, properly account for the statutory limits to the LSBC’s public interest mandate.

[272] The importance of recognizing and respecting these limits cannot be overemphasized. This Court has warned against overstating the objective of any measure infringing the *Charter* (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 144). This is especially so when the statutory objective relied upon to justify a *Charter* infringement is a broad mandate to protect the “public interest”, a notion that is inherently vague and difficult to characterize (see for

example *R. v. Morales*, [1992] 3 S.C.R. 711, at pp. 731-32; *R. v. Zundel*, [1992] 2 S.C.R. 731, at p. 762).

[273] In our view, the majority's broad interpretation of the LSBC's public interest mandate eschews this prudent, rights-conscious methodology. It is completely untethered from the express limits to the LSBC's statutory authority found in the *Legal Profession Act*, S.B.C. 1998, c. 9 ("*LPA*"). The LSBC's mandate is limited to the governance of "the society, lawyers, law firms, articulated students and applicants" (s. 11). It does not extend to the governance of law schools, which lie outside its statutory authority. It may only act with a view to upholding and protecting the "public interest" within the bounds of this mandate. These express limits to the LSBC's mandate cannot be disregarded in order to justify the infringement of *Charter* rights. A careful reading of the *LPA* leads us to conclude that the only proper purpose of an approval decision by the LSBC is to ensure that individual licensing applicants are fit for licensing. Given the absence of any concerns relating to the fitness of prospective TWU graduates, the only defensible exercise of the LSBC's statutory discretion for a proper purpose in this case would have been for it to approve TWU's proposed law school.

(4) Limits to the Exercise of Discretion

[274] It is a fundamental principle of administrative law that the exercise of discretion by statutory delegates must conform to the purposes authorized by their enabling statute (G. Cartier, "Administrative Discretion: Between Exercising Power

and Conducting Dialogue”, in C. M. Flood and L. Sossin, eds., *Administrative Law in Context* (2nd ed. 2013), 381, at p. 391; Van Harten et al., *Administrative Law: Cases, Text, and Materials* (7th ed. 2015), at p. 894). “[A] power granted by legislation for one purpose cannot be used by a delegate for another purpose” (D. P. Jones and A. S. de Villars, *Principles of Administrative Law* (6th ed. 2014), at p. 190). Nor may a statutory delegate exercise discretion on the basis of considerations that are, in light of the statute’s purpose, improper or irrelevant (Van Harten et al., at p. 895; *Cartier*, at p. 391; Jones and de Villars, at p. 190).

[275] This same principle lies at the heart of this Court’s decision in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, where, despite the Quebec Liquor Commission’s broad statutory discretion to cancel permits for the sale of alcoholic liquors, the Commission’s decision to revoke Mr. Roncarelli’s permit was “beyond the scope of [its] discretion” because the reasons therefor (Mr. Roncarelli’s actions in support of Jehovah’s Witnesses) were “totally irrelevant to the sale of liquor” (p. 141). The Court elaborated by way of a statement which continues to guide administrative decision making to this day:

In public regulation of this sort there is no such thing as absolute and untrammelled “discretion”, that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. . . . “Discretion” necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. [Emphasis added; p. 140.]

[276] Traditionally, the exercise of discretion taken for an improper purpose or on the basis of irrelevant considerations formed specific grounds for judicial review as an “abuse of discretion” (Cartier, at p. 388). Notably, these grounds were applied by this Court in *Smith & Rhuland Ltd. v. The Queen*, [1953] 2 S.C.R. 95, and *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231. And, they persist under the modern “pragmatic and functional” approach to judicial review. Indeed, this Court, in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 53, reaffirmed that discretionary decisions must “be made within the bounds of the jurisdiction conferred by the statute”, and

in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis*, [1959] S.C.R. 121), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038).

To be clear, these “general principles of administrative law governing the exercise of discretion” include the doctrines of improper purpose and irrelevant consideration, which continue to ensure that the bounds of a decision-maker’s statutory powers are respected.

[277] Cartier accurately summarizes the courts’ task in assessing whether the exercise of discretion was taken for an improper purpose or on the basis of irrelevant considerations, respectively:

In the first case, courts must identify the object authorized by the statute and then determine whether that object or purpose has been followed or not. Similarly, in the second case, the question whether a consideration is relevant or not is usually answered with reference to the object of the statute. [p. 391]

(5) The Purpose of the LSBC's Approval Decision Is to Ensure That Individual Applicants Are Fit for Licensing

[278] In deciding not to approve TWU, the LSBC purported to act under Rule 2-27(4.1) of the *Law Society Rules* (now Rule 2-54(3) of the *Law Society Rules 2015*) (“Rule”), which provides that, to satisfy the academic requirements for licensing, applicants must have a degree from an approved law faculty, a status which the LSBC may, in exercising its discretion, deny.

[279] The Rule sets out no particular criteria for this discretionary decision. Its purpose, and the relevant considerations that may be taken into account in reaching such a decision, must therefore be found in the relevant objectives, duties and powers of the LSBC, as set out by the *LPA (Shell Canada, at pp. 275-79)*. Further, they must be consistent with a contextual and purposive reading of the Rule (see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21).

[280] A plain reading of the Rule, in its entirety, leads to the obvious conclusion that its purpose is to ensure that individual applicants are fit for licensing. The Rule, which falls under the heading “Enrolment in the admission program”, sets out the requirements for an applicant to become licensed, as follows:

...

- (3) An applicant may make an application under subrule (1) by delivering to the Executive Director the following:
 - (a) a completed application for enrolment in a form approved by the Credentials Committee, including a written consent for the release of relevant information to the Society;
 - (b) proof of academic qualification under subrule (4);
 - (c) an articling agreement stating a proposed enrolment start date not less than 30 days from the date that the application is received by the Executive Director;
 - (d) other documents or information that the Credentials Committee may reasonably require;
 - (e) the application fee specified in Schedule 1.
- (4) Each of the following constitutes academic qualification under this Rule:
 - (a) successful completion of the requirements for a bachelor of laws or the equivalent degree from an approved common law faculty of law in a Canadian university;
 - (b) a Certificate of Qualification issued under the authority of the Federation of Law Societies of Canada;
 - (c) approval by the Credentials Committee of the qualifications of a full-time lecturer at the faculty of law of a university in British Columbia.
- (4.1) For the purposes of this rule, a common law faculty of law is approved if it has been approved by the Federation of Law Societies of Canada unless the Benchers adopt a resolution declaring that it is not or has ceased to be an approved faculty of law.

...

