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CONVOCATION

PUBLIC SESSION

THURSDAY, APRIL 10, 2014 - 9:00 A.M.

OSGOODE HALL, TORONTO

1 CONVOCATION ATTENDANCE - MORNING SESSION

2 TREASURER - Thomas G. Conway

3 Robert P. Armstrong (ph.) George D. Hunter (ph.)

4 Vern Krishna Gavin MacKenzie

5 Harvey Strosberg Marion Boyd

6 Jack Rabinovitch Jan Richardson (ph.)

7 Gerald Sheff Baljit Sikand

8 Catherine Strosberg (ph.) Larry Banack

9 Paul Copeland (ph.) Patrick Furlong (ph.)

10 Ron Manes (ph.) Ross Murray

11 Heather Ross (ph.) Clayton Ruby

12 Gerald A. Swaye Bradley H. Wright (ph.)

13 Roger Yachetti (ph.) Raj Anand

14 Constance Backhouse (ph.) Jack Braithwaite

15 Christopher D. Bredt Robert Burd

16 John Callaghan John A. Campion

17 Cathy Corsetti Marian Louise Dickson

18 Adriana Doyle Ross F. Earnshaw

19 Lawrence Eustace (ph.) Robert Evans

20 Julian Falconer Avvy Go

21 Howard Goldblatt Michelle Haigh

22 Susan M. Hare Carol Hartman

23 Jacqueline Horvat Brian Lawrie

24 Janet Leiper Michael Lerner

25 Marian Lippa Virginia MacLean (ph.)

1	William McDowell	Susan T. McGrath
2	Malcolm Mercer	Janet E. Minor
3	Barbara Murchie	Julian Porter
4	Judith M. Potter	Nicholas John Pustina
5	Susan Richer	Linda Rothstein
6	Mark Sandler	James Scarfone (ph.)
7	Paul Schabas	Alan G. Silverstein
8	Joseph Sullivan	Beth Symes
9	Peter Wardle	Laurie H. Pawlitza

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1 CONVOCATION ATTENDANCE - AFTERNOON SESSION

2 TREASURER - Thomas G. Conway

3 Gavin MacKenzie Marion Boyd

4 Jack Rabinovitch Jan Richardson (ph.)

5 Gerald Sheff Catherine Strosberg (ph)

6 Patrick Furlong (ph.) Ron Manes (ph.)

7 Clayton Ruby Bradley H. Wright (ph.)

8 Roger Yachetti (ph.) Raj Anand

9 Constance Backhouse (ph.) Jack Braithwaite

10 Christopher D. Bredt Robert Burd

11 John Callaghan John A. Campion

12 Cathy Corsetti Marian Louise Dickson

13 Adriana Doyle Ross F. Earnshaw

14 Robert Evans Julian Falconer

15 Avvy Go Howard Goldblatt

16 Michelle Haigh Susan M. Hare

17 Jacqueline Horvat Brian Lawrie

18 Michael Lerner Marian Lipa

19 Virginia MacLean (ph.) William McDowell

20 Susan T. McGrath Janet E. Minor

21 Barbara Murchie Julian Porter

22 Judith M. Potter Nicholas John Pustina

23 Susan Richer Linda Rothstein

24 James Scarfone (ph.) Paul Schabas

25 Alan G. Silverstein Joseph Sullivan

1 Beth Symes

Laurie H. Pawlitza

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INDEX

MATTER	PAGE NO.
TREASURER'S REMARKS	8
ADDRESS BY FREYA KRISTJANSON	16
DISCUSSION OF TRINITY WESTERN UNIVERSITY	
ACCREDITATION	24

1 --- Upon commencing at 9:00 a.m.

2 TREASURER CONWAY: Good morning,
3 everyone. I'd like to take attendance, for those
4 members of Convocation who are attending by phone.
5 When I call your name, would you please indicate that
6 you're present. Robert Armstrong?

7 MR. ARMSTRONG: Good morning, Treasurer.

8 TREASURER CONWAY: Constance Backhouse?

9 MS. BACKHOUSE: Present.

10 TREASURER CONWAY: Larry Banack?

11 MR. BANACK: Present in the room.

12 TREASURER CONWAY: Thank you. Paul
13 Copeland? Paul Copeland? Seymour Epstein?

14 MR. COPELAND: Present. Paul Copeland
15 present.

16 TREASURER CONWAY: Thank you. Seymour
17 Epstein? Lawrence Eustace?

18 MR. EUSTACE: I'm here.

19 TREASURER CONWAY: Patrick Furlong?

20 MR. FURLONG: Here.

21 TREASURER CONWAY: Virginia MacLean?

22 MS. MacLEAN: Here.

23 TREASURER CONWAY: Jan Richardson?

24 MS. RICHARDSON: Present.

25 TREASURER CONWAY: Heather Ross?

1 MS. ROSS: Present.

2 TREASURER CONWAY: Catherine Strosberg?

3 MS. STROSBERG: Present.

4 TREASURER CONWAY: Bradley Wright?

5 MR. WRIGHT: Here.

6 TREASURER CONWAY: James Scarfone?

7 MR. SCARFONE: Here.

8 TREASURER CONWAY: Is there anyone on
9 the phone whose name I have not called?

10 MR. SANDLER: Mark Sandler.

11 TREASURER CONWAY: I'm sorry?

12 MR. SANDLER: Mark Sandler.

13 TREASURER CONWAY: Thank you, Mr.
14 Sandler. Anyone else?

15 MR. MANES: Ron Manes.

16 TREASURER CONWAY: Anyone else? All
17 right.

18 MR. YACHETTI: Roger Yachetti is here.

19 TREASURER CONWAY: Thank you, Mr.
20 Yachetti. Anyone else?

21 MR. HUNTER: George Hunter.

22 TREASURER'S REMARKS:

23 TREASURER CONWAY: Thank you, Mr.
24 Hunter. Anyone else? All right. Before turning to
25 the business at hand, I'd like to review the

1 instructions for the phone system for those
2 participating by phone. Once we determine who is on
3 the telephone, I will let everyone know that we will be
4 placing those calling into the meeting in what we call
5 lecture mode.

6 This means that from our end we are
7 muting all callers and, once muted, they will be able
8 to hear the meeting, but cannot speak. We, of course,
9 will need to come out of lecture mode to hear callers
10 who wish to speak and we will do that as the day
11 progresses with the speakers' list. Unless callers
12 wish to speak I ask that they star 6 their telephones,
13 as we have done in the past, and we will repeat this
14 procedure throughout Convocation as necessary.

15 I have one additional bit of business to
16 deal with today, not anticipated, but it comes as a
17 result of a happy event for one of our bencher
18 colleagues.

19 As you know from the memorandum from the
20 secretary, Robert Wadden was appointed a judge of the
21 Ontario Court of Justice last week. On behalf of
22 Convocation, I congratulate Justice Wadden on his
23 appointment and wish him well as he begins his career
24 on the bench in Ottawa.

25 This appointment has created a vacancy

1 for a bencher in the electoral region outside of
2 Metropolitan Toronto, and we have a motion before us at
3 tab 5 -- sorry, tab 6, to elect Peter Festeryga from
4 Leamington as a bencher.

5 The motion before Convocation is moved
6 by Adriana Doyle and seconded by Ross Earnshaw. Any
7 discussion? All in favour of the motion? Opposed, if
8 any? Carried.

9 Mr. Festeryga will be joining us on
10 April 24th, when I will give him a more fulsome
11 introduction. I know you will extend a warm welcome to
12 him at that time.

13 On behalf of Convocation I also wish to
14 congratulate the five paralegal benchers who were
15 elected on March 31st and took office yesterday.
16 Robert Burd, Cathy Corsetti, Michelle Haigh, Brian
17 Lawrie and Marian Lipka. Welcome. For most of you,
18 welcome back to Convocation.

19 Before we begin the deliberations
20 respecting Trinity Western University, I want to take
21 this opportunity to review today's proceedings. Before
22 that, however, I would like to acknowledge three
23 individuals who are joining us today in Convocation
24 room; Bob Kuhn, the president and vice chancellor of
25 Trinity Western University, Janet F. Buckingham, LLC,

1 director and associate professor of political studies
2 and history at Trinity Western University, and Eugene
3 Meehan, of Supreme Advocacy LLP Ottawa, counsel to
4 Trinity Western University.

5 TWU is the applicant seeking
6 accreditation. Its representatives are here today as
7 observers only and will not be participating in our
8 discussions. They will have the opportunity provide a
9 written response following this Convocation for
10 Convocation on April the 24th and to address
11 Convocation at that time.

12 As you know, we are webcasting
13 Convocation today and on April the 24th so that anyone
14 who wishes can view our Convocation proceedings from
15 their desktop computer. For those benchers who are
16 following the debate on the telephone and were thinking
17 of also watching the webcast, you should know there is
18 a 60 second delay and, as a result, I suggest you do
19 not try to follow the webcast or at least mute the
20 volume if you do.

21 In addition, some rooms have been set
22 aside here at the Law Society for lawyers, paralegals
23 and members of the public to watch the webcast. Today
24 these individuals are in the upper and lower
25 barrister's lounges and on April 24th will be in the

1 Lamont Learning Centre.

2 On February 27th, 2014, I advised
3 Convocation of the process we would follow in
4 determining the Law Society's accreditation of TWU. A
5 copy of my statement is available on the Law Society's
6 website and on BoardBooks at tab 1. I don't intend to
7 repeat that statement here.

8 In a few moments, Ms. Freya Kristjanson,
9 who is acting as counsel to the Law Society on this
10 matter, will provide Convocation with some overview
11 information and will refer to some of the issues I
12 addressed in my February statement.

13 Ms. Kristjanson is a partner at
14 Cavalluzzo, Shilton, McIntryre, Cornish LLP Toronto,
15 where she practices administrative law and civil
16 litigation. Welcome to Convocation.

17 Before Ms. Kristjanson speaks, however,
18 I would like to highlight the material that is before
19 Convocation and a few points from my February statement
20 to remind Convocation of certain procedural issues.

21 As you know, there are two Convocations
22 scheduled to consider the Trinity Western University
23 accreditation. Today we will begin the Law Society's
24 consideration of the TWU matter. We will not be voting
25 today. Today's meeting is to give benchers the

1 opportunity to raise any questions or concerns they
2 have relevant to the issues before them.

3 As I mentioned earlier, TWU will be
4 given the opportunity to respond in writing to the
5 issues and concerns raised today prior to April 24th.
6 We will complete our consideration of this issue on
7 April the 24th at regular Convocation, after which
8 Convocation will vote in answer to the question.

9 As set out in my February statement, I
10 would ask the secretary, Mr. Varro, to read the
11 question that Convocation will answer on April the
12 24th. Mr. Varro.

13 SECRETARY: Thank you, Treasurer.
14 Treasurer and benchers, the question to be put to
15 Convocation is as follows. Given that the Federation
16 Approval Committee has provided conditional approval to
17 the Trinity Western University law program in
18 accordance with processes Convocation approved in 2010
19 respecting the national requirement and in 2011
20 respecting the approval of law school academic
21 requirements, should the Law Society of Upper Canada
22 now accredit Trinity Western University pursuant to
23 section 7 of by-law 4.

24 TREASURER CONWAY: The material before
25 you includes material provided by TWU, background

1 reports from the Federation of Law Societies and the
2 Law Society relevant to the issue, other material such
3 as statutes and by-laws and all of the submissions the
4 Law Society received before the deadline of March 28th.
5 All of the material is posted on our website on the
6 dedicated TWU page. We have also posted the equivalent
7 of the Convocation material the benchers have through
8 their BoardBooks on our Convocation page on the website
9 so that all page references are identical for anyone
10 using the web version of material.

11 To ensure the integrity of the process,
12 I again ask benchers to keep in mind, one, that during
13 the course of Convocation today and on the 24th,
14 benchers should not use social media, either by sending
15 or receiving communications on the issues being
16 considered.

17 Two, that they -- benchers should
18 refrain -- excuse me, I'm going to take a moment while
19 we reconnect the phones.

20 All right, so to ensure the integrity of
21 the process, I ask benchers to keep in mind, one, that
22 during the course of Convocation today and on April
23 24th benchers should not use social media either by
24 sending or receiving communications on the issues being
25 considered.

1 Two, that they should refrain from
2 expressing their views or considering additional
3 submissions they may receive following today's
4 Convocation and, three, that they should refrain from
5 reaching a final view until the decision is made on
6 April the 24th.

7 I appreciate that many benchers will
8 wish to speak during today's Convocation and
9 Convocation on April the 24th, and as you can see by
10 looking around the room, there are many benchers in
11 attendance today and a number participating on the
12 phone.

13 Although we have scheduled an all day
14 Convocation today, in the interests of the process
15 operating fairly and effectively, I'm just going to set
16 out a few guidelines. I will, as I do at every
17 Convocation, be creating a speakers' list. While I am
18 not setting a time limit for speaking, I am asking,
19 imploring benchers, perhaps, to use their best efforts
20 to be on point and concise in their remarks.

21 I will not recognize benchers to speak a
22 second time as long as there remain benchers who have
23 not yet spoken for a first time.

24 If you're recognized to speak a second
25 time, please use the additional time for any new

1 information or questions you may have. I will be
2 encouraging benchers to keep any second opportunity to
3 speak to a few minutes only.

4 I ask benchers to consider not repeating
5 at length points that have already been made by others.

6 We'll take the morning break and
7 afternoon breaks at appropriate times and we'll break
8 for lunch at 12:30.

9 I would now ask Freya Kristjanson to
10 address Convocation.

11 ADDRESS BY FREYA KRISTJANSON:

12 MS. KRISTJANSON: Thank you, Treasurer,
13 and members of Convocation. I have been asked to
14 advise Convocation on the procedural fairness of the
15 process for considering the TWU accreditation
16 application. The process has been designed to provide
17 the requisite degree of procedural fairness to TWU as
18 an applicant whose rights, privileges or interests will
19 be affected by Convocation's decision.

20 As the Baker case has established, the
21 values underlying the duty of procedural fairness
22 relate to the principle that the individual or
23 individuals affected should have the opportunity to
24 present their case fully and fairly and have a decision
25 made affecting their rights, interests or privileges

1 made using a fair, impartial and open process
2 appropriate to the statutory institutional and social
3 context of the decision.

4 The decision is one to be made by
5 Convocation in its deliberative capacity. It will be
6 made by majority vote. Those are the elements of the
7 statutory scheme. There are no by-laws or regulations
8 setting out a different process.

9 Under the Law Society Act, you have a
10 very broad discretion which must be exercised in a
11 manner consistent with the statutory scheme, including
12 the purposes and the principles set out in the Act and
13 in accordance with your determination of the public
14 interest.

15 It is very different than a judicial or
16 quasi-judicial decision. The SPPA does not apply to
17 Convocation's decision; as a result, I advise that the
18 common-law of procedural fairness will be met through
19 the process you are engaged in and which I will
20 highlight today.

21 The decision will be made primarily on
22 the basis of a written record by way of written
23 hearing. TWU will be given notice of Convocation's
24 concerns through the questions and statements you make
25 today. TWU will have an opportunity to respond, both

1 orally and in writing, before the vote on April 24th.
2 After hearing TWU's response, you will deliberate in
3 public and vote on April 24th.

4 The reasons of Convocation will be
5 provided through the transcript of both sessions, as
6 well as the written record and, ultimately, the vote.

7 I will now briefly expand on the key
8 elements of procedural fairness. The first aspect is
9 the written record and the primarily written hearing.

10 The Treasurer set the question announced
11 in Convocation on February 27th. TWU made an
12 application in response to the question on April 2nd.
13 The submission is at 2.1, page 7 of the BoardBooks.

14 Convocation has also received public
15 submissions on the question contained at tab 4. The
16 Society received 210 submissions in response to the
17 invitation for submissions.

18 You have also been provided with three
19 legal memos, which are intended to provide guidance to
20 you in the exercise of your discretion. I have
21 provided a memorandum, a letter, providing you with
22 guidance on discretion and the public interest. This
23 is at tab 3.2.4, page 1852 of your BoardBooks.

24 Mahmud Jamal of Osler Hoskins & Harcourt
25 LLP has provided guidance on the application of the

1 Charter and Charter values to your decision making
2 process, and that is set out in tab 3.2.3, page 1836.

3 Finally Andrew Pinto of Pinto, Wray,
4 James, LLP, has provided guidance on the application of
5 the Ontario Human Rights Code and human rights values
6 to your decision making process. That is at tab 3.2.5,
7 page 1878. TWU may choose to comment on or respond to
8 this guidance before the vote.

9 The three guidance memos have been made
10 public and are posted on the website.

11 The Federation of Law Societies of
12 Canada materials also form part of the record. The
13 Federation's approval committee report is at tab 3.1.1,
14 page 737 of your BoardBooks.

15 The Federation's approval committee has
16 given conditional approval to TWU's program based on
17 meeting the national requirement. This Society
18 participated in that process as a member of the
19 Federation.

20 Law Society staff have provided a
21 background report on the national requirement with
22 links or with the full contents, and that background on
23 the national requirement is at tab 3.2.1, page 1264 of
24 BoardBooks.

25 I can advise that TWU likely has a

1 legitimate expectation that the Federation's process
2 for approval of the academic requirement, the process
3 adopted by Convocation, will not be disturbed by
4 Convocation. The Federation's Special Advisory
5 Committee Report is at tab 3.1.2, page 1017, and the 30
6 submissions received by the Federation commence at tab
7 3.1.3, page 1063.

8 TWU took part in the Federation's
9 academic requirement approval process, as did the
10 Society, however, the Federation process did not and
11 could not answer the question of whether it is in the
12 public interest in Ontario to accredit or refuse to
13 accredit TWU. Only you can answer that question, and
14 that is the question you are answering in the present
15 process.

16 Law Society staff have also provided a
17 background report on mobility, tab 3.2.2, page 1742 of
18 your BoardBooks, and other relevant materials which are
19 often referred to in the submissions, and the other
20 matters are the Charter, the Human Rights Code and the
21 TWU Community Covenant.

22 So those background materials are posted
23 at tab 3.3, commencing at page 1924.

24 So that essentially is the written
25 record to date. And that's one element of our

1 procedural fairness.

2 The second aspect of procedural fairness
3 is notice to TWU of any concerns or questions that
4 Convocation may have, and that is the purpose of today.

5 The procedural fairness requirement is
6 that notice be given of your concerns so that TWU can
7 make a meaningful response.

8 This is the first Convocation since the
9 question was set and since the submissions were
10 received. As decision makers, you have reviewed those
11 submissions and today you are to raise your questions
12 and your concerns that you believe are relevant to the
13 exercise of your discretion.