It is readily apparent that the approval of law faculties is tied to the purpose of assessing the fitness of an individual applicant for licensing. And the LSBC had received a legal opinion to this effect. It concludes that “[t]he object of [setting out academic or other qualifications] is that the Benchers are satisfied that candidates are ‘of good character and repute and . . . fit to become a barrister and a solicitor of the Supreme Court’ (s. 19(1))” (Legal Opinion re Academic Qualifications, May 8, 2013 reproduced in R.R., vol. III, pp. 87-116, at p. 90). Read in its entire context, the LSBC’s authority to approve law schools acts only as a proxy for determining whether a law school’s graduates, as individual applicants to the LSBC, meet the standards of competence and conduct required to become licensed.

[281] This interpretation respects the express limits to the LSBC’s rule-making powers. Section 11 of the *LPA* grants the LSBC rule-making powers “for the governing of the society, lawyers, law firms, articulated students and applicants, and for the carrying out of [the *LPA*]”. The powers are thus limited to the regulation of the legal profession and its constituent parts, extending no further than the licensing process — the doorway to the profession. Any exercise of the LSBC’s discretion for a purpose extending beyond the express limits set out by s. 11 would be *ultra vires*.

[282] More particularly, the Rule does not grant the LSBC authority to regulate law schools. Applying the maxim of statutory interpretation *expressio unius est exclusio alterius* (“to express one thing is to exclude another”), we can presume that the legislator did not intend to include the governing of law schools among the

LSBC's rule-making powers at s. 11. The scope of its mandate is limited to governance of "the society, lawyers, law firms, articulated students and applicants". Had the legislator intended to grant the LSBC supervisory powers over law schools, it would have explicitly provided for such a significant grant of authority.

[283] This leads us to conclude that, in enacting the Rule under its power to make rules for the governing of applicants, the LSBC sought to regulate entrance into the legal profession by ensuring that individual applicants are fit for licensing.

[284] This interpretation is consistent with the purpose of the *LPA* as a whole. A careful reading of the *LPA* reveals that the scope of the LSBC's mandate is limited to the governance of the practice of law. The *LPA*'s provisions only relate to matters relevant to the governance of the legal profession and its constituent parts (the LSBC, lawyers, law firms, articulated students and applicants). Even its farthest-reaching provisions confirm its limited mandate. For example, Part 3 of the *LPA* (ss. 26 to 35), concerned with the protection of the public, is limited to allegations regarding the conduct or competence of a law firm, lawyer, former lawyer or articulated student (s. 26). Similarly, s. 28, which, under the heading of "Education", empowers benchers to establish and maintain or otherwise support a system of legal education, grant scholarships, bursaries and loans, establish or maintain law libraries, and to provide for publication of court and other legal decisions, expressly confines these actions to those taken "to promote and improve the standard of practice by lawyers". The LSBC's object, duties and powers are, in short, limited to regulating the legal

profession, starting at (but not before) the licensing process — that is, starting at the doorway to the profession.

[285] Section 3 of the *LPA* states the LSBC’s overarching object and duty, which includes upholding and protecting the public interest in the administration of justice by “preserving and protecting the rights and freedoms of all persons”. It is on this basis that the majority concludes that the LSBC’s decision to refuse to approve TWU’s proposed law school because of its admissions policy was a valid exercise of its statutory authority. In doing so, it is our respectful view that it misconstrues the purpose underlying the LSBC’s discretionary power to approve a law school under the Rule and extends the Rule’s scope beyond the limits of the LSBC’s mandate.

[286] Section 3 of the *LPA* cannot be understood in isolation. It must be examined “in [its] entire context and . . . harmoniously with the [*LPA*’s] scheme [and] object” *Rizzo & Rizzo Shoes*, at para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. Section 3 does not grant the LSBC the authority to exercise its statutory powers for a purpose lying outside the scope of its mandate under the guise of “preserving and protecting the rights and freedoms of all persons”. For example, the LSBC could not take measures to promote rights and freedoms by engaging in the regulation of the courts or bar associations, even though such measures might well impact “the public interest in the administration of justice”. These matters fall outside of the scope of its statutory mandate, as does the governance of law schools.

[287] It is the scope of the LSBC's statutory authority that defines how it may carry out its public interest mandate, not the other way around. Had the legislator intended otherwise, the rule-making powers at s. 11 would have presumably provided the LSBC with broad discretionary power to make rules "to uphold and protect the public interest in the administration of justice".

[288] This is not to say that public interest considerations are irrelevant to the exercise of the LSBC's discretionary power. The LSBC's duty is to uphold and protect the public interest; however, this duty may only be exercised within the scope of its statutory mandate. The *LPA* does not empower the LSBC to police human rights standards in law schools. Provincial legislatures, including British Columbia's, have conferred that mandate upon provincial human rights tribunals. The LSBC does not enjoy a free-standing power under its "public interest" mandate to seek out conduct which it finds objectionable, howsoever much the "public interest" might thereby be served. Under the Rule, the LSBC can act in the public interest only for the purpose of ascertaining whether individual applicants are fit for licensing.

[289] While ensuring the competence of licensing applicants clearly falls within the LSBC's mandate, this purpose does not rationally extend to guaranteeing equal access to law schools. The fact that the Rule sets out minimum requirements for licensing confirms that the LSBC is properly concerned with competence, not with merit. Setting admissions criteria to select the "best of the best" is up to law schools. To be clear, the selection of law students does not in any way fall within the LSBC's

mandate, which is confined to the narrow task of ensuring that those who have graduated from law school and who apply for licensing meet minimum standards of competence and ethical conduct. Whether or not law schools have themselves selected the “best of the best” has no bearing on the LSBC’s task of determining who is fit to practise law in British Columbia. Contrary to what the majority concludes at paras. 42 and 43 of their reasons, equal access to the legal profession and diversity in the legal profession are distinct from the duty to ensure competent practice. Indeed, the facts of this appeal are an example. Despite the unequal access effected by the requirement that applicants to TWU commit to a community covenant, the LSBC concedes its lack of concern regarding the competence or ethical conduct of TWU graduates. Relatedly, and while the majority notes (at para. 45) that “[t]he LSBC did not purport to make any other decision governing TWU’s proposed law school or how it should operate”, the majority’s statement (at para. 39) that “[t]he LSBC 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” would logically apply to other aspects of law school admissions which might be said to create inequitable barriers to legal education, such as tuition fees. By the majority’s logic, then, the LSBC would be entitled (or indeed, required) to consider such barriers in accrediting law schools in order to promote the competence of the bar as a whole.