14 TWU's counsel and representatives are
15 here today and they will listen to the issues that you
16 raise. They will also receive a transcript of today's
17 proceedings and it is on the basis of the concerns that
18 you raise today that they will prepare their response.

19 And that takes me to the third aspect of
20 procedural fairness, which is the right to make a
21 meaningful response. TWU will be given the opportunity
22 to respond in writing by April 22nd. TWU will also be
23 given the opportunity to make oral submissions on April
24 24th.

25 The fourth aspect I will comment on is

1 reasons, which have specifically been raised by TWU. I
2 advise you that if there is such a duty in this case,
3 the duty to give reasons will be reflected in the
4 public deliberative decision making process, which
5 takes place in the context of the vote on April 24th.

6 Convocation will be held in public, your
7 decision process will be held in public, and a majority
8 vote reflecting the will of Convocation will determine
9 the outcome.

10 In the case of an elected body, the
11 question of reasons has to be determined in the context
12 of the statutory institutional and social context of
13 the decision making process in which you are engaged.
14 It is distinct from an adjudicative process before an
15 administrative tribunal subject to the SPPA. The
16 majority vote is the decision.

17 So the record, the transcripts of today
18 and the transcripts of April 24th will act as a
19 sufficient surrogate for formal written reasons, so
20 that the purpose of reasons, that TWU as applicant or a
21 reviewing court can understand the rationale behind
22 your decision.

23 The entire proceedings will be
24 transcribed, and this meets the requirement for reasons
25 in this statutory and institutional context.

1 The fifth and final aspect of procedural
2 fairness I will comment on today is that you are a body
3 which is and must remain impartial. You must keep an
4 open mind today. You must keep an open mind when you
5 review the response by TWU, the written response by
6 April 22nd and the oral submissions on the 24th. You
7 are then to exercise your vote once you have considered
8 the complete record, including that response.

9 You may and you are expected to raise
10 concerns today, whether as statements or questions.
11 You are raising those concerns today so that TWU can
12 respond, so that you can have TWU's answers to your
13 questions or TWU's position with respect to your
14 concerns before you vote.

15 Your concerns expressed today, however,
16 should not be the final expression of an opinion which
17 cannot be changed. Rather, this is your opportunity as
18 decision makers to raise for TWU the questions and
19 issues you see relevant to your discretionary decision.

20 Once TWU has completed its response on
21 April 24th, the hearing portion will end. You will
22 then begin your deliberations on the question. After
23 you hear from TWU on the 24th, then you will have to
24 make up your mind on the question and vote. Until that
25 time, you have to keep an open mind.

1 Treasurer, those -- that is my advice
2 with respect to procedural fairness and I thank you for
3 the opportunity to address Convocation.

4 TREASURER CONWAY: Thank you for your
5 assistance, Ms. Kristjanson. I now have started a
6 speakers' list and Mr. MacKenzie is first on the list.
7 I'm going to ask Mr. MacKenzie to go to the podium,
8 followed by Ms. Leiper and Mr. McDowell and Mr. Anand.

9 DISCUSSION OF TRINITY WESTERN UNIVERSITY
10 ACCREDITATION:

11 MR. MacKENZIE: Thank you very much,
12 Treasurer. I want to address a couple of process
13 issues and I want to discuss the decision that we have
14 to make on April 24th on the merits. But first of all,
15 let me start, Treasurer, if I may, by commending you
16 and your advisors for the process that you have
17 developed for Convocation's consideration in this
18 important and difficult issue.

19 This could have been dealt with in a
20 much more nonchalant way, but I personally have found
21 very helpful the submissions that we received that we
22 invited and also I found very helpful the legal advice
23 that we've received about the various issues, including
24 from Ms. Kristjanson, and I do think it's very
25 important that we honour her admonition and yours,

1 Treasurer, that we keep an open mind about this and
2 listen carefully before coming to a firm conclusion as
3 to how we will vote.

4 I and others will be expressing strong
5 views today, I expect, on the issues, but I don't think
6 any of us should consider those to be conclusive views
7 until we have an opportunity to vote.

8 I wanted to address the process that was
9 adopted at the Federation level. I do think that it's
10 important that we, like other law societies, have been
11 moving towards the development of national standards in
12 different areas, such as rules of professional conduct,
13 but certainly also in the area of establishing uniform
14 national standards on questions of academic matters and
15 entry level competence, and I think in so far as the
16 recommendation of the approval committee of the
17 Federation is concerned on Trinity Western University's
18 compliance with those standards of entry level
19 competence, we should give great deference to those
20 standards because we believe in national standards and
21 it's in the public interest that we have national
22 standards.

23 But I do think there is an important
24 distinction to be made between national standards of
25 entry level competence, on the one hand, and questions

1 of core values on the other, and the process that was
2 followed by the Federation in this unique case with the
3 establishment of a special committee to express advice,
4 and it was advice only, it was an advisory function
5 that the special committee served to provide advice on
6 whether there were other issues, was an extraordinary
7 process and it goes again to the question of values.
8 And those values are different, they're important and
9 they're core values that we subscribe to here.

10 The decision that we have to make as to
11 whether to accredit Trinity Western University is ours
12 to make. We didn't delegate questions and values to
13 the Federation.

14 The other comment that I would like to
15 make with respect to the Federation's process and its
16 reports is that the special committee that was set up
17 to provide advice with respect to matters other than
18 academic or entry level competence qualifications
19 focused to what I found to be a surprising degree on
20 the decision in the British Columbia College of
21 Teachers case a number of years ago.

22 That's certainly a consideration that we
23 should weigh, but I think we have to keep in mind that
24 we are not an inferior court, we are not bound by a
25 doctrine of stare decisis, we have a very different

1 function under our by-laws in deciding whether to
2 accredit a university proposing to provide a law school
3 education. And so I think that that consideration is
4 one of limited interest to us in our deliberations
5 today and on April 24th.

6 That case may be distinguishable, and
7 I'm not going to get into an analysis of the reasons
8 and whether there are reasons to distinguish it from
9 the present case. Others have done so in their
10 submissions. I do think that it bears mention that
11 there is probably no issue on which public attitudes
12 have changed more in the last fifteen years or so than
13 the question of public attitudes towards discrimination
14 based on sexual discrimination, and there have been
15 intervening events that may well lead to a different
16 legal conclusion today than was formed by Supreme Court
17 of Canada in the BCCT case when it was decided.

18 Perhaps, most importantly, the enactment
19 in 2005 of the Civil Marriage Act, which recognizes the
20 legitimacy of same sex marriage throughout Canada.

21 I also found it interesting, just when I
22 leave this subject, that there was a dissenting
23 judgment in the B.C. College of Teachers case as well
24 from the Madam Justice L'Heureux-Dubé, who mentioned
25 the decision that the U.S. Supreme Court came to in the

1 mid-1980s in the Bob Jones University case.

2 In that case the issue that the U.S.
3 Supreme Court had to face was whether a university that
4 discriminated based on race in the sense that they had
5 an equivalent, I suppose, of a Community Covenant that
6 prohibited interracial dating and interracial marriage
7 was entitled to tax advantages.

8 Now, I think perhaps we can draw a
9 useful analogy between public attitudes towards
10 interracial dating and interracial marriage in 1985 and
11 discrimination based on sexual orientation in 2014, and
12 I find that a useful analogy.

13 Now, there is no issue on which, in my
14 view, we have made greater progress in our profession
15 and in the Law Society specifically during my time as a
16 bencher than matters of equity through the
17 establishment of our Equity and Aboriginal Issues
18 Committee and its work over the years, through the
19 establishment of our equity advisory group, through the
20 work of our equity department under Josée Bouchard's
21 leadership, but I think perhaps the most important
22 development in that area at the Law Society for our
23 purposes is our adoption of a rule of professional
24 conduct which says that lawyers have a special
25 responsibility to honour the obligation not to

1 discriminate on grounds that include sexual
2 orientation. Lawyers who contravene that rule of
3 professional conduct may be disciplined by the Law
4 Society.

5 If that's a rule of professional conduct
6 that we require all lawyers to comply with, how can it
7 not be a rule that we must honour ourselves?

8 That leads me to the question, finally,
9 that we must answer here. I don't, and I don't think
10 any of us should disagree with the approval committee's
11 finding that Trinity Western University has a
12 curriculum that complies with our requirements
13 nationally for entry level competence, but I do have a
14 very considerable concern about the questions of values
15 that is raised by the Community Covenant requirement,
16 which, in my respectful submission, must be
17 discriminatory on the basis of sexual orientation.

18 I, for one, would feel comfortable
19 granting conditional approval to Trinity Western
20 University, the condition being that its Community
21 Covenant be at least amended in such a way that it does
22 not discriminate on grounds of sexual orientation. And
23 if Trinity Western University is unwilling to comply
24 with that condition, I'm afraid the answer to the
25 question that's posed in Convocation today must be no.

1 Thank you very much for your attention.

2 TREASURER CONWAY: Ms. Leiper.

3 MS. LEIPER: Thank you, Treasurer. Good
4 morning. I wish to acknowledge the presence of Trinity
5 Western representatives and thank them for attending in
6 person.

7 Questions. TWU publicly endorses six
8 core values. The first of these is to obey the
9 authority of scripture by embracing all that the Bible
10 teaches regarding faith, ethical commitments and way of
11 life, believing this to be the ultimate standard of
12 truth.

13 So my questions arising from this are as
14 follows. Is the TWU Community Covenant an example of
15 the ethical commitments mentioned in the core values?
16 If so, is it anticipated that those ethical commitments
17 and, by extension, the Community Covenant, will form a
18 critical or any part of the pedagogy of the law program
19 planned for TWU?

20 Could TWU expand on the relationship
21 between this expression of values and ethical
22 commitments and the curriculum, and if not, why not?

23 Are there areas of public law, including
24 human rights legislation, Charter of Rights
25 jurisprudence, for example, that TWU would anticipate

1 conflicting with the scriptural sources of ethical
2 commitment among its students? How would these
3 conflicts be resolved?

4 And, finally, given that there is no
5 impediment to teaching law at TWU, and the question
6 before us relates to accreditation in Ontario of
7 graduates from TWU, can TWU assist us in understanding
8 the relationship between offering an accredited program
9 and a religious practice or activity? How does that
10 differ from the relationship between the teaching of
11 law without accreditation and religious practice?

12 Thank you, Treasurer.

13 TREASURER CONWAY: Thank you, Ms.
14 Leiper. Mr. McDowell.

15 MR. McDOWELL: Thank you, Treasurer, and
16 I, again, want to thank our guests for coming. I'm
17 here to listen to my colleagues and ultimately to TWU.
18 I haven't made up my mind. I have some explicit
19 questions that I'll come to at the end, but I'm
20 inclined to believe that we must accredit TWU.

21 And like all of you, I have found coming
22 to this tentative view agonizing. No matter what we
23 decide, it will be contended by the losing side that we
24 have violated fundamental rights and I'm deeply
25 uncomfortable with the Community Covenant.

1 Now, many submissions to us have taken
2 the view that we are in breach of our obligations
3 should we accredit TWU. It is said that there is a
4 clash of rights. The Society itself will have violated
5 the Law Society Act. We will have acted inconsistently
6 with our duties as individual lawyers, as I gather I'm
7 seen to be doing by making these tentative submissions,
8 and that we will have violated the Charter. The
9 Advocates' Society has taken this view.

10 TREASURER CONWAY: I'm sorry, Mr.
11 McDowell, we have to reconnect the phone system. Maybe
12 we should take a commercial break and ask our service
13 provider in. Mr. McDowell, I'm sorry.

14 MR. McDOWELL: Treasurer, hopefully we
15 can count that as injury time.

16 As I was saying, from my reading, the
17 weight of the submissions we have received tilts
18 heavily in favour of the view that we should not
19 accredit. Opponents contend that in 2014 such a clash
20 of rights can only be resolved in one way; the changes
21 in social norms, the evolution of the social context
22 means that the rights of LGBT persons must trump any
23 right to freedom of expression and religion supposed to
24 be expressed by the Community Covenant of TWU.

25 All of us understood the emotional

1 force of this argument. Canada has led the world in
2 not just legalizing, but embracing the legitimacy of
3 same-sex marriage. We have had same-sex marriage in
4 Canada since the Halpern case in 2003. It is a right
5 that has been hard won by LGBT persons through the
6 Supreme Court's decision and the Marriage Reference
7 decision, and, ultimately, the Marriage Reference Act.

8 None of this came easily. In the
9 lead-up to the Supreme Court reference, the federal
10 government itself had argued that permitting same-sex
11 marriage would be destructive to the nuclear family as
12 the building block of Canadian society. But in the
13 twinkling of an eye, the federal Crown itself had
14 reversed the decision, and it was right to do so.

15 In the reference, the Supreme Court
16 declined to rule on an important aspect of the case
17 because the Martin government intended to introduce
18 same-sex legislation, whatever the Court said.

19 The vote in the legislation was close,
20 but it passed. Same-sex marriages blossomed in Canada,
21 the sky has not fallen, heterosexual marriage as a
22 social institution continues to thrive.

23 LGBT people in Canada are accepted in
24 every sphere of our society and certainly in our
25 profession. Same-sex marriage is now recognized by 23

1 of the United States, the intelligent states, as Bill
2 Maher calls them. The recognition of the rights of
3 LGBT persons is, without question, the greatest social
4 transformation of my lifetime.

5 So surely it must follow that an
6 institution like TWU, which fails to move with the
7 times, get with the program, accept what the Courts
8 have recognized, what Parliament has recognized, what
9 our provincial human rights code have recognized,
10 cannot possibly grant degrees which the Law Society
11 should recognize.

12 My friend, Mark Berlin, from the
13 Department of Justice is a married gay man who has
14 taught for years at the University of Ottawa and
15 McGill. He asks point blank, how can you even consider
16 accrediting such a place in 2014?

17 But I adopt the submission of the B.C.
18 Civil Liberties Association. We are convinced that one
19 group's rights to equality and non-discrimination
20 cannot be bought at the price of intolerance for the
21 fundamental freedoms of others.

22 I say that as a matter of law we cannot
23 accept that the section 15 rights of LGBT persons trump
24 the freedom of religion rights enjoyed by the community
25 of TWU.

1 If we vote to accredit, we are accepting
2 that members of a religious institution whose views we
3 do not hold are, nevertheless, free to join us in the
4 fellowship of the bar. We may profoundly reject their
5 views. In a free society and in our profession we have
6 to live with the idea that some of our colleagues hold
7 repugnant views.

8 On the other hand, should we decline to
9 accredit, we at the Law Society will not have injured
10 Trinity Western so much, but we will have voted to bar
11 students from our profession because they are adherents
12 of a faith who have agreed to live by a certain code.

13 The sad history of the struggle of
14 minority religious groups trying to enter our
15 profession within living memory warns us that we should
16 not go that way.

17 My friends say the focus must be on the
18 institution. TWU applicants won't be admitted, but
19 they won't be admitted because they went to a
20 non-accredited law school. But Mr. Roncarelli lost his
21 business because he was stripped of his license. The
22 question is still what lies behind the denial of
23 accreditation.

24 The Supreme Court has repeatedly
25 renounced the notion that there exists any hierarchy of

1 rights in the Charter. To the greatest extent
2 possible, the Court has told us, rights are to be
3 reconciled and not prioritized.

4 To balance rights not only protects the
5 rights of individual Canadians, it allows Canada to
6 function as a diverse and pluralistic society.
7 Confederation was forged as a compromise, not only of
8 language rights, but equally so of religious rights.

9 Now, many years ago, Governor Mario
10 Cuomo addressed the challenges of religious rights and
11 pluralism in a famous speech at Notre Dame.

12 He said, "The Catholic public official
13 lives the political truth most Catholics through most
14 of American history have accepted and insisted on: The
15 truth that to assure our freedom we must allow others
16 the same freedom, even if occasionally it produces
17 conduct by them which we would hold to be sinful."

18 "I protect my right," said Governor
19 Cuomo, "to be a Catholic by preserving your right to
20 believe as a Jew, a Protestant or a non-believer, or as
21 anything else you choose."

22 "We know that the price of seeking to
23 force our beliefs on others is that they might some day
24 force theirs on us."

25 Many in this debate have reminded us of

1 the remarks of Chief Justice Dickson in Big M Drug Mart
2 about the essence of freedom of religion, the right to
3 entertain such religious beliefs as the person chooses,
4 the right to declare them openly and without fear of
5 hindrance or reprisal, and so on, but also the need to
6 balance where other fundamental rights are threatened.

7 There is a clear and unbroken line of
8 authority which expands on this proposition.

9 Last year in Whatcott, the Supreme Court
10 said, "We are therefore required to balance fundamental
11 values, underlying freedom of expression, and later
12 freedom of religion, in the context in which they are
13 invoked, with competing Charter rights and values
14 essential to a free and democratic society, in this
15 case a commitment to equality, respect for identity and
16 the inherent dignity owed to all human beings."

17 The limit to exercise freedom of
18 religion lies where religious practices or beliefs
19 could cause harm. As the Supreme Court said in TWU
20 2001, "The line is drawn between belief and conduct.
21 Does the exercise of freedom of expression and religion
22 cause objective societal harm? In this instance, is
23 there a risk that TWU lawyers will discriminate against
24 LGBT people or will otherwise harm them should they be
25 called to the bar."

1 It does not seem to me that the focus on
2 the likelihood of actual harm or risk of harm as a
3 limit to rights has shifted in our jurisprudence.

4 In *Whatcott*, the Supreme Court
5 re-emphasized the broad protection to be afforded to
6 freedom of religion. The Court warned of the mistaken
7 propensity to focus on the nature of the ideas
8 expressed, rather than the likely effects of the
9 expression, and I say, I think it's important to say,
10 that no one in this debate seems to be saying that TWU
11 is hate mongering. Nevertheless, the Community
12 Covenant is troubling for the reasons the many
13 submissions have pointed out.

14 As the Advocates' Society says, the
15 covenant forbids students from same-sex marriage and is
16 said to be necessary to ensure the integrity of the TWU
17 community. This does seem to suggest that even
18 associating with LGBT people at TWU would affect the
19 integrity of TWU.

20 The covenant misses the point that
21 sexual expression is not what LGBT people do, it is at
22 the core of what they are. Equally repugnant is the
23 notion that TWU students are expected to inform on one
24 another if there are breaches of the covenant. If TWU
25 will not treat its covenant simply as a matter of

1 conscience, it become dangerously intrusive. If the
2 state has no place in the bedrooms of the nation, I
3 really wonder, covenant or not, whether university
4 administrators belong there either.

5 But we have to put this in context. TWU
6 is a private religious university. It is a faith
7 community. It has a comprehensive faith-based set of
8 rules. It is not a public university, much less an arm
9 of the state. I say that the rules of the covenant are
10 not imposed on anybody, they are accepted by those
11 students who choose to join the faith community and
12 attend TWU.