[290] At their core, the majority’s reasons err by assimilating legal education to the LSBC’s mandate. They extend the reach — without any justification grounded in

the terms of the *LPA* — of the LSBC’s “authority as the gatekeeper to the legal profession” (para. 45 (emphasis added)) all the way back to the law school’s threshold. The LSBC must, however, take licensing applicants as they come; its statutory mandate empowers it to control the doorway to the profession, not to decide who knocks on the door. No reference to the LSBC’s history — again, unsupported by the actual terms of the *LPA* — can justify the majority’s endorsement of such a distension of its mandate (see Majority Reasons, at para. 46). Any measures undertaken by the LSBC to promote diversity in the legal profession must fall within the bounds of its statutory mandate *as expressed at the time those actions are undertaken*. Though the majority denies it, by allowing the LSBC to refuse to accredit a law school solely on the basis of its admissions policies — and in the absence of any concerns relating to the fitness of that school’s graduates — it allows the LSBC to do that which it is not statutorily empowered to do — govern law schools by regulating their admissions policies. It does, in effect, tell law schools “how [they] should operate” (Majority Reasons, at para. 45). But so long as a law school’s admissions policies do not raise concerns over its graduates’ fitness to practise law, the LSBC is simply not statutorily empowered to scrutinize them.

[291] The majority’s overextension of the LSBC’s mandate is equally apparent in discussing the LSBC’s duty to “preven[t] harm to LGBTQ law students” (para. 40). The majority correctly notes that any risk of harm falls on “LGBTQ people who attend TWU’s proposed law school” (para. 96 (emphasis added); see also paras. 98 and 103); in other words, the harm occurs in the context of legal education

rather than the legal profession. Again, it is conceded by the LSBC that it has no basis for doubting that the graduates of TWU's proposed law school will be competent lawyers that will practise in accordance with human rights codes prohibiting discrimination against LGBTQ persons. There is, therefore, no basis upon which to find that such harms will manifest in the legal profession. Any harms to marginalized communities in the context of legal education must be considered by provincial human rights tribunals, by legislatures, and by members of the executive, which grant such institutions the power to confer degrees. The LSBC is not a roving, free-floating agent of the state. It cannot take it upon itself to police such matters when they lie beyond its mandate.

[292] Finally, as discussed in more detail below, the “imperative of refusing to condone discrimination against LGBTQ people” (McLachlin C.J.’s Reasons, at para. 137; see also Majority Reasons, at paras. 40 and 105), is not a valid basis for the LSBC’s decision. This Court has already held that denying accreditation should be based on specific evidence rather than “general perceptions” (*TWU 2001*, at para. 38). As we explain below, the recognition of a private actor by the state cannot be construed as amounting to an endorsement of that actor’s religious beliefs or practices.

[293] The only proper purpose for the LSBC’s approval decision is to ensure that individual applicants are fit for licensing. Given that the LSBC concedes that there are no concerns relating to the fitness of prospective TWU graduates, the only

defensible exercise of the LSBC's statutory discretion for a proper purpose would have been to approve TWU.

G. *The LSBC Benchers Fettered Their Discretion in a Manner Inconsistent With Their Statutory Duty*

[294] We disagree with the majority that the Benchers' decision to bind themselves to the results of a referendum on the approval of TWU's proposed law school did not violate their statutory duties (Majority Reasons, at para. 48). While the Benchers may not have had a duty to provide formal reasons (Majority Reasons, at para. 55), the rationale for deference under *Doré* — expertise in applying the *Charter* to a specific set of facts (paras. 47-48) — requires more engagement and consideration from an administrative decision-maker than simply being “alive to the issues”, whatever that may mean (Majority Reasons, at para. 56). Irrespective of whether the Benchers had the authority to be bound by a referendum outside of the circumstances set out in s. 13 of the *LPA*, we agree with the Court of Appeal that, in this case, the Benchers abdicated their duty as administrative decision-makers to properly balance the objectives of the *LPA* with the *Charter* rights implicated by their approval decision.

[295] As the majority recognizes at para. 52 of its reasons, judicial review has always been concerned with both the outcome *and the process* of administrative decision making. We stress that the issue identified by the Court of Appeal was with the lack of reasoning in the process adopted and not the sufficiency of reasons —

whether formal or informal — themselves. The majority’s reliance on *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, and *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360, elides this issue. Indeed, in *Catalyst Paper*, the Court explicitly relied on the municipal council’s rich deliberative process in finding that there was no duty to provide formal reasons when passing a by-law (para. 29). Further, neither *Catalyst Paper* nor *Green* involved the adoption of a by-law that risked infringing the *Charter*. The importance of the reasoning process that must underlie administrative decision making where a *Charter* right is at issue was explicitly stated in *Doré* (at paras. 55-56). Yet, its absence in this case is given no significance whatsoever by the majority.

[296] The LSBC violated its statutory duty by adopting the results of a referendum affecting *Charter* rights without engaging in the process of balancing *Charter* rights and statutory objectives required by *Doré*. It is plain from an examination of the LSBC’s decision-making “process” that any balancing exercise engaged in by the Benchers was disconnected from the outcome the LSBC now seeks to justify, which was merely a rubber stamping of the outcome of a referendum of LSBC members.

[297] As noted by the majority, the Benchers engaged in debate and deliberation on the *Charter* issues during their April 11, 2014 and September 26, 2014 meetings. They decided *against* adopting a resolution declaring TWU’s proposed law school to *not* be an approved faculty of law at the conclusion of each of

those meetings. But that particular deliberation did not lead to the outcome the LSBC now seeks to justify. Instead, despite having (arguably) twice balanced the *Charter* rights implicated with the LSBC's statutory objectives in fulfilment of their statutory duty, the Benchers — at the conclusion of the September 26, 2014 meeting — opted for a binding referendum on the issue of TWU's approval, with the results of that referendum being adopted with *no further discussion* and therefore no substantive debate on October 31, 2014.

[298] In light of this background, it is, with respect, pure historical revisionism to suggest that the Benchers believed their decision “would benefit from the guidance or support of the membership as a whole” (Majority Reasons, at para. 50). Indeed, at the time of their *actual* deliberations on September 26, 2014, the Benchers *already had* the Resolution of the Special General Meeting of LSBC members adopted on June 10, 2014, and they took this expression of the membership's will into account during that meeting. By then opting for a binding referendum, the Benchers abdicated their duty as administrative decision-makers by deferring to a popular vote. It might, of course, be argued that the Benchers preferred any outcome dictated by popular vote to the outcome flowing from their own reasoning. The flaw, however, of such an approach is that the LSBC membership could never, through means of a referendum, engage in the balancing *process* required by *Doré*.

[299] Such a serious error would normally require that the LSBC's decision be quashed and returned for a proper determination. As counsel for the LSBC conceded

before us (transcript, at p. 341), however, “because of the failure of the [LSBC] to . . . determine the proportionate balancing in this situation” it now falls to this Court to determine the “single answer”, which we understand to refer to the proportionate balance between the severity of the limitation on the *Charter* right at issue and the statutory objectives governing the LSBC. The difficulty here is that (as we have already pointed out) the LSBC’s decision is completely devoid of any reasoning.

[300] And yet, the majority justifies deferring to that void by reminding us that reviewing courts “may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome” (para. 56). But, for two reasons, this statement is untenable. First, it does not conform to this Court’s recent direction, in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, at para. 27, that “reviewing courts must look at both the reasons *and* the outcome” (emphasis in original). In other words, it is never sufficient to consider the outcome alone. Indeed, the Court in *Delta Air Lines* went on (at para. 27) to caution that “[i]f we allow reviewing courts to replace the reasons of administrative bodies with their own, the outcome of administrative decisions becomes the sole consideration.” In our respectful view, the majority does both these things: it replaces the (non-) reasons of the LSBC with its own, and makes the outcome the sole consideration.

[301] The second objection to the majority’s statement that courts “may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of

the outcome” is that, of course, there is no record in this case of post-referendum deliberation allowing anyone to “ass[ess] the reasonableness of the outcome”. Still, the majority, even without the benefit of reasons or a relevant record, assures us that “the Benchers came to a decision that reflects a proportionate balancing”. But, and with respect, the majority simply cannot point to *any* basis whatsoever for suggesting that the Benchers conducted any balancing at all, let alone proportionate balancing.

H. *The Doré/Loyola Framework*

[302] Our reasons apply the *Doré/Loyola* framework as we are able to understand it from the jurisprudence, but we note our concerns in relation to this framework for judicial review of *Charter*-infringing administrative decisions. The comments and scholars cited by the Chief Justice (para. 111, fn. 1) are overwhelmingly critical and make clear that the framework’s contours are poorly defined. While we welcome the clarification of the framework articulated in the Chief Justice’s reasons, we find the lack of rationale for insisting on a distinct framework for administrative decisions troubling, particularly in light of the fact that the application of the stages of the *Oakes* test in our jurisprudence is already context-specific (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *RJR-MacDonald*, at para. 132).

[303] In our view, the suggestion in *Doré* (at para. 4) that “an adjudicated administrative decision is not like a law which can, theoretically, be objectively justified by the state, making the traditional s. 1 analysis an awkward fit” does not

account for this Court’s statement that, where a *Charter* infringement can be attributed to individualized decisions of state decision-makers, the proportionality test must apply (*Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at paras. 16 and 21, per Charron J.). Further, it is belied by the application of the *Oakes* test by this Court to administrative decisions in many cases prior to *Doré* (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483; *Dagenais*; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *Greater Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295). That suggestion is also doubtful in light of the ambivalent application of *Doré* in *Loyola*, and by its non-application in *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3. Similarly, this Court avoided applying the deferential *Doré* framework when defining the scope of the *Charter* right in *Association of Justice Counsel v. Canada (Attorney General)*, 2017 SCC 55, [2017] 2 S.C.R. 456, and *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386.

[304] We acknowledge the majority’s insistence (at para. 80) that “the framework set out in *Doré* and affirmed in *Loyola* is not a weak or watered-down version of proportionality”. Rather, it maintains, it is “robust”. But saying so does not

make it so. Indeed, the Chief Justice’s attempt to clarify that framework, combined with the majority’s continued defence of the “robustness” of proportionality as set out in the *Doré/Loyola* framework, simply reinforce our view that the orthodox test — the *Oakes* test — must apply to justify state infringements of *Charter* rights, regardless of the context in which they occur. Holding otherwise subverts the promise of our Constitution that the rights and freedoms guaranteed by the *Charter* will be subject only to “such reasonable limits prescribed by law as can be demonstrably justified” (s. 1).

[305] This is evident in the majority’s own reasons. The state, it says need only show that its decision “gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate” (para. 80, quoting *Loyola*, at para. 39 (emphasis added)). Or, “[p]ut another way, the *Charter* protection must be ‘affected as little as reasonably possible’ in light of the applicable statutory objectives” (para. 80, quoting *Loyola*, at para. 40 (emphasis added)). In other words, under *Doré*, *Charter* rights are guaranteed *only so far as they are consistent with the objectives of the enabling statute*. When push comes to shove, statutory objectives — including, presumably, unconstitutional statutory objectives — trump the right. But s. 52 of the *Constitution Act, 1982*, which provides for the primacy of the Constitution, suggests to us that it should be the other way around — that *rights* trump statutory objectives and decisions taken thereunder. Further, s. 1 of the *Charter* does not guarantee certain rights and freedoms subject only “to the limits imposed by statutory objectives”, but to limits that are “demonstrably justified in a free and democratic society”. As,

therefore, the Court of Appeal for Ontario recently stated, “[a] party bringing a *Charter* challenge is entitled to a judicial determination of whether the *Charter* right has been limited, and the government must have the opportunity to argue that such a limit is justified under s. 1 of the *Charter*: *Symes v. Canada*, [1993] 4 S.C.R. 695, [1993] S.C.J. No. 131, at para. 105 (*per* Iacobucci J.)” (*Gehl v. Canada (Attorney General)*, 2017 ONCA 319, 138 O.R. (3d) 52, at para. 78).

[306] The majority’s continued reliance on “values” protected by the *Charter* as equivalent to “rights” (Majority Reasons, at para. 58), is similarly troubling. These “values” loom large in the majority’s reasons, given its description (at para. 41) of the LSBC’s interest in protecting “the values of equality and human rights”. On this point, the majority also cites to Abella J.’s reference in *Loyola* (at para. 47) to “shared values — equality, human rights and democracy” as “values the state always has a legitimate interest in promoting and protecting”.

[307] We are in agreement with the Chief Justice and our colleague Rowe J. that *Charter* values do not receive independent protection under the *Charter*. In our view, and for several reasons, resorting to *Charter* values as a counterweight to constitutionalized and judicially defined *Charter* rights is a highly questionable practice.

[308] First, *Charter* “values” — unlike *Charter* rights, which are the product of constitutional settlement — are unsourced. They are, therefore, entirely the product of the idiosyncrasies of the judicial mind that pronounces them to be so. And, perhaps

one judge's understanding of "equality" might indeed represent a "shared value" with all Canadians, but perhaps another judge's might not. This in and of itself should call into question the legitimacy of judges or other state actors pronouncing certain "values" to be "shared". Canadians are permitted to hold different sets of values. One person's values may be another person's anathema. We see nothing troubling in this, so long as each person agrees to the other's right to hold and act upon those values in a manner consistent with the limits of core minimal civil commitments which are necessary to secure civic order — none of which are implicated here. What is troubling, however, is the imposition of judicially preferred "values" to limit constitutionally protected rights, including the right to hold other values. As W. A. Galston observes in *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (2002), at p. 131, this risks illiberal outcomes:

When we are trying to decide what to do, we are typically confronted with a multiplicity of worthy principles and genuine goods that are not neatly ordered and that cannot be translated into a common measure of value. This is not ignorance but, rather, the fact of the matter. That is why practical life is so hard. If we could reduce it to some form of quantitative calculation or resolve its quandaries by bowing to clearly dominant values, it would not be so hard. But we cannot, at least not without oversimplifying moral experience and running grave risks. In practice, in both our personal and our public lives, the pursuit of a single dominant value, whatever the cost, typically produces side consequences . . . that we ought not ignore and that few would willingly accept. . . .