13 I accept in saying that, that for a host
14 of reasons some will feel unable to sign the covenant
15 and will feel practically excluded.

16 I note the partial exemption from the
17 provisions of the Human Rights Code of British
18 Columbia. Under 2(a) of the Charter, Trinity Western
19 must have the right to determine conditions for
20 membership in accordance with its shared religious
21 beliefs. It is how faith communities survive. It is
22 for the individual to decide whether or not to sign the
23 covenant or whether or not to abide by the rules,
24 having accepted them. It's not for the Law Society to
25 pass judgment on the covenant or on any other religious

1 tenet.

2 For that reason, permitting law
3 graduates from TWU to become lawyers in Ontario,
4 pursuant to the Law Society Act, does not, it seems to
5 me, suggest that the Law Society endorses the view that
6 LGBT Canadians are less worthy of respect than others.

7 Should we accredit TWU, we will be seen
8 to accept the evaluation of the Federation Approvals
9 Committee. We will be seen to have respected the
10 freedom of those who wish to govern their own conduct
11 in accordance with the religions tenets of the
12 Community Covenant.

13 The Supreme Court said in the first
14 case, "TWU is not for everybody. It's designed to
15 address the needs of people who share a number of
16 religious convictions."

17 Then this next passage is important. "To
18 state that the voluntary adoption of a code of conduct
19 based on a person's own religious beliefs, in a private
20 institution, is sufficient to engage section 15 would
21 be inconsistent with freedom of conscience and
22 religion, which co-exist."

23 Now, I know I'm sailing into a bit of a
24 stiff breeze here, and I've taken note of many of the
25 objections. One is that the whole legal context, as

1 Mr. MacKenzie says, has evolved since the first Trinity
2 Western case. This amounts to a contention that
3 whatever the Charter says in section 2(a), freedom of
4 religion is no longer fashionable in the Courts, given
5 the inexorable sweep of history.

6 A number of submissions contend that the
7 test for equality jurisprudence has evolved since 2001.
8 Promotion of the dignity of all citizens and the goal
9 of substantive equality is, it is said, and should be
10 the main consideration for the courts.

11 Leaving aside Whatcott, several thoughts
12 come to mind. One is that freedom of conscience and
13 religion remain by the terms of the Charter itself,
14 fundamental freedoms. Parliament had this firmly in
15 mind when it adopted same-sex marriage. The Civil
16 Marriage Act of 2005 which guaranteed same-sex
17 marriage, also preserved and protected the right of
18 Canadians to disagree about the legitimacy of marriage
19 within their religious beliefs.

20 3.1 reads, "For greater certainty, no
21 person or organization shall be deprived of any
22 benefit, or be subject to any obligation or sanction
23 under any law in the Parliament of Canada solely by
24 reason of their exercise, in respect of marriage
25 between persons of the same sex, of the freedom of

1 conscience and religion guaranteed under the Canadian
2 Charter of Rights and Freedoms or by the expression of
3 their beliefs in respect of marriage as the union of a
4 man and a woman to the exclusion of all others based on
5 that guaranteed freedom.

6 This is how we as Canadians have and
7 must reconcile competing rights and values surrounding
8 same-sex marriage.

9 I have to say that this provision of the
10 quasi-constitutional statutes, in my submission, makes
11 analogies to racial discrimination in Bob Jones
12 university inept. Secondly, even if the judicial
13 context has changed, how does barring graduates who had
14 agreed to live by the Community Covenant from a
15 regulated profession promote the dignity of all
16 citizens and the goal of substantive equality?

17 Third, accepting that the court might
18 not rule the same way in 2014 on TWU, is that for us to
19 say or is it for the court subsequently to say?

20 Now, a number of submissions have
21 expressed the view that because Trinity students will
22 be taught from a fixed, evangelical point of view, they
23 will receive an inadequate legal education. I leave
24 those submissions aside because I don't sense that that
25 would be a focus of our debate. I leave issues

1 surrounding the adequacy of Trinity Western's teaching
2 and academic freedom for another day, because I say we
3 have a firewall to protect against these concerns, and
4 that is our oath, which we take seriously.

5 Whatever legal education our candidates
6 have gotten, they're bound by their oath. It says in
7 part the following. "I will protect and defend the
8 rights and interests of such persons as may employ me.
9 I shall seek to ensure access to justice and access to
10 legal services. I shall champion the rule of law and
11 safeguard the rights and freedoms all persons."

12 Whether our graduates come to us from
13 Thompson Rivers or the University of Toronto, this is
14 our covenant. We don't vet out lawyers' beliefs, but
15 we do hold them to these standards. In a country as
16 vast and diverse as ours, this is surely where we draw
17 the line.

18 Now, I do have some questions, and these
19 arise from the Pinto opinion, and I appreciate Trinity
20 Western's position that Ontario Human Rights Code
21 principles have nothing to do with what we do here, but
22 like a court, I say if we imagine that they do have
23 relevance for our exercise of the public interest
24 jurisdiction which we have, should that change our
25 analysis? And I draw your attention, in particular, to

1 questions 1 to 9 at page 22 of the Pinto opinion.
2 Because it does seem to me that, notwithstanding
3 everything I've said here, if the lens is the questions
4 that are in that part of the Pinto opinion, it may
5 change their analysis.

6 Then a further question would be to the
7 extent that that analysis is inconsistent with the
8 Charter jurisprudence which I've reviewed, does the
9 Charter nonetheless prevail, given that section 52 of
10 the Constitution Act says it's the supreme law of
11 Canada.

12 So, Treasurer, I don't know tentative
13 that sounded, but that really is my tentative view.
14 Thank you very much.

15 TREASURER CONWAY: Thank you,
16 Mr. McDowell. We'll wait again until the phone is
17 reconnected, then Mr. Anand will be up next.

18 MR. ANAND: Do you want me to go ahead?

19 TREASURER CONWAY: If you could just
20 give us a moment, Mr. Anand. Mr. Anand, please.

21 MR. ANAND: Thank you, Treasurer. Let
22 me too personally extend our welcome and our greetings
23 to our guests.

24 Some have suggested that Convocation's
25 decision on TWU's accreditation application has been

1 made by the Federation's Canadian common-law program
2 approval committee and that quality issues have no
3 place in the determination by our Law Society.

4 Some also say that the decision has been
5 dictated by the National Mobility Agreement or by the
6 agreement on internal trade.

7 Respectfully, I beg to differ. While I
8 think these factors have to be given careful
9 consideration, I want to outline my thinking on these
10 issues at this point and ask a number of questions
11 that, in my view, must be satisfactorily answered
12 before accreditation of TWU can be granted.

13 Convocation is required to make a
14 discretionary decision on whether to accredit Trinity
15 Western University under sections 4.1, 4.2, 27.3,
16 62.02, 4.1 of the Law Society, and our by-law 4.

17 In making its decision, Convocation is
18 guided by these provisions and by the
19 quasi-constitutional Ontario Human Rights Code and the
20 constitutional Canadian Charter of Rights and Freedoms.

21 The Law Society is required to consider
22 all relevant sources of law, including the guideposts
23 contained in the Law Society Act and the Code and the
24 Charter. Convocation is required to exercise its
25 discretion in accordance with the Law Society Act's

1 purposes and principles and in a manner consistent with
2 the fundamental values of the Code and the Charter.

3 So I want to consider these legal
4 requirements in turn. Section 4.1 of the Law Society
5 Act sets out the purposes of the Law Society, including
6 ensuring a person practising law in Ontario meets
7 standards of learning, professional competence and
8 professional conduct.

9 The Act authorizes the making of by-laws
10 prescribing qualifications and requirements for
11 licensing in Ontario, and pursuant to that power,
12 by-law 4 says to receive a licence to practice law in
13 Ontario an applicant must have a degree from an
14 accredited Canadian law school or a certificate of
15 qualification from the NCA.

16 An accredited law school is defined in
17 section 7 of our by-law as a law school that is
18 accredited by our Law Society. So the Law Society's
19 statutory authority to accredit Canadian law schools
20 has not been supplanted.

21 Section 32 of the National Mobility
22 Agreement provides that a signatory governing body will
23 require no further qualifications for a member of
24 another governing body to be eligible for membership
25 than the following. A, entitlement to practice law in

1 the lawyer's home jurisdiction; B, good character and
2 fitness to be a lawyer; C, any other qualifications
3 that ordinarily apply for lawyers to be entitled to
4 practice law in its jurisdiction; that is, this
5 province.

6 So there's no doubt in my view that for
7 an individual to be entitled to practice and for us to
8 decide that, the legislation and regulations of Ontario
9 are incorporated and binding, including the requirement
10 that the Canadian law school be accredited in Ontario
11 by this Law Society. Nor, in my view, is the Law
12 Society's authority displaced by section 7 or chapter 7
13 of the agreement on internal trade. Under that
14 agreement, a jurisdiction can impose additional
15 requirements to certify a worker who is certified
16 elsewhere in Canada, if those additional requirements
17 are in the service of a legitimate objective.

18 The determination of legitimate
19 objective is made at the receiving governmental level,
20 in this case in Ontario, under the laws of Ontario.
21 Again, we're back to the Law Society Act, the Human
22 Rights Code and the Charter.

23 While the Ontario Mobility Act obviously
24 has statutory force, it must yield to the
25 quasi-constitutional code and the constitutional

1 Charter to the extent of any inconsistency.

2 So we return to the seminal provisions
3 that govern this issue, and they are in section 4.2 of
4 the Law Society Act; that in exercising our powers to
5 accredit a Canadian law school, the Law Society has a
6 duty to maintain and advance the cause of justice and
7 the rule of law and the Law Society has a duty to
8 protect the public interest.

9 In exercising our discretionary
10 statutory authority, Convocation, therefore, has a
11 positive duty to determine and act in accordance with
12 the public interest, the cause of justice and the rule
13 of law. Indeed, in the precise context of lawyer
14 licensing, our cross-committee working group on the
15 Federation's suitability to practice standards said
16 just a few months ago in a submission that was adopted
17 by Convocation, that under one of the four behaviours
18 for good character, which was respect for the rule of
19 law and the administration of justice, specific
20 reference to respect for, and adherence to, human
21 rights and equality principles sends an important
22 message to those entering the legal profession.

23 More generally, our Law Society is proud
24 of its equity initiatives, as Mr. MacKenzie said, and
25 its advocacy and support of inclusion and

1 non-discrimination in areas that include sexual
2 orientation, gender equality and marital status.

3 The Law Society's equity initiative
4 department actively supports and promotes adherence to
5 equity principles in legal organizations, including law
6 firms, and in its own backyard. Consideration of human
7 rights principles is, therefore, required for the Law
8 Society to comply with its home or constituting
9 statute. Moreover, the rule of law, the public
10 interest and the cause of justice surely mandate that
11 the Law Society will act in accordance with these
12 overriding external enactments, most notably the
13 guarantees of equality.

14 Quite independently, Supreme Court
15 jurisprudence within the last decade made it clear that
16 every administrative decision maker with the power to
17 decide questions such as this is obliged to consider
18 and take into account the Human Rights Code and the
19 Charter. Tranchemontagne determined that Human Rights
20 issues are not relegated to Human Rights Tribunals and,
21 indeed, we often take the Human Rights Code into
22 account in our tribunal cases at this Law Society and
23 in making accommodations for licensing examinations.

24 In Martin and Laseur the Supreme Court
25 made the same decision in relation to the Charter, and

1 the Law Society is obviously subject to the
2 constitution as a body itself exercising power as
3 conferred by statute.

4 All of this to say that human rights
5 issues and Charter values of non-discrimination must
6 form part of our decision today. Indeed, if there were
7 any doubt, the Supreme Court explicitly said that in
8 the context of Trinity Western in the 2001 case, that
9 the College of Teachers in B.C. had the jurisdiction to
10 consider discriminatory practices in its determination
11 of Trinity Western's application.

12 Mr. Laskin's opinion for the Federation,
13 and the Special Advisory Committee in its consideration
14 of TWU's law school application, reached the same
15 conclusion.

16 More recently the Supreme Court in Doré
17 has held that administrative decision makers must act
18 consistently in the values underlying the grant of
19 discretion, including Charter values. In disciplining
20 a lawyer, the Barreau du Québec was obliged to balance
21 the public interest in lawyer integrity and conduct
22 with the lawyer's Charter right to free expression.

23 So Convocation in making its
24 discretionary decision must balance and give effect to
25 its statutory objectives, as well as overriding Charter

1 values and non-discrimination rights.

2 The TWU application has been presented
3 as a clash of fundamental rights to the students and
4 faculty's freedom of religion, on the one hand, and a
5 host of non-discrimination rights on the other in terms
6 of sexual orientation, in terms of marital status
7 principally.

8 TWU is a private university based on
9 evangelical Christian principles and beliefs that is
10 not subject to the Charter on its own, and it may
11 benefit from exemptions and defenses to
12 non-discrimination rights that are generally available
13 under the B.C. Human Rights Code.

14 On its face, the covenant that students
15 and faculty are required to sign annually is prima
16 facie discriminatory against LGBTQ students and faculty
17 and on unmarried persons in common-law relationships.

18 That's discrimination on grounds of
19 sexual orientation and marital status, unless the
20 adverse impact is exempted by the code. And you know
21 and it's been stated that conflicts of protected rights
22 are to be reconciled to the extent possible by
23 repairing each set of rights to the minimal extent
24 necessary.

25 In the 2001 TWU case, the Supreme Court

1 focused on the allegation that education and graduates
2 of TWU would be ill-equipped to serve as teachers. The
3 Court balanced competing rights on the facts before it.
4 We will have to focus, however, on what's different
5 about this case and what has changed in the meantime.

6 Number one, the Supreme Court relied on
7 the B.C. legislature's approval of the TWU
8 requirements. I question whether that's relevant here
9 since we're operating under Ontario law. Two, the
10 Supreme Court relied on what it called the burden that
11 the B.C. College of Teachers' decision placed on a
12 particular religious group, preventing them from
13 expressing freely their religious beliefs and
14 associating to put them into practice.

15 I don't know if this is even relevant to
16 the decision of Ontario's Law Society not to accredit a
17 law school in another province. Three, as has been
18 noted, the Supreme Court relied on a correctness
19 standard of judicial review. Recent jurisprudence
20 suggests a reasonableness standard in terms of
21 reviewing a decision such as ours that would lessen the
22 prospects of a court overturning our decision if the
23 proper statutory and human rights considerations are
24 taken into account, as I'm confident they will be.

25 Four, clearly the last decade has seen

1 an evolution in social values. Again, this has been
2 referred to, concerning the importance of providing
3 substantive equality to a vulnerable minority based on
4 sexual orientation. The central determination in the
5 earlier case was that the Court required proof of harm
6 inflicted by TWU graduate teachers.

7 I question whether that determination
8 was consistent with other Supreme Court jurisprudence
9 that would rely on the impact of the covenant on the
10 dignity and self respect of individuals plain and
11 simple. Indeed, is it good law after the Supreme
12 Court's decision in Whatcott, another decision that
13 balanced fundamentalist religious rights against
14 non-discrimination based on sexual orientation.

15 More important is the earlier case in
16 the Supreme Court binding on us with our independent
17 mandate to make a discretionary decision in the public
18 interest, taking account of and following the rule of
19 law and the cause of justice.

20 Fifth point with respect to the earlier
21 TWU case. In the Whatcott case and in several Human
22 Rights Tribunal decisions since then in different
23 jurisdictions across the country, adjudicators have
24 refused to draw a distinction between the prohibition
25 of homosexuals, on the one side, and the prohibition of

1 homosexual activity on the other.

2 This would appear to be another reason
3 to reject the American Bar Association approach.
4 Operating in an environment that includes many private
5 religious universities, unlike Canada, the
6 ABA settlement appears to accredit law schools with
7 covenants such as TWU's on condition that admission of
8 LGBTQ applicants is not prohibited.

9 Is this not an impoverished conception
10 of equality inconsistent with our most robust human
11 rights jurisprudence that focuses on dignity and
12 respect? A gay or lesbian student is not required to
13 hide his or her sexual orientation and sign a document
14 that is contrary to his or her values in order pursue a
15 legal education.

16 If I've captured the situation
17 accurately, the human rights term that captures the
18 situation of the gay or lesbian student would be
19 poisoned educational environment.

20 More importantly, the ABA accreditation
21 criterion seems unworkable. For TWU to come within the
22 defence under section 18 of our Human Rights Code under
23 the Divisional Court decision in Christian Horizons,
24 which has been referred to in one of the opinions, the
25 parallel section 24 defence, TWU would have to prove

1 that the teaching of law furthered the religious
2 purposes of the university and its members, that law
3 students were attending TWU to obtain a religious legal
4 education.

5 Whether or not that can be proven,
6 that's quite a different perspective than we would look
7 for as a secular institution in accrediting TWU.

8 But do we need to draw the balance of
9 competing values in TWU's employment and student
10 restrictions at all? Rather, should we accept that
11 TWU is operating within B.C. law as a private
12 educational institution, but ask ourselves a different
13 question. Whether our public interest rule of law
14 cause of justice mandate in Ontario should be exercised
15 in its favour.

16 In that context, there are a number of
17 additional questions that I believe must be answered
18 and with which I'll close.

19 Does it accord with the rule of law, the
20 public interest and the cause of justice for
21 Convocation to accredit a law school which seeks to
22 promote and advance what are acknowledged to be genuine
23 minority religious beliefs, but in doing so, requires
24 exclusionary policies that harm the interests of
25 several segments of society, those coming within the

1 very large groups that are covered; marital status and
2 sexual orientation prominently.

3 Can accreditation be reconciled with our
4 Law Society's long standing and abiding commitment to
5 promote equity and diversity in the legal professions?
6 These are interests which must be protected by the Law
7 Society, a secular institution that serves a diverse
8 Ontario society in which gays and lesbians are entitled
9 to participate fully and openly in all aspects of
10 society.

11 Does it advance the cause of justice and
12 the rule of law for the Law Society to provide its
13 imprimatur to an institution which reserves required
14 educational opportunities to enter into the practice of
15 law to a small segment of the population and
16 concurrently decreases the proportionate opportunities
17 available to a historical disadvantaged group, members
18 of the vulnerable LGBTQ community.

19 Will our Law Society, if it accredits
20 TWU, violate section 9 of the Ontario Human Rights Code
21 which prohibits a body from discriminating directly or
22 indirectly? If an applicant at TWU is denied admission
23 because of the covenant, does accreditation implicate
24 the Law Society, a secular and public institution, in
25 adopting or assisting in what would undoubtedly be

1 discriminatory policies in a public institution such as
2 ours and thereby violate the Human Rights Code and the
3 Charter that govern us quite independently of TWU.