. . . Life would be simpler if there were clear rules to resolve the clashes between politics and its competitors. But there are not. When a parent, or artist, or faith community, or philosopher challenges the political system's right to constrain thought and action, those involved must seek ways of adjudicating the conflict that does not begin by begging the question and does not end in oppression. [Emphasis added.]

[309] Secondly, and relatedly, *Charter* “values”, as stated by the majority, are amorphous and, just as importantly, undefined. Lacking the doctrinal structure which courts have carefully crafted over the past 35 years to give substantive meaning to *Charter* rights (including the right to equality) and to guide their application, *Charter* values like “equality”, “justice”, and “dignity” become mere rhetorical devices by which courts can give priority to particular moral judgments, under the guise of undefined “values”, over other values and over *Charter* rights themselves.

[310] Take, for example, the majority’s preferred value of “equality”. In our view, without further definition this is too vague a notion on which to ground a claim to equal treatment in any and all concrete situations, such as admission to a law school. Of course, as a legal claim, equality relates to differential application of a *specific rule* to a certain group of people in a certain legal context. But the majority does not (and cannot) point to a specific legal rule or right to ground the application of a value of equality here. Rather, it advances “equality” in a purely abstract sense, such that it could mean almost anything. For example, an acceptable legal incarnation of the abstract notion, “equality” is a principle of the rule of law that all are equal before and under the law, such that all have a claim to equal protection and to equal application of the law (T. Bingham, *The Rule of Law* (2010), at pp. 55-59; F. C. DeCoste, *On Coming to Law: An Introduction to Law in Liberal Societies* (3rd ed. 2011), at p. 178). But equality in an absolute sense is also perfectly compatible with a totalitarian state, being easier to impose where freedom is limited. “Equality” as an abstraction could also mean tolerance of difference, as Justice Sachs said in *National*

Coalition for Gay and Lesbian Equality v. Minister of Justice, [1998] ZACC 15, 1999

(1) S.A. 6, at para. 132:

...equality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference. [Emphasis added.]

[311] None of these (or innumerable other) meanings of “equality” as an abstraction are relied on by the majority or are evident in its reasons. Rather, by relying on a sweeping abstraction, the majority avoids actually making explicit its moral judgment, its premises and the legal authority on which it rests. A “value” of “equality” is, therefore, a questionable notion against which to balance the exercise by the TWU community of its *Charter*-protected rights.

[312] Finally, we echo McLachlin C.J.’s comment that “the onus is on the state actor that made the rights-infringing decision (in this case the LSBC) to demonstrate that the limits their decisions impose on the rights of the claimants are reasonable and demonstrably justifiable in a free and democratic society” (para. 117). This Court has, however, been silent on who bears this onus in the administrative context, leaving a conspicuous and serious lacuna in the *Doré/Loyola* framework. Inexplicably, and despite the challenge *on this very question* posed by the reasons of the Chief Justice and of Rowe J., the majority maintains this silence, thereby failing to clarify the

matter. With respect, this hardly bolsters the credibility of the *Doré/Loyola* framework.

[313] It follows that we reject the majority’s claim that its reasons “explain why and how the *Doré/Loyola* framework applies here” (Majority reasons, at para. 59 (emphasis added)). On the basic question of who bears the onus, the majority explains nothing about *how* that framework applies — whether here, or anywhere else. In particular, the majority’s resort to the passive tense (“the reviewing court *must be satisfied* that the decision reflects a proportionate balance”) fails to provide the necessary guidance, since it leaves reviewing courts guessing about precisely who must do the “*satisfying*” — the rights-holder, or the state actor. Further, and again with respect, the majority’s invocation of *stare decisis* (“*Doré* and *Loyola* are binding precedents”) is no answer to good faith attempts in concurring and dissenting judgments to clarify precedent. A precedent of this Court should be strong enough to withstand clarification of who carries the burden of proof.

[314] As to how *we* would resolve the question of onus under *Doré/Loyola*, it is this simple: either the majority’s statements about the *Doré/Loyola* framework’s equivalency to *Oakes* and about the “same justificatory muscles” being flexed (Majority Reasons, at para. 82) are empty and meaningless words, or they are statements to be taken seriously. And if they are statements to be taken seriously, they must in our view mean that the burden to justify a rights limitation rests with the state actor under *Doré/Loyola*, just as it does when *Oakes* flexes its “justificatory muscles”.

I. *The LSBC Benchers' Decision Is an Infringement of TWU's Section 2(a) Charter Rights*

[315] We agree with the majority that the LSBC decision not to approve TWU's proposed law school infringes the religious freedom of members of the TWU community (Majority Reasons, at paras. 60-75). The LSBC was bound to make its accreditation decision regarding TWU's proposed law school in a way that conforms to the *Charter*-protected religious freedom of members of the TWU community who seek to offer and wish to receive a Christian education (*Loyola*, at para. 34). As the majority acknowledges, religious freedom is not just about private and individual beliefs and practices; it has a relational or communal character (*Hutterian Brethren*, at para. 182; *Loyola*, at paras. 59-60, 91 and 96). While it may not be necessary to determine whether TWU, *qua* institution, enjoys a right to religious freedom in its own right for the purposes of this appeal (Majority Reasons, at para. 61), in our view, ensuring full protection for the "constitutionally protected communal aspects of...religious beliefs and practice" requires more than simply aggregating individual rights claims under the amorphous umbrella of an institution's "community" (*Loyola*, at paras. 33 and 130). That being said, for the purposes of this appeal we adopt the majority's description of the rights-holder as the "TWU community".

[316] We emphasize, like our colleague McLachlin C.J. (paras. 122 and 124), that freedom of religion under the *Charter*, interpreted broadly and purposively, also captures the freedom of members of the TWU community *to express* their religious

beliefs through the Covenant and *to associate* with one another in order to study law in an educational community which reflects their religious beliefs. Religious freedom is “not just about individuals praying alone but about communities of faith living out their traditions and religious lives” (Newman, at p. 9). Freedom of religion is among the “original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order” (*Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, at p. 329, per Rand J.).

[317] It follows, therefore, that we reject our colleague Rowe J.’s proposed narrowing of the scope of activity protected by the right to freedom of religion (paras. 231-34). In our view, looking only to circumstances in which “the claimant sincerely believes that their religion compels them to act” does not begin to account for the scope of activities identified by this Court in *Big M Drug Mart*, at p. 336. As this Court recognized in *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 47, “[i]t is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection.” Not every adherent will “declare religious beliefs openly” because they feel compelled to do so. Nor will every adherent “teach” or “disseminate” religious belief out of compulsion. Rather, they may freely choose to do so.