4 I hope further discussion and response
5 will answer these troubling questions.

6 TREASURER CONWAY: Thank you, Mr. Anand.
7 On the speakers' list next is Mr. Mercer, followed by
8 Mr. Schabas, Ms. Hare and Mr. Ruby. And I've got some
9 hands up so I'll add them to the list.

10 MR. MERCER: I propose to principally
11 address just one aspect of the question before
12 Convocation. I do so hoping that our discussions and
13 subsequent submission by TWU will clarify and challenge
14 my current thinking.

15 Specifically, I want to address what is
16 relevant for the purpose of our exercise of our
17 discretion prior to consideration of Charter values and
18 Human Rights Code issues. It's my view that it's too
19 easy in this discussion to leap to those discussions,
20 not that they're not important, but rather that
21 there's something that we need address before that.

22 We need to be clear about what is
23 relevant for us to -- what relevant purposes we have to
24 advance, as this is the basis of our jurisdiction. The
25 Law Society Act says that applicants for licensing,

1 lawyers and paralegals, are entitled to be licensed if
2 they meet the qualifications and other requirements set
3 out in the Law Society Act and in Law Society by-laws.

4 The Law Society as it's entitled and
5 presumably required to do, has established such
6 qualifications and requirements. One of the
7 requirements is either graduation from an accredited
8 Canada law school or, alternatively, obtaining an
9 NCA certificate. Because the Law Society can set
10 qualifications and restrictions -- qualifications and
11 other requirements, rather, for licensing, the law
12 Society is, in a very real sense, the gatekeeper to the
13 professions.

14 Obviously a central purpose of the
15 exercise of the gatekeeping function is that licensees
16 have an appropriate standard of learning. That's
17 obvious to us all.

18 If that's the only relevant purpose of
19 what we're undertaking now, then our inquiry would be
20 properly limited to an examination of whether TWU will
21 provide or ensure an appropriate standard of learning
22 from its graduates, such that a law degree from TWU
23 should be taken as sufficient for demonstrating an
24 appropriate standard of learning.

25 My tentative view, given the work done

1 by the Federation and what I read, is that a TWU law
2 degree will signify that a satisfactory standard of
3 learning will have been achieved by its graduates, but
4 I doubt that this is the only relevant issue for us to
5 consider, particularly given section 4.2 of the Law
6 Society Act, which requires that in carrying out our
7 functions, duties and powers, one of which is
8 accreditation, that we have regard to the enumerated
9 principles set out in 4.2.

10 The question then is if achieving
11 appropriate standards of learning for licensees is not
12 the only purpose advanced, what else is relevant?

13 I think that it's clear that the Law
14 Society has long considered the diversity in the legal
15 profession and equality of access to the legal
16 profession are of signal importance. Canada is a
17 pluralistic society composed of different groups,
18 different persuasions, in a sense, different tribes.
19 One of the things about which we should be most proud
20 as Canadians is that we have formed a free, democratic
21 and prosperous society that is not premised on one
22 people, one culture, one tribe.

23 Section 4.2 commands that we have regard
24 to our duty to maintain and advance the cause of
25 justice and the rule of law and that we observe our

1 duty to protect the public interest.

2 I believe that the importance that the
3 Law Society has placed on diversity in the profession
4 and equality of access to the profession reflects in
5 substantial part these duties.

6 Our focus is in part on the rights of
7 applicants to the profession and licensees, but I think
8 our focus on diversity in the profession and equal
9 access to the profession is more than that. The rule
10 of law is one of the foundations of our ability to
11 maintain our pluralistic society, but the law applies
12 to all, despite our many differences and distinctions.

13 The proper administration of justice is
14 another foundation of society we maintain. Maintaining
15 and advancing the cause of justice depends on the
16 proper administration of justice, the administration of
17 justice must be accessible, irrespective of one's group
18 or persuasion. Public confidence in the administration
19 of justice depends on equality of access to that
20 administration.

21 It is virtually a truism that our free
22 and democratic and prosperous society rests on these
23 foundations. The fates of members of our diverse
24 society in our democratic institutions depends on the
25 rule of law and equal access to the proper

1 administration of justice.

2 Reflecting on initiatives such as the
3 Justicia Project, The Retention of Women Task Force,
4 challenges for racialized licensees, it seems clear to
5 me that we have concluded, and rightly so, that
6 ensuring that there are no limitations to the entry to
7 the practice of law, other than learning, training and
8 character, is important to these foundations to our
9 free, democratic and prosperous society.

10 Reflecting on our shame that here and in
11 other common-law jurisdictions, jews, blacks,
12 communists and others were once denied admission, I
13 think is corroboration of this conclusion. Said
14 simply, we are clear that the qualifications and
15 restrictions that would limit entry to the profession
16 on the basis of one's race, religion, gender, sexual
17 orientation and the like would be inappropriate, given
18 the importance of the legal profession to the rule of
19 law and the cause of justice in this diverse society.

20 The law -- legal profession must be
21 diverse, no group can be forced to see their members
22 excluded from entry or restricted from entry to the
23 legal professions. To this point I would have thought
24 there would be no controversy.

25 While we are gatekeepers to the

1 profession, there is a gatekeeper before us. The
2 candidates for entry to our licensing process are
3 largely determined by the law schools. We are the
4 gatekeepers at our stage, but we only consider law
5 school graduates and NCA certificates. For every place
6 in law schools in Canada there are more than three
7 applicants. The law schools are significant
8 gatekeepers prior to the Law Society.

9 With this observation, it seems to me
10 that the Law Society should appropriately seek to
11 ensure that these prior gatekeepers do not restrict
12 entry to the legal profession where the Law Society
13 would not do so for the same reasons.

14 My tentative view is that the Law
15 Society should not accredit law schools that
16 effectively limit or impair admission on the basis of
17 race, creed, religious belief, gender, sexual
18 orientation and the like because, in part, of the
19 importance of the rule of law and the administration of
20 justice and the pursuit of justice in our society.

21 I say this not because of the impact on
22 the applicant or the rights of the applicant, although
23 I accept that those are other important distinctions,
24 but my intent is to analyze this question from the
25 perspective of our gatekeeping role to the profession

1 and the importance of a diverse profession and equal
2 access to the profession in pursuit of the rule of law
3 and cause of justice.

4 I recognize the analysis doesn't
5 properly end there. Having considered our statutory
6 purposes, we must consider Charter values and the Human
7 Rights Code. I'm not going to do that because there
8 will be a rich discussion about that, but I do want to
9 recognize that we are presented with a Hobson's choice.
10 Maintaining the principle that law schools should not
11 be allowed to limit or impair admissions on the basis
12 of sexual orientation and marital status and declining
13 to accredit will limit entry of religious candidates to
14 the profession.

15 This is truly unfortunate, because, as I
16 consider it, we should be equally pleased in our
17 pluralistic society to see new evangelical Christian
18 lawyers as much as LGBTQ lawyers in our profession.
19 But it seems to me that we're entitled, and I think
20 obliged, tentatively, to act in broad principle rather
21 than counting heads and seeing which is the least bad
22 alternative on the facts presented to us. The approach
23 that we take here will echo into and shape the future,
24 not just of this application, but applications
25 generally, and public confidence in the legal

1 profession and our willingness to support the rule of
2 law, advance the rule of law and cause of justice will
3 be supported if we take in issue as a principle matter.

4 Finally, I would like to observe that
5 many of submissions received on both sides ironically
6 say the answer is plain and obvious and that they are
7 shocked and appalled that we could even have a debate.
8 Perhaps this is advocacy. Perhaps it reflects deeply
9 held personal views, but fairly reflecting on our legal
10 responsibility, and if lawyers we can't do that
11 properly we should be concerned, and honouring the rule
12 of law makes it clear that the decision before us isn't
13 an easy one. The answer isn't obvious. Simply relying
14 on our personal beliefs would not be right.

15 The rule of law demands that we exercise
16 our discretion in accordance with the jurisdiction
17 granted, not do just what we personally prefer. That's
18 why my presentation, and questions implicit in it, are
19 focused on our statutory duty in advancing the purposes
20 of the Law Society Act.

21 So I'll continue to reflect carefully on
22 the submissions received and on the view of my
23 colleagues, but as matters stand today, I would not
24 accredit TWU because TWU's covenant unacceptably limits
25 admissions based on sexual orientation and marital

1 status.

2 The likely standard of learning of TWU
3 graduates is of no concern to me. I welcome their
4 graduates as people. I fully accept that the -- that
5 law can properly be taught from a religious
6 perspective, just as from various other secular
7 perspectives.

8 One need only reflect on legal history
9 to know that many religious legal scholars have greatly
10 contributed to our legal understanding, but like Mr.
11 MacKenzie, as I stand today, and before listening to
12 the debate and the further submissions, I would decline
13 to accredit.

14 If conditional accreditation were an
15 option open to me I would be in favour of that. Thank
16 you.

17 TREASURER CONWAY: Thank you,
18 Mr. Mercer. I think given that the hour is just after
19 ten-thirty, we'll take the morning break for about
20 twenty minutes.

21 --- Recess taken at 10:32 a.m.

22 --- On resuming at 11:01 a.m.

23 TREASURER CONWAY: Members of
24 Convocation, our speakers' list is growing, so, again,
25 in the interests of trying to give everybody an

1 opportunity to raise their concerns, if we could try to
2 be as brief as you can.

3 I would now like to invite Mr. Schabas
4 to address Convocation.

5 MR. SCHABAS: Thank you, Treasurer. If
6 I wobble, bear with me.

7 TREASURER CONWAY: Did you say waffle,
8 Mr. Schabas?

9 MR. SCHABAS: I just said wobble, not
10 waffle. You and I are thinking the same way.

11 TREASURER CONWAY: I've never known you
12 to waffle on anything. Wobble on, Mr. Schabas.

13 MR. SCHABAS: Thank you, Treasurer.
14 It's been noted already this morning how fortunate we
15 are in Canada to live in one of the most diverse,
16 tolerant, non-discriminatory societies in the world.
17 While certainly not perfect, Canada is a beacon around
18 the world for respecting and protecting human rights.

19 Our recent leading role in striking down
20 laws that discriminate on the basis of sexual
21 orientation has been lauded and followed in many
22 countries, a fact I think most of us in this room are
23 very rightly proud of.

24 The Law Society has a great deal to be
25 proud of in this area. Our strong commitment to

1 equity, equality and diversity in the profession, our
2 programs to prevent discrimination and to assist
3 persons from historically disadvantaged groups are all
4 part of who we are as an organization and of what we
5 stand for as a profession.

6 It's no accident, as Mr. MacKenzie
7 pointed out earlier, that we have a rule of
8 professional conduct that prohibits discrimination.

9 And in keeping, though, with the view of
10 Mr. MacKenzie that we have to maintain an open mind, I
11 too have been carefully reading everything and will
12 continue to read and review everything before I vote on
13 this, but I do have a view on this. I have formed a
14 view, a tentative view, a strongly held tentative view
15 on this, which I intend to express.

16 Just last month at the request of the
17 Human Rights Monitoring Group, Convocation approved the
18 issuance of letters and a public statement regarding
19 the antigay laws passed in Uganda, specifically
20 expressing concern over the persecution of gay lawyers
21 or of other lawyers or advocates who advocate on behalf
22 homosexuals or wish to challenge those horrible laws.
23 A no-brainer. The motion passed with the usual
24 overwhelming support of this body.

25 But do we not apply the same standards

1 and commitment to human rights at home? Because in my
2 view today I would say make no mistake, approving
3 Trinity Western's application would be a discriminatory
4 act by our Law Society. By approving or accrediting
5 this law school, we approve and accredit a path to
6 licensing that is open to some and not to others.

7 We grant a special status, as Mr. Mercer
8 said, an entitlement to a school that discriminates
9 against those who will not, cannot sign the Community
10 Covenant because of their sexual orientation.

11 We then create a situation where fewer
12 places for admission into our entitlement, our
13 licensing process, through attending an accredited
14 Canadian law school are available to some and not to
15 others. Not to those LGBTQ, and to others, but to them
16 in particular.

17 Trinity Western University, as Mr.
18 McDowell pointed out, the Supreme Court said it's not
19 for everybody, but if we accredit them, then our
20 licensing process and the roots to entitlement under
21 our licensing process aren't for everybody either.

22 That's marginalization, that's
23 discrimination, and that is harm. This is not to say
24 that followers of Trinity Western and their covenant do
25 not have rights too, but when they take these beliefs

1 to us and ask us to accredit a discriminatory path,
2 their religious freedom is attenuated, to use the words
3 of the Supreme Court in Whatcott and N.S. because it
4 has a discriminatory impact.

5 So my view today is that I do not see
6 this as a clash of competing equal rights. No one is
7 preventing Trinity Western from operating their
8 university, or even opening a law school and
9 maintaining their beliefs and practices. Trinity
10 Western can discriminate all it wants on its private
11 campus, but when it asks us to accept their school as
12 one that gets a pass into our licensing process, we
13 have to apply our own values. We cannot ignore the
14 discriminatory nature of the institution.

15 It seems to me today that we must apply
16 the law and say no to the value that does not respect
17 other values, and that, to me, is why, for example, the
18 eloquence of Mario Cuomo, quoted by my good friend, Mr.
19 McDowell, I say doesn't apply here. We're dealing with
20 a discriminatory practice, maybe under the guise of
21 freedom religion, but it causes harm, it causes
22 discrimination.

23 Trinity Western can, one could say, hide
24 its discrimination behind the exemptions in the British
25 Columbia Human Rights Code, but we can't. We do not

1 discriminate and we cannot turn a blind eye to Trinity
2 Western's discrimination when they seek to make it part
3 of our path to licensing.

4 So in my view today, I see the decision
5 as an easy one and supported by everything we claim to
6 be about.

7 In response to the argument that says
8 no, we will somehow discriminate against the graduates
9 of Trinity Western or that we are refusing to admit
10 people to our Society who hold those views, that is
11 just not so. We aren't barring their graduates or
12 people who ascribe to the covenant from membership in
13 our profession, they just have to take a different
14 route. And students who choose to attend Trinity
15 Western will know that one of the consequences of that
16 is that, like the students who go to the University of
17 Leicester in England or another unaccredited
18 university, there is a different path.

19 Again in response to my friend Mr.
20 McDowell, I say we aren't barring anybody. We are
21 making our own decision about the entitlement to
22 licensing under our procedures. And it kind of
23 astonishes me how lawyers can twist themselves in knots
24 over this.

25 I read with alarm a statement in the

1 materials by someone I respect who suggested that there
2 was no real public interest basis to refuse this
3 application. Since when is the prevention of
4 discrimination not in the public interest? What is the
5 public interest, if not, among other things,
6 eradication of discrimination?

7 Unfortunately, the Federation of Law
8 Societies didn't or couldn't consider the public
9 interest, and that is unfortunate because some have
10 raised the spectre that we will have different
11 provinces accept. Some may accept it and some may not,
12 and that would be a bad thing, contrary to what the
13 existence of Federation is all about. But uniformity
14 or conformity is not a justification for
15 discrimination.

16 Sadly, the Federation may have brought
17 that problem on itself by not looking at the broader
18 issue.

19 Whether or not they could have stopped
20 this, we at least have the obligation to consider the
21 matter broadly, reflecting our fundamental values
22 rooted in the Law Society Act, the Canadian Charter of
23 Rights and Freedoms, and the Ontario Human Rights Code.

24 We have debated in another context
25 recently, I still have the scars to show it, the issue

1 of whether access to the profession should be in some
2 other way unequal or there should be different paths,
3 but to approve this path is to clearly create unequal
4 and discriminatory access to the profession.

5 As to the Trinity Western decision by
6 the Supreme Court of Canada, some people I know are
7 concerned about it. We've got opinions on it. Let me
8 be blunt. We can make our decision, they can tell us
9 if we're wrong. I daresay they won't. I have read and
10 re-read the Supreme Court of Canada's decision, and
11 while not decided so long ago, it smacks of another
12 era, as indeed it was, as we have, as people have
13 commented, moved so quickly in eradicating
14 discrimination on the basis of sexual orientation.

15 One line in that judgment illustrates my
16 point. The weak assertion, and it is weak, that the
17 covenant would probably -- probably prevent homosexual
18 students and faculty from applying. It may have been
19 weak in part because the issue framed before the
20 Supreme Court there wasn't about entry into the school,
21 it was about whether they produced bigoted teachers.
22 That's not the issue here.

23 Perhaps it was also weak in part because
24 it didn't reflect the same degree of recognition that
25 now exists that documents like a covenant that

1 discriminates on the basis of sexual orientation are so
2 clearly discriminatory.

3 In short, I believe the Court would not
4 be so equivocal today and would recognize the different
5 framework and context, legal and social, in which we
6 must make our decision and I believe, and I think the
7 opinions support this, that it will respect our
8 decision and defer to it, as their own law suggests.

9 Finally let me say this, perhaps as a
10 reminder what, to me at least, today seems obvious. We
11 wouldn't be wrong to say no, indeed, I daresay we
12 wouldn't be having this debate if Trinity Western
13 excluded blacks or persons of, say, Chinese descent, as
14 the Association of Chinese Canadian Lawyers points out
15 in their submission. This is just the same.

16 Based on the submissions received, it
17 looks like most of the profession has no difficulty
18 seeing this as well and my view today is that we must
19 see it that way too. My view today, at least, is that
20 it will be our shame if we don't. Thank you.

21 TREASURER CONWAY: I'm going to go to
22 the phone right now to ask people who are on the phone
23 if they would like to be added to the speakers' list.
24 Those who are on the phone, is there anyone that wishes
25 to be added to the speakers' list at this time?

1 MS. MacLEAN: Yes, I would like to be
2 added to the speakers list, Mr. Treasurer. It's
3 Virginia MacLean.

4 MR. WRIGHT: Not yet.

5 TREASURER CONWAY: I'm sorry?

6 MR. WRIGHT: Not yet.

7 TREASURER CONWAY: Okay, thank you. Was
8 that Mr. Wright?

9 MR. PORTER: Don't go there.

10 TREASURER CONWAY: We'll put the phone
11 back on mute. I'll now ask Ms. Hare to address
12 Convocation. Ms. Hare.

13 MS. HARE: Thank you, Mr. Speaker.
14 Ahnee. Nungosuk gushe n'i dezhuakauss. My name is
15 Susan Hare, that means my name is Susan Hare. I'm from
16 the Ojibwe tribe. I'm co-chair of the Equity and
17 Aboriginal Issues Committee here at the Law Society.

18 I understand you've travelled from far
19 away, so we welcome you to the traditional lands of the
20 Mississauga tribe.

21 I -- the combination of religious
22 schools, disadvantaged groups and laws upholding the
23 same has led to disaster in the past. I bring to you,
24 I guess, a cautionary tale today and I bring to you the
25 obvious.