[318] We agree with the analytical approach set out in the reasons of the majority (at paras. 62 and 63) and McLachlin C.J. (at para. 120): a s. 2(a) *Charter*

infringement is made out where a claimant establishes that impugned state conduct interferes, in a manner that is more than trivial or insubstantial, with their ability to act in accordance with a sincere practice or belief that has a nexus with religion (*Amselem*, at paras. 56 and 65; *Multani*, at para. 34; *Loyola*, at para. 134; *Ktunaxa*, at para. 68).

[319] In this case, it is the TWU community's expression of religious belief through the practice of creating and adhering to a biblically grounded Covenant that is at issue. The Covenant describes TWU as "a community that strives to live according to biblical precepts, believing that this will optimize the University's capacity to fulfill its mission" (TWU Community Covenant Agreement, reproduced in A.R., vol. III, pp. 401-5, at p. 401). For members of the TWU community, religious belief and education are inextricably linked (TWU Mission Statement; TWU Purpose Statement; TWU Core Values, reproduced in R.R., vol. I, at pp. 119-21). As described in the affidavit evidence of TWU students, the Covenant is a key mechanism for facilitating students' spiritual development and growth in the Christian faith so as to engender a personal connection with the divine (Affidavit #1 of Brayden Volkenant, July 30, 2014, reproduced in R.R., vol. V, pp. 42-46, at p. 44). Covenanting assists in the creation and strengthening of a religious community which includes all those who study and work at TWU. It fosters their moral and spiritual growth in an academic setting. Members of the TWU community sincerely believe that, as a manifestation of their creed, studying, teaching and working in a post-secondary educational environment where all participants covenant with those around

them — regardless of their personal beliefs — subjectively engenders their personal connection with the divine.

[320] The LSBC decision was “capable of interfering with religious belief or practice” in a manner that was not trivial or insubstantial (*Edwards Books*, at p. 759; *Amselem*, at para. 60). This assessment is an “objective” one (*Hutterian Brethren*, at para. 89), and the distinction between obligatory and non-obligatory practices is irrelevant to determining whether an interference is more than trivial or insubstantial (*Amselem*, at para. 75). The denial of the benefit of LSBC approval in this case negatively impacts the TWU community’s ability to practise its beliefs through the Covenant at an approved law school. As we explain below, not only was this interference not trivial or insubstantial, it violated the state’s duty of neutrality and profoundly interfered with the religious freedom of the TWU community.

J. *Proportionality: The Infringement Was Not Proportionate*

(1) The LSBC Approval Decision Does Not Balance the TWU Community’s Section 2(a) Rights With a Relevant Statutory Objective

[321] In *TWU 2001*, at para. 35, this Court emphasized that a “restriction on freedom of religion must be justified by evidence that the exercise of this freedom . . . will, in the circumstances of [a] case, have a detrimental impact” on the statutory decision-maker’s ability to fulfill its statutory mandate. Just as justifying the infringement in *TWU 2001* required a detrimental impact on the school system to be

demonstrated, justification in this case requires evidence of a detrimental impact in the form of the unfitness of future graduates of TWU's proposed law school's to practise law.

[322] At the justification stage, care must be taken not to overstate the objective of any measure infringing the *Charter*: “The objective relevant to the s. 1 analysis is the objective of the infringing measure, since it is the infringing measure and nothing else which is sought to be justified. If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised” (*RJR-MacDonald*, at para. 144 (emphasis deleted)). We accept that in the administrative law context, judicial review of individualized decisions made pursuant to statutory authority which is not itself challenged may not require the objectives of the legislation to be reviewed at the justification stage (*Multani*, at para. 155, per LeBel J.). Even, however, where a decision-maker's authority is not challenged (and particularly where a decision-maker does not provide any formal reasons whatsoever), we think it is worth emphasizing the importance of a reviewing court carefully ensuring that the objectives put forward by the state actor find their source in the actual grant of authority. Doing so avoids the danger that objectives said to advance a statutory mandate might be invented holus-bolus after an infringement is claimed. This is precisely the risk that materialized here: while the majority refers to the LSBC's “interpretation of its statutory mandate”, the decision-making process adopted by the LSBC did not, at the time of the decision, involve *any* delineation or articulation of any particular statutory objectives.

[323] As we have already recounted, the LSBC’s statutory objective in rendering an approval decision is to ensure that individual applicants are fit for licensing. And, as the fitness of future graduates of TWU’s proposed law school was not in dispute, this statutory objective cannot justify any limitations on the TWU community’s s. 2(a) rights. But as we will explain (under heading (3) “Approving TWU’s Proposed Law School Is Not Against the LSBC’s Public Interest Mandate”), *even if* the LSBC’s statutory mandate had permitted the consideration of broader “public interest” concerns invoked by the LSBC and the majority, the LSBC’s decision would not be justified, since withholding approval substantially interferes with the TWU community’s freedom of religion and approving TWU’s proposed law school was not against the public interest, so understood.

(2) The LSBC Approval Decision Substantially Interferes With Freedom of Religion

[324] In our view, the LSBC approval decision represents a profound interference with religious freedom: it is a measure that undermines the core character of a lawful religious institution and disrupts the vitality of the TWU community (*Loyola*, at para. 67). While the approval decision under review may appear to be facially neutral (as it denies a benefit and does not purport to directly compel or prohibit a religious practice), it is substantively coercive in nature. As the majority recognizes, at para. 99 of its reasons, “the TWU community has the right to determine the rules of conduct which govern its members” through its Covenant. Indeed, the TWU Covenant is protected by British Columbia’s *Human Rights Code*, R.S.B.C.

1996, c. 210, s. 41(1). Yet, notwithstanding that right and that statutory protection, the LSBC approval decision makes state acceptance contingent upon the TWU community manifesting its beliefs *in a particular way*. That this is so is, on this record, beyond dispute. As noted by the British Columbia Court of Appeal, “the Law Society was prepared to approve the law school if TWU agreed to remove the offending portions of the Covenant requiring students to abstain from ‘sexual intimacy that violates the sacredness of marriage between a man and a woman’” (para. 176; see also the respondents’ Judicial Review Petition, reproduced in A.R., vol. I, pp. 125-55, at p. 136, at para. 45). This is highly intrusive conduct by a state actor into the religious practices of the TWU community. That conduct, like the ensuing LSBC decision to deny accreditation, contravened the state’s duty of religious neutrality: each represented an expression by the state of religious preference which promotes the participation of non-believers, or believers of a certain kind, to the exclusion of the community of believers found at TWU (*Mouvement laïque*, at paras. 74-78).

[325] The majority concludes that the infringement in this case was “limited” and “of minor significance” (paras. 86-90). We agree with the Chief Justice (at paras. 128-32) that the fact the Covenant is not “absolutely required” and “preferred (rather than necessary)” does not diminish the severity of the infringement in this case.

- (3) Approving TWU’s Proposed Law School Is Not Against the LSBC’s Public Interest Mandate

[326] In our view, even were the majority's overbroad interpretation of the LSBC's statutory mandate to apply, approving TWU's proposed law school would not undermine the statutory objectives which the majority identifies as relevant to deciding whether or not to approve TWU's proposed law school. Accommodating religious diversity *is* in "the public interest", broadly understood, and approving the proposed law school does not condone discrimination against LGBTQ persons.

[327] The majority states that the decision not to approve TWU's proposed law school furthers its public interest objective by "maintaining equal access to and diversity in the legal profession" (Majority Reasons, at paras. 93-95). We recognize, as this Court has previously recognized, that while there is evidence before us that some LGBTQ persons do attend TWU, the vast majority of LGBTQ students "would not be tempted to apply for admission, and could only sign the so-called student contract at a considerable personal cost. TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions" (*TWU 2001*, at para. 25). In our view, however, the majority fails to appreciate that the unequal access resulting from the Covenant is a function of accommodating religious freedom, which itself advances the public interest by promoting diversity in a liberal, pluralist society.

[328] The rights recognized in the *Charter* and the enshrinement of multiculturalism therein reflect the premise of our constitutional law and history that pluralism is intrinsically valuable. Our colleague McLachlin C.J. notes Canada's long

history of religious schools (para. 130). Similarly, and writing extra-judicially, our colleague Karakatsanis J. has observed that, “[i]n a global environment where religious accommodation is sometimes seen as a detriment, Canada has found a way to welcome difference” (quoted in H. MacIvor and A. H. Milnes, eds., *Canada at 150: Building a Free and Democratic Society* (2017), at p. 9; see also M. A. Yahya, “Traditions of Religious Liberty in Early Canadian History” in D. Newman, ed., *Religious Freedom and Communities* (2016) 49, at p. 49).

[329] But this generous and historically Canadian posture towards religious accommodation stands in stark contrast to the majority’s view of the pursuit of statutory objectives as “unavoidabl[y]” limiting the individual freedoms protected by the *Charter* (Majority Reasons, at para. 100). This view fundamentally misconceives the role of the state in a multicultural and democratic society. As described by W. A. Galston, “[i]n a liberal pluralist regime, a key end is the creation of social space within which individuals and groups can freely pursue their distinctive visions of what gives meaning and worth to human existence” (*The Practice of Liberal Pluralism* (2005), at p. 3). Or as Sachs J. said in *Christian Education South Africa* (at paras. 23-24), “if society is to be open and democratic in the fullest sense it needs to be tolerant and accepting of cultural pluralism” and allow “individuals and communities . . . to enjoy what has been called the ‘right to be different’”.

[330] We emphasize that it is the state and state actors — not private institutions like TWU — which are constitutionally bound to accommodate difference in order to foster pluralism in public life.

[331] This is entirely consistent with this Court’s jurisprudence. In *Big M Drug Mart*, this Court recognized (at p. 336) that “[a] truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct.” It is therefore not open to the state to impose values that it deems to be “shared” upon those who, for religious reasons, take a contrary view. The *Charter* protects the rights of religious adherents, among others, to participate in Canadian public life in a way that is consistent with *their own* values. By accommodating diverse beliefs and values, the state protects and promotes the *Charter* rights of all Canadians. As the five-member panel of the British Columbia Court of Appeal noted, where it attempts to do more, it risks “impos[ing] its views on the minority in a manner that is in itself intolerant and illiberal” (C.A. Reasons, at para. 193).

[332] In *TWU 2001*, this Court held (at para. 35) that “freedom of religion is not accommodated if the consequence of its exercise is the denial of the right of full participation in society”. This is, of course, consistent with the majority’s acknowledgment (at para. 101) that “a secular state cannot interfere with religious freedom unless it conflicts with or harms overriding public interests”. The majority then goes on to observe, correctly, that this Court in *Big M Drug Mart* (at p. 346)

noted that a secular state can act to limit religious freedom “where an individual’s religious beliefs or practices have the effect of ‘injur[ing] his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own’” (para. 101). But, and with respect, the majority points to no legally cognizable injury here. Rather, it affirms the LSBC decision which undermines secularism itself. Properly understood, secularism connotes pluralism and respect for diversity, not the suppression of full participation in society by imposing a forced choice between conformity with a single majoritarian norm and withdrawal from the public square. Secularism does not exclude religious beliefs, even discriminatory religious beliefs, from the public square. Rather, it guarantees an inclusive public square by neither privileging nor silencing any single view.

[333] Simply put, the secular state is a neutral state, which refrains from espousing “values” that undermine or go beyond what is necessary for the civic participation of all. As Iacobucci J. recognized in *Amselem*, at para. 50, “the State is in no position to be, nor should it become, the arbiter of religious dogma”. We agree, and would add that the state is equally unfit to be the arbiter of *irreligious* dogma (see *Mouvement laïque*, at para. 70). As this Court said in *Mouvement laïque* (at para. 72 (emphasis added)), “[state] neutrality requires that the state neither favour nor hinder any particular belief, and the same holds true for non-belief”. Either way, state neutrality must prevail.

[334] It follows from the foregoing that accommodating diverse beliefs and values is a precondition to secularism and pluralism. Further, it is necessary to ensure that the dignity of all members of society is protected. “Tolerance”, then, means forbearing, and allowing for difference. “[I]t is a feeble notion of pluralism that transforms ‘tolerance’ into ‘mandated approval or acceptance’” (*Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710, at para. 132, per Gonthier J., dissenting in the result but agreeing with the majority on this point).

[335] The “public interest”, broadly understood, is therefore served by accommodating TWU’s religious practices, including the Covenant. That this is so is confirmed by provincial and federal legislation. Contrary to the LSBC decision under review, the Legislative Assembly of British Columbia has already determined that the public interest is served by accommodating religious communities by providing that they do not contravene provincial human rights law when they grant a preference to members of their own group (*Human Rights Code*, s. 41). This provision was described by this Court in *TWU 2001*, at para. 28, as “accommodat[ing] religious freedoms by allowing religious institutions to discriminate in their admissions policies on the basis of religion”. The practical exclusion of LGBTQ individuals from attending TWU’s proposed law school is therefore a direct result of *the Legislature’s accommodation of the TWU community*. Further, that exclusion — which expresses a community code of conduct in conformity with orthodox evangelical beliefs — is not directed to LGBTQ persons; no one group is singled out, and many others (notably unmarried heterosexual persons) would be bound by it. The purpose of TWU’s

admissions policy is not to exclude LGBTQ persons, or anybody else, but to establish a code of conduct which ensures the vitality of its religious community.