1 I speak today about the aboriginal
2 children's experience with religious schools in Canada.
3 About the laws that upheld them and the religious
4 institutions that caused great harm.

5 These religious institutions, religious
6 individuals and the newcomer laws imposed with respect
7 to the same used and were used by the faith-based
8 churches who were given the exclusive authority to
9 teach aboriginal children. Legal agreements were
10 signed between the government and the churches. They
11 were all legal, laws were passed to punish the parents
12 if they tried to interfere with their children being
13 sent to these religious schools.

14 And I think there is something we can
15 learn from this, or at least something to provide us
16 with caution and open eyes. During that period,
17 aboriginal spirituality or religion was suppressed and
18 outlawed in Canada, and today are we talking about
19 fundamental rights regarding sexual orientation being
20 suppressed as well?

21 Indian residential schools were operated
22 by the major Christian churches in Canada and the
23 subbranches thereof of those churches. Aboriginal
24 beliefs were suppressed and outlawed, while strict
25 enforcement of the beliefs of the major Christian

1 churches were implemented under law and by law.

2 I know of what I speak. My family went
3 to Indian residential schools and I, along with others,
4 including Ms. Backhouse, who is not here today,
5 adjudicated some of the worst cases of
6 institutionalized abuse of aboriginal children within
7 those Christian institutions.

8 Granted, most students we speak of at
9 TWU are adults, but I would think that some are still
10 under 18 and still children as well.

11 The second point is that the beliefs
12 that came with the Christians largely from the papal
13 rolls dating back to the 15th century were that people
14 of colour, colonized -- people in the colonized world
15 were not considered human. They were considered
16 savages, they were considered like animals, so
17 mistreatment was almost preordained. And while their
18 Bibles said to love thy neighbour as thyself,
19 aboriginals and others were excluded from that and it
20 was only the Christian neighbours who fell into that
21 Christian precept.

22 Aboriginal people and aboriginal
23 children in those schools were made to feel different.
24 The feeling of difference, the imposition on people
25 that you're different from us is very harmful.

1 And there is an inherent message of
2 non-equality I see in the TWU situation. It has the
3 potential to again send this different message to those
4 whose sexual orientation is different than the people
5 who have the beliefs and who run the school.

6 Two of the laws of the Ojibwe are
7 respect and love. Does TWU respect its
8 non-heterosexual students by denying them their most
9 fundamental and personal choices as adults? I haven't
10 seen a good answer to that yet.

11 The Supreme Court of Canada has said
12 neither freedom of religion nor guarantee against
13 discrimination based on sexual orientation is absolute.
14 The Supreme Court said there has to be a balance. When
15 evidence of this discrimination comes far too late, the
16 no evidence stance is not palatable, in my view.

17 We must make our decision and we must
18 abide by two principles, in my view. The cause of
19 justice and the rule of law in finding that balance.
20 The contradiction of values that is inherent in the
21 covenant imposed by TWU on its students, I don't know
22 how that can be balanced. Perhaps it can't.

23 Finally, I will continue to listen, as I
24 have this morning, continue to read, but I am deeply
25 troubled by the imposition of differences upon other

1 particular position and, indeed, has confirmed that
2 he's representing a client who will be challenging the
3 decision of the British Columbia government, however,
4 Mr. Ruby does no longer have the right to vote in
5 Convocation on this matter and, therefore, based on
6 that consideration, I don't think that it would be
7 appropriate to not permit Mr. Ruby to express his view,
8 acknowledging, I think, that he has taken a position in
9 the past and will continue to do so, no doubt. Mr.
10 McDowell.

11 MR. McDOWELL: Treasurer, I just think
12 it would very dangerous to allow the fact that someone
13 has taken a position as an advocate to preclude them
14 from making submissions before Convocation. We have to
15 separate those roles out.

16 TREASURER CONWAY: Yes, I agree.

17 MR. STROSBERG: I agree.

18 TREASURER CONWAY: Thank you, Mr.
19 Strosberg. Mr. Ruby, please.

20 MR. RUBY: Let me confirm what has been
21 alluded to. There will be a challenge to the
22 constitutionality of the decision of the government of
23 British Columbia in consenting to the issuance of law
24 degrees.

25 That decision is one that will go ahead

1 and be challenged in the near future. I am one of a
2 half dozen volunteer counsel in that case, and I will
3 help present the case and shape it.

4 But the issue today is not that issue.
5 The issue today is it in the public interest for this
6 Law Society to recognize a degree from Trinity Western.
7 I'm not suing Trinity Western.

8 That different question is a crucial
9 one, and it turns upon their requirement that any
10 student adhere to the covenant, the Community Covenant
11 they've established, which reflects their narrow,
12 biblical view of what is required to be a Christian.

13 In my submission to you, it is wrong to
14 acquaint being gay with being a moral failure in the
15 eyes of right-thinking Christians. It is hateful, it
16 is destructive, it is bigotry, and I trust that we will
17 reject it.

18 But views, no matter how hateful, that
19 are religious or conscientious in nature are, to some
20 extent, protected in this country, and we need that
21 protection. We have a history of suppression of
22 religions and racial groups which has cost us dearly
23 over the centuries. We should be alive to the need to
24 protect religious minorities.

25 The question, then, is what is the scope

1 of freedom of religion? What are we protecting under
2 that rubric? How broad does that protection go, where
3 does it extend?

4 It's interesting in looking at the
5 techniques developed, as our colleague knows, in human
6 rights law, at least they're consistent with those used
7 in constitutional law, for examining these claims to
8 religious freedom. One they ask is what's going on in
9 a context that is private or a context that's open to
10 the public. Here we are very near the totally public
11 area.

12 This is not a school for kindergarten
13 children in the religion itself, which is much closer
14 to the private. This is the preparation and the
15 gatekeeping function for entrance to the profession and
16 becoming a judge. Very public.

17 A second one; is this a religious
18 activity akin to prayer, for those religions that adopt
19 prayer, or is it a commercial activity, are people
20 charged money for it? Is it the kind of institutional
21 activity that the rest of the culture charges money for
22 and conducts in public? Again, this is a law school,
23 not a voluntary Sunday school teaching.

24 These issues culminated in 2001 in a
25 challenge to Trinity Western University in the Supreme

1 Court of Canada.

2 Has anything changed? Well, the first
3 thing that's changed is that the litigants in that case
4 made one claim and one claim only. They said anybody
5 who graduates from this particular Christian
6 university, Trinity Western University, is by reason of
7 their training and exposure to these ideas, unfit to
8 teach in any capacity in British Columbia. It was a
9 claim about future inability and it was not surprising
10 that the Supreme Court of Canada responded by saying
11 that's the only claim you make and you've got no
12 evidence that's so.

13 And I say that because it seems obvious
14 to us now that some people exposed to this kind of
15 hatred and denigration of gay and lesbian people will
16 be touched by it and unable to teach properly, but many
17 more will not. That's true of people in any university
18 and in any walk of life, some of us will and some of us
19 won't.

20 There really wasn't, and could not, in
21 my suggestion be any evidence that future teaching
22 would be tainted. But there have been changes since
23 2001. Some of the speakers have adverted to it.

24 Let me focus on one change. In 2001
25 people were alive to the problem that almost anything

1 could be made subject to a claim of freedom of
2 religion. I believe as a Muslim extremist that women
3 should not be taught, neither reading nor writing nor
4 law, and so I'm setting up schools that don't allow any
5 of that. There has to be an answer because that's not
6 part of freedom of religion.

7 So we start by saying is this connected
8 to religion? Yes, it clearly is in that example.
9 Second, we say is it subjectively believed by the
10 adherents? Is it a genuine belief that's religious in
11 nature? Yes, it is, they genuinely believe this is the
12 way God wanted the world to be ordered.

13 So the Court developed a test post-2001
14 as to the objective nature of the protection we're
15 going to grant, how far we're going to grant it. And
16 I'm going to bore you to death by reading pieces of a
17 case.

18 In 2009 a Hutterite case came up in
19 Alberta, went to the Supreme Court of Canada. And the
20 Hutterites said, quite reasonably, we believe literally
21 in the second commandment, which says no graven image
22 shall be permitted, and so they wouldn't allow
23 themselves to be photographed for a driver's licence.

24 It was in direct contradiction of a
25 commandment of God and fundamental to their beliefs.

1 It was central. That conflict led to the development
2 of some principles which I think are helpful, and I'm
3 going to try to read you some excerpts from that case.
4 If anybody wants the citation, it's 2009, two Supreme
5 Court Awards 567.

6 The Court said, "As stated in Anselem,"
7 this is Iacobucci in an earlier case, "Religious
8 freedom revolves around the notion of personal choice
9 and individual autonomy and freedom. The question is
10 whether the limit leaves the adherent with a meaningful
11 choice to follow his or her religious beliefs and
12 practices. It's not every infringement, not every rule
13 that would stop a religion from doing what it thinks is
14 required in the eyes of God or the deity. It's got a
15 very high standard. Does it leave the adherent with a
16 meaningful choice to follow his or her religious
17 beliefs and practices?"

18 And I say that if Trinity Western can
19 only run a law school that teaches a Christian
20 perspective on law, but it cannot exclude gays and
21 lesbians by reason of religious understanding of what
22 they think the Bible means, they are still left with a
23 completely intact freedom of living as we understand.

24 I go on. "There is" the court said "no
25 magic barometer to measure the seriousness of a

1 particular limit on a religious practice. Some aspects
2 of a religion, like prayers and the basic sacraments,
3 may be so sacred that any significant limit verges on
4 forced apostasy."

5 "Other practices may be optional or a
6 matter of personal choice. Between these two extremes
7 lies a vast array of beliefs and practices more
8 important to some adherents than to others."

9 I simply say, if they could run their
10 own law school, but can't discriminate, they've got
11 everything they're entitled to under this understanding
12 of freedom of religion, which is new.

13 The Court went on, "This is not a case
14 like *Edwards Books* or *Moltani* where the incidental and
15 unintended effect of the law is to deprive the adherent
16 of a meaningful choice as to the religious practice.
17 The impugned regulation of attempting to secure a
18 social good for the whole of society, the regulation of
19 driver's licenses in a way that minimizes fraud,
20 imposes a cost on those who choose not to have their
21 photos taken, the cost of not being able to drive on
22 the highway. But on the evidence before us, that cost
23 does not rise to the level of depriving the Hutterite
24 claimants of a meaningful choice as to their religious
25 practice or adversely impacting on other Charter

1 values."

2 Could anyone suggest that if we don't
3 have our own law school with the right to keep out gays
4 and lesbians, our religious options are no longer
5 available. We have no meaningful choice to practice
6 our religion. To say it is to answer it.

7 "The Hutterite claimants argue that the
8 time presents them with -- the limit presents them with
9 an invidious choice. The choice between some of its
10 members violating the second commandment, on the one
11 hand, or accepting the end of their rural communal life
12 on the other hand."

13 But the Court went on and pointed out
14 the evidence said, well, look, we're not destroying
15 your way of life, you've still got that choice. You
16 may have to hire a driver if you want to go on the
17 highways, and that's not too high a price to pay.
18 Obtaining alternative transport would impose an
19 additional economic cost on the colony and the goal
20 against their traditional self sufficiency, but there's
21 no evidence that this would be prohibitive.

22 "On the record before us, it is
23 impossible to conclude that colony members have been
24 deprived of meaningful choice to follow or not to
25 follow the edicts of their religion." .

1 The Court noted, "These costs are not
2 trivial, but on the record they do not rise to the
3 level of seriously affecting the claimants' right to
4 pursue their religion, they do not negate the choice
5 that lies at the heart of the religion."

6 My point, we are on the fringes in this
7 case of claims that could possibly be made about
8 religion.

9 Now, last time I looked at the Bible,
10 and I don't study it carefully, there was no command,
11 no teaching from anyone, go out, be fruitful and found
12 a law school. That is not central to any belief of
13 which I know, certainly not to the Christian one.

14 The Bible does not mention duty and,
15 quite frankly, fundamentalist Christians successfully
16 attend law schools that are open to all across the
17 country. Nobody closes a door to them, and after
18 graduation they have, nonetheless, managed, despite not
19 having their own exclusionary law school, they have
20 managed to live useful and praiseworthy Christian
21 lives. That is a fact.

22 There is simply no evidence of a risk to
23 religious freedom so understood here. There have to be
24 limits on these claims, especially when the harm being
25 caused is so obvious. And it's obvious, I'm proud to

1 say, to the Advocates' Society, which is a middle of
2 road group as you can get, and the Canadian Bar
3 Association, which may have invented the middle of the
4 road. We would look like fools if we acted in the face
5 of what is obvious to all our members.

6 So welcome to the 21st century, this
7 kind of discrimination is unacceptable, but don't sell
8 religion short. It's not freedom of religion that
9 justifies this bigotry. If anybody justifies this
10 bigotry you are on your own. Thank you.

11 TREASURER CONWAY: Ms. Go?

12 MS. GO: I've only decided to speak this
13 morning, so I have to call up my notes.

14 TREASURER CONWAY: Just for the
15 reference of other people on the list, Ms. Go will be
16 followed by Ms. Minor, then Ms. Rothstein and Mr.
17 Lerner. There's more on the list, but just get
18 prepared to make your points. Thank you, Ms. Go,
19 you've got your notes now?

20 MS. GO: Yes. I have to admit that I'm
21 speaking with trepidation as I feel that anything I say
22 will be perceived as having a closed mind, however, if
23 I don't speak and do not express the views that I have
24 at this point, I may be accused of not providing TWU an
25 opportunity to respond to my concerns. So in the end I

1 decide to err on the side of speaking, as opposed to
2 not speaking.

3 As some of the benchers may know, for
4 many years I was involved in a movement to seek redress
5 for the Chinese Head Tax and Exclusion Act. During the
6 late 1800s tens of thousands of Chinese labourers were
7 brought to Canada to work on the Canadian Pacific
8 Railway in order to help realize the national dream
9 that the first Canadian Prime Minister, Sir John A.
10 Macdonald, had to connect Canada from coast to coast.
11 But as soon as the railroad was completed in 1885, the
12 same prime minister immediately imposed a head tax on
13 all and only Chinese who wished to come to Canada.
14 Starting at 50 dollars, the racist tax was raised to
15 one hundred dollars in 1900 and then \$500 in 1903.

16 When the head tax was proven ineffective
17 from stopping Chinese from entering Canada, the
18 Canadian government enacted the Chinese Exclusion Act
19 to ban all Chinese immigration in 1923 and the Act was
20 not repealed until 1947.

21 1947 was also the year when Chinese
22 were first allowed to take up Canadian citizenship. It
23 was also the year when a gentleman by the name of Kew
24 Dock Yip was allowed to practice law, the first Chinese
25 Canadian ever to do so in Canada.

1 Mr. Yip was born in British Columbia.
2 After obtaining a degree in engineering, Mr. Yip
3 decided to pursue a new career, law. When he tried to
4 enter -- apply to enter law school in British Columbia
5 he was turned away. Why? Because the Law Society of
6 British Columbia decided, quite conveniently, that only
7 those who had the right to vote in B.C. would have the
8 right to enter law school, and since Chinese were
9 denied Canadian citizenship under the British Columbia
10 law they were also denied the right to vote in that
11 province.

12 Mr. Yip decided to move to Toronto to
13 study law at Osgoode Hall Law School because,
14 thankfully, the Law Society of Upper Canada at that
15 time did not have the same discriminatory rule in
16 place.

17 After graduating from law school,
18 however, it would still take Mr. Yip five tries before
19 he could pass the bar exam. On the first four tries he
20 was not allowed to take the exam. He was literally
21 stopped at the gate by the gatekeeper at the Law
22 Society because of his race.

23 On his last try Mr. Yip showed up in his
24 military uniform and was finally allowed to write the
25 exam and passed. Among the first things he did as a

1 lawyer was to successfully lobby the government of
2 Canada to repeal the Chinese Exclusion Act. For his
3 contribution to the legal profession, Mr. Yip was
4 awarded with the Law Society Medal several years before
5 he passed away.

6 The Chinese Canadian community began the
7 redress movement in 1984 when two head tax payers went
8 to see their local MP and asked, now that Canada has a
9 Charter of Rights and Freedoms, when can we expect to
10 get back the money that our government has unjustly
11 taken from us? Yet it would still take another 22
12 years, including an unsuccessful class action lawsuit,
13 before the Chinese Canadian community finally received
14 an apology from the government, and the few surviving
15 taxpayers and the widows were given a symbolic
16 compensation.

17 The class action lawsuit failed in part
18 because the Charter has no retroactive application and
19 the government has no obligation to redress historical
20 wrongs under law.

21 But until quite recently I have always
22 thought that had the Charter been in place in 1885 or
23 in 1923, the head tax would not have been enacted,
24 Chinese would not have been barred from entering the
25 country -- sorry, getting emotional -- and they would

1 not have been disenfranchised and thus excluded from
2 the legal profession.

3 Now I have doubt about my position in
4 view of the discussions we're having today. I'm sure
5 back then the British Columbia Law Society and the law
6 school which rejected Mr. Yip had absolutely no doubt
7 about their legal authority or even their moral
8 authority to exclude Chinese Canadians from the legal
9 profession at that time. In fact, on its face, the
10 rules barring Chinese had nothing to do with race at
11 all, it was simply based on the very technical rule
12 about the right to vote.

13 As we all know, our rules and our laws
14 were both reflection of the prevailing social values
15 and, sadly, for a very long time the prevailing social
16 values in Canada were to preserve a white Canada at the
17 expense of our first peoples and people of colour.

18 So today I hope that our prevailing
19 social values will tell us something different. It
20 will tell us that no one should be prohibited from
21 entering law school and becoming a lawyer because of
22 race, gender, disability, sexual orientation and so on.

23 So perhaps my question is not so much
24 for TWU. Indeed, it's a question for myself and my
25 fellow benchers. What are the values that we should

1 uphold when we decide whether or not to accredit TWU;
2 would such values include the principles of equality,
3 respect for human rights and the rule of law, and
4 twenty years from now if we're to look back at our
5 decision that we're making on April 24th, are we going
6 to say that we have made the right decision because of
7 the values that we're trying to uphold and live up to
8 or are we going to say we have made the decision that
9 we are authorized to make based on the rules laid down
10 by somebody else? Thank you.

11 TREASURER CONWAY: Ms. Minor.

12 MS. MINOR: Thank you, Treasurer. I
13 would like to address the public interest component of
14 our decision and other documents or other requirements
15 that we should look to, like the Charter and Human
16 Rights Code, in formulating our views.

17 I express these views now as preliminary
18 views and questions. I agree with the questions and
19 views that have already been expressed by Mr. Anand,
20 Mr. Mercer, and others with respect to this matter, and
21 I'm very interested in my colleagues -- other
22 colleagues' comments and any rely that TWU has to make.
23 So I look to them if I have erred in any statement of
24 fact in terms of what they may comment on on my views.

25 We -- I focus my remarks on the public

1 interest and the admission requirements as they affect
2 those who may ultimately be admitted to the bar in
3 Ontario, and it is the Ontario public interest that we
4 are entitled to look to and must look to.

5 We look to the interest as we understand
6 it and we also have to look to what Charter
7 requirements are and human rights requirements are.

8 As has been mentioned, the Human Rights
9 Code has a section which directly applies to the Law
10 Society, and that is the requirement to admit persons
11 to self-governing professions, that is, ours, without
12 discrimination.

13 While there is no person before us
14 seeking to be admitted, that principle, in my mind,
15 must inform how we interpret the public interest with
16 respect to accreditation. If we are going to admit
17 people to the bar without discrimination, I ask how we
18 can do that if we accredit a school which, in fact,
19 places limits, exclusions and preferences on groups
20 who, in fact, happen to be in this case protected
21 otherwise by the Human Rights Code and the Charter.

22 So it is not the teaching or the
23 curriculum which has been examined by the Federation,
24 which, in my mind, is foremost, it is, rather, the
25 effect of what I understand to be exclusionary and

1 preferential admission requirements. And I'm going to
2 call those people the pool, if I may, and that's with
3 the greatest of respect. So the pool of persons who we
4 may ultimately admit to the bar are those which pass
5 through accredited law schools.

6 At this point in time, the only persons
7 who pass through accredited law schools are persons who
8 have been admitted on non-discriminatory grounds and on
9 the basis of merit, and that is underlying our
10 principle of equal access to education and equal access
11 to the profession.

12 At the same time, we know -- I think we
13 can take notice of the fact that there are insufficient
14 places in our law schools to accept all of those
15 persons who are otherwise qualified. There's a cutoff,
16 there's a limitation, but it's not because no one else
17 is qualified. In fact, we know that persons seek many
18 other avenues and law schools outside of Ontario, in
19 fact, outside of Canada, in order to be admitted to the
20 bar.

21 But the underlying principle in Ontario
22 at least is that those people who may come forward to
23 be accredited before the Law Society are those people
24 who have gone through a non-discriminatory process and
25 who have not received any kind of unequal treatment

1 with respect to admission or, frankly, denial of
2 admission.

3 My question is how do we further that
4 principle if we are permitting accredited -- if we are
5 permitting the pool to be -- and this is my language --
6 skewed by a different admission policy which excludes
7 or prefers groups?

8 I'd like to also add, and, again, I
9 invite any comment, but I understand this covenant to
10 exclude more than LGBTQ persons. How could a
11 common-law couple satisfy the covenant without having
12 an unfair burden or a different burden on them than a
13 married straight couple? I understand this to be
14 problematic for common-law straight people.

15 Persons might argue that there is a
16 distinction between single and married people with
17 respect to that covenant.

18 I also don't understand, and I invite
19 comment, how a practising Jew or practising Muslim, an
20 atheist, could accept and comply with that covenant.
21 So I am very concerned that it is very extensive and it
22 wouldn't matter if it was only one group, but, in fact,
23 I think it's more extensive than that.

24 So to my mind, what I ask us to consider
25 and what I'm very concerned about is what is the effect

1 of accrediting a school which limits the pool of
2 applicants and extends the pool of applicants to groups
3 on a differential basis and on a basis that's not
4 consistent with the Human Rights Code or the Charter?

5 And going to the public interest
6 principle, again, I'm going back -- I'm taking a few
7 steps back to very first principles. In Ontario we
8 have a commitment, and I submit it's a commitment we
9 should agree with, adopt and further, and that is equal
10 access to education, particularly equal access to
11 professional education, and that is one which means
12 that anyone could apply and be accepted on the merits.
13 I should have brought some water. Thank you,
14 Mr. Anand.

15 Of course, we respect the rights of
16 religious institutions or religious groups to have
17 their own schools, and in the elementary and secondary
18 context we recognize religious schools, but at the same
19 time we have a fully accessible open public access to
20 education. If one chooses to go to a separate school,
21 which we must have, according to our constitution, if
22 one chooses to go to another private school or
23 religious school, so be it, it is open to a person, but
24 there is no burden placed on others with respect to the
25 obtaining of education.

1 At this point in time we have no private
2 professional schools in Ontario, we have no private
3 universities which grant general degrees. We do have
4 seminaries, of course, who train persons in a religious
5 context for a religious service; that's not the issue
6 here.

7 What we have is the application from a
8 general education institution, that is, say, general
9 in the sense of professional. It's not a religious
10 school. And in my mind that should be very separated
11 from the right to have a seminary or some institution
12 that produces religious officers or ordains, whatever
13 the appropriate expression is, for other religions.

14 So why -- to accept this would be the
15 first time that we in Ontario would countenance, would
16 legitimize different standards for being admitted to
17 the profession, which would limit, as I say -- and I'm
18 concerned about this, limit those who are not of that
19 particular faith and who cannot accept the admission
20 requirement.

21 And that, to my mind, as I say at this
22 point I'm very concerned that that skews the pool and
23 therefore we would be, in effect, furthering a
24 discriminatory approach towards, ultimately, admission
25 to our profession.

1 With respect to the religious right, of
2 course we have to acknowledge that there are religious
3 rights, there are freedom of religion, there is freedom
4 of association with respect to religion, but the case
5 that Mr. Ruby just mentioned, the Hutterite case, I
6 think is quite helpful.

7 Granted, it was a government standard
8 and it was a section 1 case ultimately, but what the
9 Court advised us to do is look at the nature of the
10 religious right. It's not absolute, and that's been
11 quite evident in the material that we received.

12 I'm not questioning the sincerity or the
13 accuracy of the description of the religious view here,
14 I'm not saying we should go into that, but to pick up a
15 bit on what Mr. Ruby said, what is this religious right
16 or what is this religious requirement? There is no
17 requirement to have a law school. There is no
18 requirement to only get education within the context of
19 one's co-believers, it's not a requirement. It may
20 well be a preference, but it's not a requirement.

21 It's not a requirement to wear a
22 particular kind of clothing, it's not a requirement to
23 pray so many times a day. These are not requirements
24 that have to be observed by the religious in order to
25 satisfy their religion.

1 The group -- the members of this
2 particular religion and persons who sympathize with it
3 are quite able to be full religious participants in
4 their religion without having a law school. They can
5 attend other law schools, and they do. They can be
6 called to the bar through their attendance at other law
7 schools.

8 So I'm very concerned that we start on a
9 path that would, in my view, and my concern would be to
10 change the landscape, to change those -- the pool of
11 those who we will be admitting to the bar in a way that
12 is not just discriminatory, but it's unfair to many
13 others, even if they are not protected groups.

14 Are we going to have profit making law
15 schools which will give a preference to those people
16 who have means? It's not before us, but the whole
17 principle of open access, of universal access to
18 education, in my view, should be supported here and it
19 should be supported through avoiding, if at all
20 possible, any kind of admission standard or indirect
21 admission standard which privileges or burdens persons,
22 particularly those who are protected under the code and
23 the Charter.

24 Those are my concerns. I think they
25 have been echoed by others, and thank you, Treasurer.

1 important to accept that we have a very broad public
2 interest discretion. Open textured, I think the
3 constitutional lawyers in my office would call it.

4 I agree with those who said already that
5 TWU 2001 cannot be said to bind our decision making,
6 let alone our consciences, but I do share the view of
7 many of my colleagues who say but it is the Supreme
8 Court of Canada and it is the careful thinking of some
9 of the greatest jurists in the land, many of whom we
10 very much -- all of whom we respect. So I do think it
11 should be given prominence in our thinking and I have
12 spent a lot of time looking at that case and asking
13 myself what's different.

14 Here's what I've learned. We know from
15 the Supreme Court of Canada decision that the court
16 thought that the B.C. College of Teachers had a very
17 limited public interest making role, particularly with
18 respect to defining discriminatory practices, defining
19 and interpreting Human Rights Codes, reconciling
20 competing rights.

21 We know that they did not have, that is
22 to say, the BCCT, their own by-law making power, as we
23 do. We know that the only relevant by-law did not
24 oblige them to advance the cause of justice or
25 generally to take into account the public interest in

1 everything that they do.

2 We know that the B.C. College of
3 Teachers had not established, as we have in our rule
4 504, standards which oblige each and every member of
5 that profession to take on a special responsibility, a
6 very special responsibility to respect the requirements
7 of human rights laws and everything that goes with it.

8 And so whether or not the B.C. College
9 of Teachers just had a paper deficit is likely the
10 case. Likely they aspired to all of that and their
11 decision reflects that they actually saw themselves as
12 having that role, but one can't read TWU 2001 without
13 noticing that the Court was very concerned that they
14 were actually meddling in somebody else's living. It
15 reluctantly ultimately concluded that it was
16 appropriate for them to consider the discriminatory
17 practices which were embedded in the covenant, but it
18 was, I'm going to argue, a fairly reluctant conclusion
19 by the Court.

20 The second thing that I've noted and
21 others have noted in the submissions that we've
22 received is that the covenant has, indeed, changed
23 since 2001. In TWU 2001 the Supreme Court of Canada
24 made no reference to there being a mechanism under
25 which the community standards document could discipline

1 and expel a student who did not honour the covenant,
2 leading the court to conclude at paragraph 22, and I
3 saw this as so very important, that there was no
4 evidence that anyone had been denied admission or was
5 expelled because of a refusal to sign it.

6 And I put it on that point because I do
7 not anticipate that in the future that kind of no
8 evidence conclusion would support the court's analysis
9 when the issue put before it was whether or not there
10 were, in fact, barriers to entry.

11 It was pivotal, therefore, to the
12 court's decision that it looked at, as Mr. Ruby so
13 carefully put it, something very different. It was
14 entirely peripheral, although noted, peripheral to the
15 Court's concern that there may be barriers to entry to
16 the teaching profession and that there may be barriers
17 to entry to a teaching education.

18 The Court's focus was on whether or not
19 the covenant produced teachers who would foster
20 discrimination in public schools, and I share the
21 court's conclusion that that was very much a freedom of
22 religion and freedom of conscience violation to make
23 such assumptions on the evidence before it.

24 So I say this case is different. I say
25 this case is fundamentally about access to legal

1 education, access to the legal profession, such great
2 privileges that we, luckily, get to live every day.
3 And I ask myself these questions. Are we really living
4 here at the Law Society in a world where if a private
5 religious university prohibits admission to female
6 students, and I pick that example because I know TWU
7 does no such thing and would find it offensive to do
8 any such thing, but I do know that members of my
9 religious heritage have done such things in other
10 jurisdictions. I'm a Jew, and that has happened in
11 some of the orthodox communities. So I pick that for a
12 purpose.

13 I say to us, would we really say as
14 governors of this profession that we are obliged to
15 accredit that religious institution in the name of
16 freedom of religion? I ask myself the question if a
17 private religious university prohibits interracial
18 marriage, this example has been given, or interracial
19 dating, would we say it's any different because the
20 focus is on the behaviour and not the identity of any
21 particular individual?

22 Would we say that we are obliged in the
23 public interest to accredit such an institution in the
24 name of freedom of religion?

25 I ask myself the question if a private

1 religious institution, a private religious university
2 had a covenant which required First Nations not to
3 engage in sacred practices while they were students at
4 that university, would we say we were obliged in the
5 public interest and in the name of freedom of religion,
6 to accredit that university?

7 And I ask us, what is different? What
8 is different if a private religious university
9 prohibits sex and intimacy between an unmarried
10 heterosexual couple; sex and intimacy between same-sex
11 couples, whether married or unmarried? And I say to
12 myself, although my mind is not closed, that is the
13 important question to ask.

14 The harm, in my view, Mr. McDowell, the
15 societal harm is not to be focused on the risk that TWU
16 lawyers will discriminate against anyone. I am
17 confident, based on what I've heard from TWU, that they
18 will endeavour not to, as we all do. The harm is that
19 this covenant surely has the practical effect without
20 evidence and without proof and without testimony of
21 denying admission to LGBT students, to unmarried
22 students, to a range of people, including from other
23 religions, and it perpetuates very negative, perhaps
24 noxious stereotypes that undermine their dignity and
25 worth and, of course, their equality.

1 And that is my problem. Thank you.

2 TREASURER CONWAY: Mr. Lerner.

3 MR. LERNER: First and foremost, I would
4 like to welcome our guests from British Columbia.
5 We're pleased that you're here today.

6 Secondly, I'd like to congratulate the
7 Treasurer. As one who believes in the transparency of
8 this organization, I think what we have done today is a
9 statement that ought not to be ignored. At our break
10 as I looked around the portraits in the other room, I
11 thought I detected a smile on the faces of some of
12 those who have come before us who fully appreciated the
13 level the advocacy and the quality of the debate today,
14 and I congratulate my colleagues who have come before
15 me.

16 Like Mr. MacKenzie, I think that this is
17 an issue of core values. What I'm concerned about is
18 if we are to accredit Trinity Western, how am I going
19 to explain to those members of the community whose
20 interests we are required to protect, how am I going to
21 justify the decision that we have made?

22 I've thought about that, I've thought
23 about ways in which it might be done, and to this point
24 in time I don't have an answer that satisfies me that I
25 will be able to do so.

1 I find it interesting that if this were
2 a perfect world we wouldn't need a Human Rights Code.
3 It would be the manner in which we all live, without
4 the necessity of having specific legislation to dictate
5 how equity-seeking groups ought to be welcomed into our
6 community. The very fact that we need legislation is
7 indicative of the struggle that has taken place over
8 centuries for the protection of individual rights,
9 whether it be race, religion, civility or sexual
10 orientation.

11 I am also somewhat troubled by the fact
12 that some have suggested that Trinity Western
13 University is provided with a defence through the
14 protection of the British Columbia Human Rights Code.
15 The fact that they have to defend it, to me suggests
16 that there may be a recognized violation, and that
17 concerns me at a very basic and fundamental level.

18 We are controlled by our mandate to
19 protect the public interest. We are governed by
20 by-laws. Interestingly, at the bottom are a coat of
21 arms, the words "Let Right Prevail" appear on all of
22 the documents, formal documents that we issue from the
23 Law Society.

24 I'm not sure that I know what is the
25 public interest, but as someone said before, I think I

1 know what it isn't.

2 I suggest to you that a group that on a
3 monthly basis condemns abuses of human rights around
4 the world may be in the position of having asked our
5 Treasurer to write a letter to himself at a subsequent
6 Convocation as a result of a decision we might make.

7 I agree with the principle that what
8 happens within the confines of Trinity Western
9 University is its business and we ought not to dictate
10 the manner in which they control their own affairs,
11 however, I looked hard and long to find some sort of an
12 analogy that might give me some comfort and I found
13 this.

14 "I took the position that after we
15 accepted South Africa unconditionally, the action would
16 be taken as approval, or at least condonation of racial
17 policies which are abhorred by Canadians as a whole."

18 I never thought the day would come when
19 I would quote John G. Diefenbaker, but I have. I think
20 that statement reflects the position adopted by the
21 world community, not just by Canada, but by the world
22 community to the atrocities of apartheid and the
23 restriction imposed upon South African athletes who
24 attempted to participate in the Olympics games from
25 1972 through 1978.

1 I believe I prefer to adopt the broad
2 interpretation enunciated in the Pinto opinion, and on
3 that basis I leave my mind open to be convinced
4 otherwise, but I must say that there are questions that
5 need to be answered and I look forward to hearing those
6 in due course.

7 TREASURER CONWAY: Mr. Swaye. Yes, I
8 should say we have Mr. Swaye, followed by Mr. Falconer,
9 followed by Ms. MacLean, followed by Ms. Symes, and
10 that's the remainder of the list so far -- and now we
11 have two more, three more. Am I bid four, five? I've
12 got a list. Mr. Swaye.

13 MR. SWAYE: I have had the pleasure of
14 sitting in Convocation for the last 19 years. This
15 probably is one of the most important issues that's
16 ever come before us.

17 We know about the mandate, but let me
18 refer you to a New York Times article, and it recalls
19 the State of Colorado recently had issues, and there's
20 a headline, "Religious Right in Arizona Cheers Bill
21 Allowing Business to Refuse to Serve Gays." The date
22 of the article is February 21, 2014.

23 "In New Mexico, a photographer declined
24 to take pictures of a lesbian couple's commitment
25 ceremony. In Washington State, a florist would not

1 provide flowers for a same-sex marriage. And in
2 Colorado, a baker refused to make a cake for a party
3 celebrating the wedding of two men."

4 "The business owners cited religious
5 beliefs in declining to provide services celebrating
6 same-sex relationships, and in each case they were
7 sued."

8 "Now, as states around the nation weigh
9 how to balance the rights of same-sex couples with
10 those of conservative religious business owners,
11 Governor Jan Brewer of Arizona must decide whether to
12 sign legislation that would allow business owners to
13 cite religious beliefs as a legal justification for
14 denying service to same-sex couples."

15 We know that the governor would not sign
16 the bill. Why? My submission is because, from her
17 perspective, it was wrong.

18 The article goes on to state, "The
19 legislation, approved by lawmakers on Thursday,
20 immediately attracted national attention with
21 conservative religious groups welcoming it as a
22 necessary form of protection for objectors to same-sex
23 marriage, and gay rights groups denouncing it as a
24 license for discrimination. The measure comes at a
25 time when the courts are grappling with how to define

1 the religious rights of private businesses. The
2 Supreme Court is to hear two cases next month in which
3 businesses are seeking exemptions from providing
4 insurance coverage for contraception to their
5 employees, citing the religious beliefs of the
6 companies' owners."

7 To move on in the article, "Religious
8 freedom is a fundamental right, but it's not a blank
9 cheque to harm others or impose our faith on our
10 neighbours, said Daniel Mach, who directs a program of
11 freedom of religion and belief for the American Civil
12 Liberties Union, which opposes the Arizona legislation.
13 Over the years we as a nation have rejected efforts to
14 invoke religion to justify discrimination in the
15 marketplace, and there is no reason to turn back the
16 clock now."

17 The article further says, "It sounds
18 like it's opening the door to hate and bigotry of all
19 stripes, said Rocco DiGrazia, a Tucson pizzeria owner,
20 who on Friday attracted national attention via social
21 media because he had posted signs on the restaurant's
22 doors declaring "We reserve the right to refuse service
23 to Arizona legislators."

24 "Sarah Warbelow indicated that there is
25 a significant fear that it would undermine local

1 non-discrimination laws." She is the state legislative
2 director for the Human Rights Campaign, a gay rights
3 advocacy organization.