[336] In addition, the holding and expression of the moral views of marriage which underpin the portions of TWU's Covenant that are at issue here have been expressly recognized by Parliament as being not inconsistent with the public interest and worthy of accommodation (*Civil Marriage Act*, S.C. 2005, c. 33, preamble and s. 3.1):

...

WHEREAS it is not against the public interest to hold and publicly express diverse views on marriage;

...

3.1 For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms* or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom.

[337] That federal and provincial legislators alike have taken this view should not surprise. Pluralism, and the religious accommodation necessary to secure it, is inherently valuable. In a country whose people sometimes harbour conflicting moral values that cannot be reconciled to a single conception of how one should live life,

there is wisdom in the idea that the public sphere is for all to share, even where beliefs differ. Hence this Court's statement in *TWU 2001*, at para. 33, that "[t]he diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected." It follows that, while the public interest is served by the state's enforcement of minimal, core civil commitments which are necessary to secure civic order, legislators have also recognized that the public interest is also served by promoting the accommodation of difference. The LSBC's decision repudiates this wisdom and is unworthy of this Court's affirmation.

[338] Finally, and contrary to our colleague McLachlin C.J.'s view (at paras. 137, 145-46 and 149-50), we see no basis for concern that approval by the LSBC would amount to "condoning" the content of the Covenant or discrimination against LGBTQ persons. As previously explained, the LSBC does not govern law schools. There is no basis upon which to conclude that law schools exercise a public function on behalf of the LSBC. It therefore cannot be said that the LSBC would, by accrediting TWU, condone discrimination indirectly. Nor, for that matter, can it be said that other provincial law societies (which decided to accredit TWU's law school on the recommendation of the Federation of Law Societies of Canada), or the Federation itself, condoned discrimination indirectly. State recognition of the rights of a private actor does not amount to an endorsement of that actor's beliefs, whether that recognition takes the form of an approval decision of the LSBC, or the Legislature's enactment of s. 41 of the *Human Rights Code*, or Parliament's inclusion of the

preamble and s. 3.1 of the *Civil Marriage Act*. Equating approval to condonation turns the protective shield of the *Charter* into a sword by effectively imposing *Charter* obligations on private actors. And, it operates to exclude religious institutions, and therefore, religious communities, from the public sphere solely because they choose to exercise their *Charter*-protected religious beliefs. As noted by V. M. Muñoz-Fraticelli, “if every accrediting decision implies complicity with the values of the program that is licensed, then there is no possibility for diversity of values in any field that requires state approval. Religious education, for instance, would be permitted only when religious doctrine is perfectly congruent with the ethos of the state” (“The (Im)possibility of Christian Education” (2016), 75 *S.C.L.R.* (2d) 209, at p. 220).

[339] The implications of this logic are pernicious and potentially far-reaching. Even if, for example, the portion of the Covenant which pertains to sexual relations outside of traditional marriage were removed, on the Chief Justice’s reasoning the LSBC *could not* approve the proposed law school, since the admissions policy would still exclude persons who could not agree to live by the tenets of the evangelical Christian faith as expressed by the Covenant. This, even though the LSBC’s overtures to TWU (see para. 324, above) suggest that it found that particular part of the Covenant to be unobjectionable. This logic also runs counter to this Court’s decision in the *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698, which found that the state could not compel religious officials or houses of worship to perform civil or religious same-sex marriages contrary to their religious beliefs, even

though the marriages performed by these officials are ultimately recognized by the state (paras. 59-60). The Court, in that instance, properly distinguished between endorsement by the state, and *Charter*-compliant accommodation of s. 2(a) rights by the neutral, secular state.

[340] In short, both Parliament and British Columbia's Legislature have recognized the so-called "discriminatory" (McLachlin C.J.'s Reasons, at para. 138), "degrading and disrespectful" (Majority Reasons, at para. 101) practices represented by the TWU Covenant as consistent with the public interest, legal and worthy of accommodation. Such legislatively accommodated and *Charter*-protected religious practices, once exercised, cannot be cited by a state-actor as a reason justifying the exclusion of a religious community from public recognition. Approval of TWU's proposed law school would not represent a state preference for evangelical Christianity, but rather a recognition of the state's duty — which the LSBC failed to observe — to accommodate diverse religious beliefs without scrutinizing their content.

III. Conclusion

[341] Under the LSBC's governing statute, the only proper purpose of a law faculty approval decision is to ensure the fitness of individual graduates to become members of the legal profession. The LSBC's decision denying approval to TWU's proposed law school has a profound impact on the s. 2(a) rights of the TWU community. Even if the LSBC's statutory "public interest" mandate were to be

interpreted such that it had the authority to take considerations other than fitness into account, approving the proposed law school is not contrary to the public interest objectives of maintaining equal access and diversity in the legal profession. Nor does it condone discrimination against LGBTQ persons. In our view, then, the only decision reflecting a proportionate balancing between *Charter* rights and the LSBC's statutory objectives would be to approve TWU's proposed law school.

[342] The appeal should be dismissed. We therefore dissent.

Appeal allowed with costs, CÔTÉ and BROWN JJ. dissenting.

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Solicitor for the intervener the Canadian Association of University Teachers: Canadian Association of University Teachers, Ottawa.

Solicitors for the intervener the Law Students' Society of Ontario: Davies Ward Phillips & Vineberg, Toronto.

Solicitors for the intervener the Seventh-day Adventist Church in Canada: Miller Thomson, Calgary.

Solicitors for the intervener the BC LGBTQ Coalition: JFK Law Corporation, Vancouver; Mandell Pinder, Vancouver.

Solicitors for the interveners the Evangelical Fellowship of Canada and Christian Higher Education Canada: Vincent Dagenais Gibson, Ottawa.

Solicitors for the intervener the British Columbia Humanist Association: Hakemi & Ridgedale, Vancouver.

Solicitors for the intervener Egale Canada Human Rights Trust: Goldblatt Partners, Toronto.

Solicitors for the intervener the Faith, Fealty & Creed Society: Michael Sobkin, Ottawa; Benefic Law Corporation, Vancouver.

Solicitors for the interveners the Roman Catholic Archdiocese of Vancouver, the Catholic Civil Rights League and the Faith and Freedom Alliance: Foy Allison Law, West Vancouver; Philip H. Horgan Law Office, Toronto.

Solicitors for the intervener the Canadian Secular Alliance: JFK Law Corporation, Vancouver; Farris, Vaughan, Wills & Murphy, Vancouver.

Solicitors for the intervener the West Coast Women's Legal Education and Action Fund: British Columbia Teachers' Federation, Vancouver; West Coast Women's Legal Education and Action Fund, Vancouver.

Solicitors for the intervener the World Sikh Organization of Canada: Nanda & Company, Edmonton; World Sikh Organization of Canada, Newmarket, Ontario.