4 "This is not about the freedom of
5 individuals to practice their religion, this is about a
6 license to discriminate against individuals."

7 I submit here it is not right or wrong
8 for TWU to take the position that they choose, but it's
9 rather one of discrimination in general. Today it's
10 gays, tomorrow it's Jews and blacks. The principle is
11 there.

12 I submit that the Supreme Court of
13 Canada, in a judgment indicated called Noble versus
14 Ali, 1951 SCR, page 64, had to do with a restrictive
15 covenant in a deed drawn in 1933 that provided that the
16 lands herein shall never be sold to any person of the
17 Jewish, Hebrew, Semitic, negro or coloured race or
18 blood, and the restriction should remain in place until
19 August 1, 1962.

20 A motion was made in the Superior Court
21 of Ontario for an order declaring the covenant invalid,
22 but was dismissed. The decision was affirmed by the
23 Ontario Court of Appeal in the Supreme Court of Canada.
24 They allowed the appeal, arguing in that case it is
25 quite interesting to note that the following names

1 quite familiar to many of us, J.J. Robinette, K.C., and
2 Walter Williston for the appellant, Noble; J. Shirley
3 Denison and Norman Borins for the appellant, Wolf; K.G.
4 Morden, K.C., and J.C. Osborne for the respondents, and
5 the judgment of Kerwin and Taschereau was delivered by
6 Justice Kerwin.

7 I submit to Convocation to search your
8 conscience on this vote. I submit that discrimination
9 in any institution is just plain wrong in this day and
10 age.

11 I have read the opinion of Mr. Meehan,
12 who I respect tremendously, but my question for Mr.
13 Meehan and for the school is the following: To permit
14 the covenant to stand, will that not permit other
15 institutions to take that as a precedent to allow
16 discrimination if we ever have to decide this question
17 in this Convocation again? Thank you.

18 TREASURER CONWAY: I've noted that in
19 making remarks, some benchers have referred to issues
20 or matters that are not actually in the record that is
21 before Convocation. I would just ask benchers to
22 consider -- the benchers that are on the waiting
23 list -- on the speakers' list, if you would keep in
24 mind the advice that we've received that it's important
25 to limit our consideration of the matter before

1 Convocation to the record.

2 Certainly in the debate that will occur
3 on April the 24th you will not be able to refer to any
4 new material that isn't before Convocation on the
5 record. Just keep that in mind.

6 MR. SWAYE: May I file the --

7 TREASURER CONWAY: No.

8 MR. FALCONER: Good lawyer.

9 MR. PORTER: After fifty years you don't
10 know that?

11 TREASURER CONWAY: So if I could call on
12 the next speaker, please, which is Mr. Falconer. And
13 I'll just say, Mr. Falconer, that when you're finished
14 we're going to break for lunch, so I'm sure you'll be
15 motivated to make your remarks brief.

16 MR. FALCONER: Thank you, Mr. Treasurer,
17 for that. It's not unusual for my colleagues to hunger
18 for my submissions.

19 I want to acknowledge our guests from
20 TWU, I want to acknowledge my esteemed estates
21 professor in the form of Mr. Meehan over there, and
22 friend. I want to acknowledge the excellent advice we
23 received today from Ms. Kristjanson and I want to say
24 that in terms of my submissions, I not only remain
25 open, but I am truly, truly perplexed at suggestions

1 that values are not at loggerheads.

2 I find values today are at loggerheads,
3 and I haven't chosen and I have resisted creating a
4 hierarchical list of interests, and in doing so I look
5 forward to hearing from TWU about the concerns
6 expressed today and the questions expressed today and I
7 look forward to that stage where we make a decision,
8 and I'm certainly nowhere near that.

9 What I also want to say is I benefited
10 from many of the remarks, all of remarks today. I do
11 want to say I benefited in particular from somebody who
12 was the subject of a point of order, being Mr. Ruby,
13 and his remarks. It's not simply because he's a mentor
14 and a friend, but it's also because his remarks, as
15 usual, as one of the most preeminent human rights
16 lawyers in this country, strike at the heart of what we
17 have to consider.

18 And to any suggestion that we as
19 benchers are incapable of taking positions for our
20 clients and remaining open, this is an exercise we have
21 to do on a regular basis. For those who would suggest
22 some have fallen on one side, I urge you to look at the
23 BoardBooks record that we're making our decision on,
24 because you will see in there benchers who have very
25 supportive of TWU in writing who will be making

1 decisions in this process. That is, they are on both
2 sides of the equation. Why? Because we have jobs to
3 do, number one, and number two, we're capable of
4 remaining open and making decisions independently.

5 At the end of the day, I am left with
6 the following, and it's embarrassingly basic. When I
7 hear assertions of the right to congregate, of the
8 right to share expression, of the right to enjoy one's
9 beliefs, these are all matters that I'm not just
10 committed to personally, but committed to
11 professionally.

12 I have always had a line that I've drawn
13 in the sand and that line generally is around what I
14 call the steamroller effect.

15 To what extent does respecting and
16 upholding a particular set of values in turn lead to
17 the steamrolling of another set of values? I find as
18 simple as it is, embarrassingly, it's not a quote from
19 a prime minister, it's not a quote from the Supreme
20 Court of Canada, it's just how I live my life.

21 If I think I'm steamrolling somebody
22 else, then I have to ask a very, very serious question.
23 Is this necessary? Is it necessary to make that law
24 student -- and I envisage this law student, maybe
25 others don't, but I do, is it necessary to make that

1 law student who is in the middle of their legal
2 education, who may discover themselves in the first or
3 second year of law school at TWU, who may discover
4 something about their own personal identity, is it
5 necessary to make that person feel so vilified that
6 they would have to report themselves to the dean of TWU
7 and advise that they are now in breach of the Community
8 Covenant?

9 Is it necessary to create a world in
10 which their fellow student, who sees that they are
11 discovering themselves, report them to the dean of TWU
12 because they have witnessed someone who is in violation
13 of their covenant?

14 I don't worry that a TWU grad is going
15 to go out there and be any more prejudiced or
16 discriminatory than half of the judges or anybody else
17 I've encountered in my life. You folks will get it as
18 right or wrong as the rest of us. I worry about
19 steamrolling those who are in no position to protect
20 themselves and for reasons that confound me.

21 So I ask this when we talk about the
22 public interest, and I remain open because I want to
23 hear your answers to this. If we are truly to apply
24 the public interest, then don't we have to ask who are
25 members of this public? Is the LGBTTI2Q community, are

1 members of that community part of the public? Because
2 if they're part of our public, and they are included in
3 the public interest equation, just, of course, as TWU
4 and others are, then are they not steamrolled? And if
5 the answer is they are steamrolled, then I'm troubled.

6 I remain open to understanding whether
7 they are to be members of the public. I remain open to
8 hearing you on this. There is a quote, and I'm hoping
9 that my annotations can find it, there is a quote that
10 comes from the president of TWU in a letter dated March
11 21st, 2013, to be found at page 1235 of BoardBooks,
12 part of our record.

13 The president, President Raymond, is
14 writing to the Federation of Law Societies of Canada,
15 and he expresses at page two of the letter, top
16 paragraph, "The Civil Marriage Act includes a preamble
17 which states "It is not against the public interest to
18 hold and publicly express diverse views on marriage."

19 I agree with President Raymond. My
20 concern is how does one -- and I hope and look forward
21 to the answer to my question, how does one hold diverse
22 views at TWU with that Community Covenant? Or is the
23 answer that you don't hold diverse views if you go to
24 TWU and we don't concern ourselves with that particular
25 public interest that the president is referring to,

1 but, in fact, we have a different approach. And if, in
2 fact, the president is espousing a different approach
3 that is different than this public interest and this
4 fostering of diverse views, how do I reconcile it with
5 my public interest that I have to apply as a bencher?

6 I look forward to the ongoing debate
7 today and I look forward to the answers we receive on
8 April 24th. Thank you.

9 TREASURER CONWAY: Thank you, Mr.
10 Falconer. We'll now rise for lunch and come back at
11 1:45. So we have an hour and fifteen minutes. Thank
12 you.

13 --- Luncheon recess at 12:28 p.m.

14 --- Upon resuming at 1:50 p.m.

15 TREASURER CONWAY: Okay. Thank you,
16 Ladies and Gentlemen.

17 We'll continue the discussion, but
18 before I call on the next speaker on the list, I just
19 wanted to make a rather technical change to the
20 question that is in BoardBooks at page 3, and it's a
21 very small correction, but it more accurately tracks
22 the language of the Federation's approval.

23 So the question as amended will be:
24 "Given that the Federation Approval Committee has
25 provided preliminary approval of the TWU law

1 program...," et cetera, rather than, "provided
2 conditional approval", because that's -- the resolution
3 that was passed at the Federation speaks to preliminary
4 approval of the TWU law program. Just a change from --

5 MR. CAMPION: Point of order to
6 explain: Is there a difference between the two that we
7 should --

8 TREASURER CONWAY: No, no. It's just
9 simply to track the language. The resolution that was
10 passed by the council of the Federation, or rather, the
11 approval that was given by the Approval Committee was a
12 preliminary approval. This more accurately tracks.
13 Make that change. All right?

14 So we left off with Mr. Falconer, and
15 next on the list is Ms. MacLean who is on the phone.
16 Ms. MacLean, before I ask you to make your remarks, I
17 should use the opportunity, while we've got everybody on
18 the phone: Is there anyone on the phone right now that
19 wishes to be added to the speakers' list at this time?

20 MS. MACLEAN: You want to know who is on
21 the phone now or new people?

22 TREASURER CONWAY: Well, actually, I
23 guess we can go through, I guess we should go through
24 the list again and see if there's anybody who has left
25 or joined us.

1 Okay. We're going to go through the list again. Robert
2 Armstrong? Constance Backhouse?

3 MS. BACKHOUSE: Present.

4 TREASURER CONWAY: Larry Banack? He's
5 in the room, sorry. Mr. Copeland? Paul Copeland? Mr.
6 Epstein? Mr. Eustace? Mr. Furlong?

7 MR. FURLONG: Present.

8 TREASURER CONWAY: Thank you. Mr.
9 MacLean, excuse me, Ms. MacLean, you're on the phone.
10 I'm adding your --

11 MS. MACLEAN: Yes, I'm on the phone.

12 TREASURER CONWAY: Thank you.

13 MS. MACLEAN: Yes, I'm here.

14 TREASURER CONWAY: Ms. Richardson? MS.

15 RICHARDSON: Present.

16 TREASURER CONWAY: Thank you. Ms. Ross?
17 Ms. Strosberg?

18 MS. STROSBERG: Present.

19 TREASURER CONWAY: Mr. Wright? Mr.
20 Scarfone?

21 MR. SCARFONE: Present.

22 TREASURER CONWAY: Thank you. I think
23 Mr. Sandler was here. He's gone. I don't think he's
24 on the phone now. Mr. Manes, are you still on the
25 phone? Mr. Yachetti?

1 MR. YACHETTI: I am here, sir.

2 TREASURER CONWAY: Thank you. Mr.
3 Hunter? Mr. Hunter?

4 All right. Is there anyone whose
5 name -- is there anyone on the phone whose name I have
6 not called?

7 MR. MANES: This is Ron Manes. Did you get my presence?

8 TREASURER CONWAY: Yes, we do now.
9 Thank you, Mr. Manes.

10 MR. MANES: Right. Thank you.

11 TREASURER CONWAY: Is there anyone on
12 the phone whose name I have not called? All right. Is
13 there anyone on the phone who wishes to be added to the
14 speakers' list at this time?

15 All right. Ms. MacLean, you have the
16 floor.

17 MS. MACLEAN: Thank you, Mr. Treasurer.
18 I'd like to say hello to the representatives of the
19 Trinity Western University. I'm sorry I can't be there.
20 I can't see the wonderful counsel who I know are there.
21 I would also like, Mr. Treasurer, to commend you and the
22 staff for the wonderful materials that you have put
23 together. The written background materials record is
24 excellent and it answers many of the questions that have
25 been troubling us all the way through this process.

1 I agree that during my term, this is the most important
2 issue that has ever I think faced the bench, the
3 benchers, and I also now am conscious, like Mr. Swaye, so
4 this is a much longer period of time over which we have
5 been asked to deal with such a very important issue.
6 Now, I am not going to speak on the merits of the issue
7 because I cannot begin to express it in a way that's
8 already been expressed. What I have is a very practical
9 question arising out of the materials.

10 Specifically, when the Trinity Western
11 University made their submissions to the Federation in
12 their report, they talked about why, their rationale
13 for the law school, and in that submission, which
14 you'll find at BoardBooks on page 74, in that
15 submission, they say one of the benefits is to sole
16 practitioners of small law firms, and they go on and
17 they indicate that it's -- the benefit is to the small
18 practitioners and small law firms in British Columbia,
19 and they have addressed all their comments to the
20 lawyers and answering the concerns of the Law Society
21 of British Columbia, not the Law Society of Upper
22 Canada.

23 So my question is this: Why today, before this matter is
24 heard by the Law Society of British Columbia, which I
25 understand is to be tomorrow, are we asked to consider

1 this matter? And furthermore, why are we asked to
2 consider this matter before final determination has been
3 made by the application to the B.C. Law Society?

4 I would have thought that the law school
5 would have been better served to address the issue in
6 one jurisdiction, rather than spreading itself as it
7 has in the multiple jurisdictions, including this one,
8 which I would submit is probably one of the most
9 difficult jurisdictions for them to address, and for
10 that reason, I would like an answer to that question,
11 perhaps in a written response.

12 TREASURER CONWAY: Well, if I may --

13 MS. MACLEAN: Treasurer --

14 TREASURER CONWAY: Ms. MacLean, if I may
15 say, I'm not sure that that's a question that TWU would
16 be in a position to answer, but clearly, the law
17 societies of the provinces and territories have the
18 legislative authority for them to, you know, to
19 determine who can be admitted to their provincial bar,
20 and as I've mentioned before, the policy of this Law
21 Society which was adopted in 2011 was that we would no
22 longer be required in a typical case to examine a
23 particular law school program once the Approval
24 Committee had approved it, but as you will note from
25 the history of this matter, there has been a view that

1 the national standard omits consideration of the issues
2 that are being debated in the law societies across the
3 country, and despite our policy that we adopted in
4 2011, the by-law of our Law Society requires
5 Convocation to consider the merits of this particular
6 application and, indeed, allows the Law Society to
7 consider any, the appropriateness of any law degree
8 program.

9 I'm sorry I can't give you a better answer than that at
10 the moment, but that's the rationale for the application
11 being considered in various provinces at different times.

12 MS. MACLEAN: Thank you, Mr. Treasurer.

13 I guess the question is they have to go with their
14 application to a particular province, and I'm just, you
15 know, wondering why we are debating this today. That's
16 all.

17 Thank you for your time.

18 TREASURER CONWAY: Thank you. Do you
19 have any other points you wish to address, Ms. MacLean,
20 or --

21 MS. MACLEAN: No, I don't, Mr.
22 Treasurer. That's my question.

23 TREASURER CONWAY: Thank you. So next
24 on the list is -- but, obviously, if Trinity Western
25 wishes to augment, wishes to contribute to an

1 explanation of why they're here, certainly, they will
2 have an opportunity to do that if they wish to address
3 that point.

4 Ms. Symes, can I call on you now. And
5 while Ms. Symes is going up to the podium, I can advise
6 that Ms. Symes will be followed by Mr. Callaghan, and
7 then Mr. Silverstein, and Ms. Murchie has asked to be
8 removed from the list, and Mr. Silverstein is to be
9 followed by Mr. Evans, and then, sorry, Mr. Campion
10 before Mr. Evans.

11 Ms. Symes, please. Thank you.

12 MS. SYMES: Treasurer, representatives
13 of Trinity Western University and their counsel, I
14 don't intend to repeat the various questions that were
15 asked. I want to go into a new area and ask my
16 questions with respect to those areas.

17 I begin, of course, with the decision that we -- is
18 before us that we must make is to be done in the public
19 interest, and part of the informing of that public
20 interest is the statement from the Supreme Court of
21 Canada and Dore, which is that we are to use Charter
22 values, which includes upholding dignity and respect for
23 all Canadians including on the basis of sex, sexual
24 orientation, marital status and religion.

25 And Tranchemontagne, the Court said to us we must, in

1 making our decision, interpret and apply human rights
2 legislation and, of course, for us it is Ontario human
3 rights legislation.

4 Now, I make these remarks as -- this is as an "out"
5 Christian. Sometimes we have greater ease in talking
6 about sex and money, but religion is, in fact, one of our
7 last taboos, and so I say that: I make these remarks as
8 an "out" Christian.

9 In Canada, there is no hierarchy of rights and so we
10 can't simply say that religion trumps sexual orientation
11 or the other way around. What the Supreme Court of
12 Canada said in N.S. is that when there are competing
13 interests, then the decision-maker must strike a just and
14 proportional balance between freedom of religion on one
15 hand, and freedom from discrimination on sex, sexual
16 orientation, marital status, et cetera.

17 But what the Court said is, before you enter into the
18 balancing, is first answer the question: Are the
19 competing interests truly engaged on these facts? And if
20 the answer to that is yes, resolve those claims then to
21 try and preserve both rights.

22 So my question, my first question will be, are the
23 competing interests truly engaged on these facts? So
24 let's look at it from the point of view of freedom from
25 discrimination on the basis of sex, sexual orientation

1 and marital status.

2 There is no question, based on the
3 materials before Convocation, that gays and lesbians
4 cannot enjoy sexual relationships even if they are
5 married. The covenant prohibits it. Well, what about
6 the line, "It's okay to be gay, just no sex"? Hate the
7 sin, love the sinner. It's well-established law now
8 for a long time in Canada, beginning first with Vriend,
9 that sexual orientation includes being the person. It
10 includes the right to have sex. It does not merely
11 protect eunuchs.

12 Okay. So what is this covenant? And I ask of Trinity
13 Western, as I read the covenant, it is not aspirational
14 or merely aspirational or merely theoretical. How on
15 earth could we possibly disagree with an institution that
16 upholds integrity, honour, justice, et cetera, but the
17 covenant, as I read it, and I ask for further
18 clarification, applies not only to behaviour on campus,
19 but also off campus. And here's the kicker: Failure to
20 comply with the covenant invokes discipline up to and
21 including expulsion.

22 Now, that covenant has changed, as I read it, from the
23 2001 case involving teachers. So for freedom from
24 discrimination on the basis of sex, sexual orientation
25 and marital status, it is clearly engaged. There is

1 evidence before Convocation that either actions are
2 prohibited and will not take place, or that there is a
3 breach of the covenant, subject to discipline, the most,
4 of course, powerful one being expulsion.

5 But what about freedom of religion? My first question
6 is, is it really engaged? On these facts, that is, a law
7 school at a Christian university, is freedom of religion
8 really engaged as the Supreme Court of Canada set out in
9 N.S.? There's no requirement that a person whose
10 personal religious beliefs prohibits abortion must have
11 an abortion. There is no requirement that a lesbian must
12 have sex, even within marriage. No requirement that an
13 unmarried person must have sex.

14 Freedom of religion, I suggest, in Canada protects
15 beliefs, but when those actions extend to compelling or
16 prohibiting actions of others, that is when there is a
17 conflict.

18 Now, this is not an application or an accreditation of a
19 divinity school. This is not a code or a covenant to
20 associate, to ascertain whether or not Mary or John or
21 whatever should become a pastor in the Evangelical
22 Church. I suggest, ask of Trinity Western University,
23 that if that were the case before Convocation, that is
24 clearly protected by freedom of religion. Freedom of
25 religion is clearly engaged in a divinity school where

1 you're selecting leaders for a faith.

2 But this is a law school, and surely one of its purposes,
3 and if you read Trinity Western's submissions to the Law
4 Federation, it's in part to prepare students to practice
5 law, and that part of it, other than to be done with
6 integrity, with honour, truthfulness and in justice,
7 freedom of religion I suggest may not be engaged.

8 And so that's my first question. What is Trinity
9 Western's response to the Supreme Court of Canada in N.S.
10 as to whether or not in these particular facts, freedom
11 of religion is, in fact, engaged?

12 If the answer to that question is yes, let's turn then to
13 the other side, and let's look at those same facts and
14 determine how the Supreme Court of Canada has given us
15 direction in terms of balancing. I suggest that the most
16 helpful direction comes from the Whatcott decision. It's
17 a unanimous decision of the Court in 2013. I think it is
18 the latest pronouncement. It is a substantial change
19 from its prior decisions with respect to limits on
20 freedom of speech and it is, in fact, a different
21 viewpoint of these issues than the BCCT case in 2001.

22 It involved hate speech provisions of the Saskatchewan
23 Human Rights Code that were challenged on the basis of
24 freedom of expression, s.2(b), but the second part, which
25 is often not referred to, freedom of religion, 2(a).

1 Mr. Whatcott, clearly a very earnest man, you may have
2 met him at the Canadian Bar Association in Saskatoon
3 picketing out front of the convention centre, he
4 believed, he believes that homosexuals, who he refers to
5 as sodomites, must be kept out of public schools because
6 they provide a risk to school children, and he gave
7 evidence in the tribunal that God is calling him to
8 spread this gospel. This is his mission, his freedom of
9 religion to spread pamphlets throughout Regina, Saskatoon
10 and other places that homosexuals have no place in public
11 schools because it would place school children at risk,
12 and the second part and the smaller part of the Whatcott
13 decision deals with the freedom of religion under 2(a).
14 Now, how did the Court direct that these were to be
15 balanced? The Court said that an infringement of s.2(a)
16 will exist if the claimant sincerely holds the belief or
17 practice that has a nexus with religion, and secondly,
18 the provision interferes with the claimant's ability to
19 act in accordance with his or her religious beliefs.
20 This interference must be more than trivial or
21 unsubstantial, such that it threatens actual religious
22 beliefs or conduct.
23 Okay. Now, what did the Court do about Mr. Whatcott's
24 belief that homosexuals should not be permitted in the
25 public schools? It said when reconciling the Charter

1 rights and values, freedom of religion and the right to
2 equality accorded to all residents of Saskatchewan must
3 co-exist.

4 But they went on to say it doesn't
5 matter whether the expression is religiously motivated
6 or not. If viewed objectively, the publication of
7 these views exposes vulnerable groups to detestation,
8 these are the magic words in the hate provisions,
9 detestation and vilification, then religious expression
10 is captured by the legislative prohibition that is
11 found in the hate provision of the Saskatchewan code.
12 They said Whatcott's freedom "to preach against
13 same-sex activities...and to seek to convert others to
14 his...view" is preserved. His "freedom to express
15 those views is unlimited, except...they [may] not be
16 conveyed through hate speech."

17 So my question then to Trinity Western: The Supreme
18 Court has said that Trinity Western University is free to
19 believe, to teach, to preach to its students religious
20 beliefs which say that abortion, homosexuality and sex
21 outside marriage are morally wrong, in fact, a sin, but
22 this is a law school. It's not a school of divinity.

23 And the question really is, why should
24 the Law Society accredit Trinity Western University,
25 which will, as a number of my colleagues have said,

1 discourage and prevent gays, lesbians, bisexuals and
2 trans, from applying to your law school, but also once
3 there, will subject them to isolation and to
4 discipline, including expulsion, if they act consistent
5 with their true nature. To do so is, in fact,
6 inconsistent with Charter values.
7 So my first question to Trinity Western, if you can help
8 me: How is freedom of religion engaged? And in having a
9 new law school and in coming to Ontario for accreditation
10 of it, how is your freedom of religion engaged?

11 And a second question: If freedom of
12 religion is engaged, how does Trinity Western
13 University propose that the equality rights of women,
14 of gay, lesbian, bisexual, trans, and unmarried be
15 preserved, because religion doesn't trump.

16 Thank you.

17 TREASURER CONWAY: Mr. Callaghan,
18 I actually -- go ahead. Sorry. Go ahead. I just have
19 written down the wrong "John". I don't think the order
20 matters.

21 MR. CALLAGHAN: I have three sets of
22 notes here. I have my reading notes, my typed notes
23 and --

24 TREASURER CONWAY: Whatever one is
25 first.

1 MR. CALLAGHAN: Handwritten notes I did
2 before I just got up here. This is a difficult issue.
3 It doesn't allow for an easy answer.

4 I appreciate Bencher Symes, who kindly
5 reviewed some of the case law, because I find in my
6 deliberations that the case law does matter. I -- we
7 are a subordinate administrative body. While we have
8 our own statute, we're dealing with a clash of Charter
9 values. That's what we're dealing with. Any of us can
10 pick your own Charter value and you can say your
11 Charter value is more important than the other, and
12 it's a clash in a secular society when it comes to
13 religion, which is very dangerous, which is something
14 that we, as benchers, need to reflect on.
15 We need to reflect on what the Supreme Court of Canada
16 has said. In this case, the TWU case before the Supreme
17 Court of Canada, addressed, and Ms. Symes made a very
18 good point which I, too, want to hear from Trinity
19 Western, which is the difference between the covenant
20 today and the covenant then, but did address the
21 covenant, and the Supreme Court of Canada struggled with
22 balancing the two rights, the equality right and the
23 right to religious freedom, not dissimilar to the way we
24 did.

25 Not so long ago, in November, R. v.

1 Bedford, the Supreme Court of Canada once again
2 enunciated that precedent matters, that the rule of law
3 and the common law is a precedential system, and that
4 to deviate from precedent, as they call it, on the
5 vertical axis, they gave themselves their own
6 horizontal axis, they can do what they want, but on the
7 vertical axis where we sit, you have to have a new
8 argument, as it were, or new facts. Can't be the
9 recasting of an old argument. Can't be a different
10 emphasis on the old argument. So that's why I come
11 back to the Trinity Western case and say there is a
12 clash in values.

13 It is a clash in values that is perplexing. Because
14 Bencher Symes was nice enough to out herself, I'll out
15 myself. I am a lapsed Catholic. I have faith. I don't
16 have a lot of religion. I could not sign your covenant.
17 I could not sign a lot of that covenant, and yet I hold
18 on to my heterosexuality like I'm holding on to the
19 wreckage.

20 --- Laughter.

21 MR. CALLAGHAN: I have hockey cards in
22 the basement. I bring it out once in a while, but I
23 don't do much with it.

24 --- Laughter.

25 TREASURER CONWAY: Can we get back to

1 the matter.

2 MR. CALLAGHAN: So when one reflects on
3 religion, you know, religion and religious freedoms are
4 really the foundation of Western society as we've
5 fought intolerance. Religious freedoms were
6 hard-fought.

7 Canada is somewhat unique in a country,
8 in a fathering land of at least the English, with the
9 Act of Union and the prejudices that went on, we were a
10 country that actually did not have a state religion,
11 and yet we have religious intolerance. Ms. Hare spoke
12 of religious intolerance, religious intolerance by the
13 religious, but also by society.
14 But at the end of the day, religion is a set of beliefs,
15 your individual beliefs. They are what someone at their
16 core believes. We accept, and the Supreme Court of
17 Canada in the TWU's case accepted that believers can
18 congregate amongst themselves in a private institution
19 like TWU. They can congregate. They can be amongst
20 themselves, and, in fact, they can exclude. That's what
21 the TWU case says. They can exclude because they want to
22 gather amongst themselves and their own like.
23 That's something that's so profound that this body ought
24 not to interfere. Their covenant to allow people in or
25 out is something that they have to decide amongst

1 themselves.

2 The question then becomes what can they
3 do when they congregate? Someone earlier said that we
4 don't have a history of religious post-secondary
5 school, but that is not entirely correct. One only has
6 to go to the University of Toronto to see St. Mike's,
7 to see Trinity. Go to London and see Huron and Kings.
8 Go to Windsor and see Assumption.
9 Religious education at the post-secondary level is part
10 of our Canadian Heritage, has been and continues to be
11 what occurs. Do they all have them sign covenants? No.
12 Do they require believers? Not all. I suspect most
13 don't, but that's not the point. The point is, education
14 as a religious extension is part of the religious beliefs
15 and that's also part of what the Supreme Court of Canada
16 found in TWU when they dealt with the teacher's college.
17 So once you accept that they can congregate and they can
18 educate, and they can go on and they can do that, and
19 they can exclude, as they've done, the question is what's
20 next? Where do we sit? The question is, and
21 again, I'm saying this because I don't think this part of
22 the page has been set out, so this is not because I've
23 come down on a view. It's because I've thought of a view
24 and because I ask for assistance. As I said, Ms. Symes'
25 discussion is very apt. In fact, I stopped writing my

1 fourth set of notes when she spoke, but it is an issue
2 that I think that the TWU case dealt with.
3 In that case, it was whether or not the B.C. College of
4 Teachers would accredit the TWU students, and they
5 undoubtedly had, we don't have a record of their debates,
6 but they undoubtedly had a significant debate. Their
7 debate ranged from the B.C. Human Rights Code to the
8 Charter, and it said and their decision was:

9 "Both the Canadian Human Rights Act and
10 the B.C. Human Rights Act prohibit discrimination on
11 the ground of sexual orientation. The Charter of
12 Rights and the Human Rights Acts express the values
13 which represent the public interest. Labelling
14 homosexual behaviour as sinful has the effect of
15 excluding persons whose sexual orientation is gay or
16 lesbian. The Council believes and is supported by law
17 in the belief that sexual orientation is no more
18 separable from a person than colour. Persons of
19 homosexual orientation, like persons of colour, are
20 entitled to protection and freedom from discrimination
21 under the law."

22 That was the decision, the very decision
23 which is -- sounds like much of what I've heard today
24 that the Supreme Court of Canada was considering.
25 As I said, they went on and they talked about the right

1 of religious freedoms and the right to congregate and the
2 right to have an educational ability. I should add, in
3 case people believe, and I am not sure, I'm open to being
4 persuaded, but I don't quite see that the public interest
5 in teaching is different than the public interest we
6 have, and I don't think that that public interest, making
7 sure our children are educated in a secular society with
8 the tolerance of a secular society, is any different than
9 our rule of law at that level, and the Supreme Court of
10 Canada acknowledged that's -- they didn't talk about,
11 obviously, what we're doing, but said as much.

12 But what the point was, the point was, and again, we're
13 all looking at the same orb, and it's how we turn that
14 orb, how we view the question, and if we accept that they
15 can congregate, and if we accept that they can educate,
16 the next question is, where do we fit?

17 And the Supreme Court of Canada, again
18 back in the TWU case, said:

19 "It cannot be reasonably concluded that
20 private institutions are protected but that their
21 graduates are de facto considered unworthy of fully
22 participating in public activities."

23 And so I need help understanding, and I
24 can look to TWU, I can look to the other speakers who
25 have spoken today, and I'm sure there are many smarter,

1 wiser, who have better notes than I who can help us on
2 this, but are we not limiting the participation of
3 those who have the right to congregate in accordance
4 with their beliefs, who have the right to educate them
5 in that while congregating, to participate in our
6 society?

7 It's an issue that perplexed me because all these
8 freedoms were hard-fought. Freedom of religion was
9 fought over centuries. Same-sex battles have been fought
10 over centuries. In fact, there are more people with
11 scars on the same-sex fight than there are religious
12 fight at the moment. It's a more open and raw issue.
13 And I fear sometimes when I listen to the debates here
14 that we are taking on an enormous responsibility in
15 reorientating what we see is the balance between our
16 Charter values. That's what I -- I'm concerned that we
17 don't have, and I mentioned this to someone earlier, a
18 record that would sufficiently allow us to do what we're
19 about to do.

20 I mean, I personally would think a wiser
21 choice would be to allow Mr. Ruby to go through his
22 application and see what the law is. Now, some would
23 say we're chickening out. I could give you my
24 conditional vote after the debate and then wait. That
25 doesn't make a lot of sense. Not going to be graduates

1 from TWU for three or four years, but this is an
2 enormous issue that we are grappling with.

3 I look for guidance in the TWU case. I actually saw the
4 similarities as unassailable, but that's something I can
5 be persuaded, and Ms. Symes did a wonderful job
6 distinguishing certain elements and I'm sure, come the
7 next attendance, I'll hear others and I thank her for
8 that.

9 But I still am not there. I think the balance the
10 Supreme Court of Canada struck is something that we have
11 to be very, very leery to unstrike, and I think we also
12 have to -- I just -- and I don't know whether the record
13 today will be sufficient.

14 Just one last word: I do not ask you to change your
15 covenant. It's your covenant. You do with it what you
16 want. I don't agree with it, I won't sign it, but I'm
17 not asking you to change it. For me to ask you to change
18 it would be for me to ask you to change your belief.

19 That, obviously, is exactly the issue that we're here to
20 talk about, whether you have to change your belief and
21 whether the adherents of your belief, educated in
22 accordance with standards that have been promulgated by
23 the Federation are allowed to participate in the Society
24 because we, at the moment, are the gatekeepers of who
25 gets to participate in society.

1 I say all this waiting to hear an answer, waiting to have
2 some enlightenment, and I have to thank everybody who's
3 spoken because it has helped me, but I'm afraid I'm on my
4 fifth set of notes, so I'll probably be back here on the
5 24th with volumes of notes, but thank you.

6 TREASURER CONWAY: Thank you, Mr.
7 Callaghan.

8 Before I call on the next speaker, I
9 regret, am very saddened to have to inform Convocation
10 that Ex-Officio Bencher and former Attorney General of
11 Ontario and former Minister of Finance James Flaherty
12 has died in Ottawa, and we -- at the age of 64.
13 We are, obviously, very saddened at hearing the news of
14 the sudden death of a colleague of ours, someone with
15 whom, despite whatever political differences we may have
16 had, I think I can speak on behalf of Convocation when I
17 say that Mr. Flaherty was a true public servant and
18 devoted himself to public service as a lawyer, as a
19 politician, and as a minister of the Crown, and I'm
20 deeply saddened as I'm sure we all are at hearing this
21 news, and we extend our sincere condolences to Christine
22 Elliott, his wife, MPP Christine Elliott, and his family,
23 and our thoughts and prayers are with them at this time.
24 So now, Mr. Champion. Mr. Champion, followed by Mr.
25 Silverstein.

1 MR. CAMPION: Treasurer, and to the
2 benchers in Convocation, this debate is not a matter of
3 personal preference of conscience. We have been
4 provided with a legal process and deliberative context
5 in which to make an objective decision.
6 For that expert advice, we are much obliged to the
7 Treasurer, the Law Society staff, our legal advisors, and
8 those of Trinity Western, the Federation of Law
9 Societies, and many, many helpful intervenors.
10 May I join those benchers who spoke before in welcoming
11 Trinity Western University representatives here today. I
12 hope it cannot go unnoticed that you are here among
13 friends, and so we have discovered close friends through
14 association.

15 As lawyers, paralegals, and citizens,
16 freedom of religion and education are important values
17 that, in one case, we are sworn and in the other case,
18 choose to uphold and greatly value. Diversity is a
19 value that includes Trinity Western. The debate is not
20 about individualized opinion. It is a debate centered
21 on a community covenant requirement for law school
22 admission at Trinity Western and, therefore,
23 accreditation by this Law Society in Ontario of a
24 program that includes the covenant.
25 If the covenant is exclusionary, it must be reviewed as

1 an admission criteria or policy that impacts on our
2 accreditation in Ontario. If the exclusion is based upon
3 sexual orientation or personal intimate practices, it
4 must be judged against our analysis of the public
5 interest in Ontario.

6 My present analysis is that the public interest is
7 overwhelmingly in favour of eliminating all exclusion,
8 direct or indirect, based on sexual orientation or
9 private, intimate practices.

10 If, as I am presently persuaded, that the Trinity Western
11 law school admissions policies are based upon direct or
12 indirect exclusion, or feelings of exclusion, based on
13 sexual orientation, we at the Law Society are objectively
14 obliged to refuse accreditation.

15 This is not primarily about freedom of religion. This is
16 centrally about fundamental human rights, most
17 importantly, sexual orientation. As an objective
18 decision-maker, I will continue to listen, and review any
19 Trinity Western material and other responses to this
20 debate.

21 As a matter of process, may I
22 respectfully disagree with one point made by Mr.
23 MacKenzie. If Convocation concludes that the community
24 covenant requirement is discriminatory and not saved by
25 freedom of religion, and accreditation is therefore

1 refused, Convocation should not grant some form of
2 conditionality. That would be a derogation of our
3 decision-making authority. While Trinity Western could
4 abandon its covenant or seek to amend it, it should
5 only be permitted to do so in the context of a new
6 application.
7 Trinity Western should not be granted conditional
8 approval to amend the covenant to meet what it may
9 perceive to be existing impediments to the Law Society of
10 Upper Canada accreditation.

11 I'm much obliged.

12 TREASURER CONWAY: Mr. Silverstein. MR.

13 SILVERSTEIN: Thank you very much, Treasurer.

14 When Jose Bautista hits the ball 400 feet at the Rogers
15 Centre, it's going over the fence, the manager of the
16 opposing team can't run up and say, "Move the fences
17 back. Move the fences back." If a Toronto Maple Leaf
18 hockey player were to shoot the puck into the net, the
19 opposing coach cannot say, "Move the goal post back.
20 Move the goal post back." And the same thing in
21 football. You don't change the yardsticks in the midst
22 of the game. And that's what I fear is happening today.
23 We're losing track of what we're here to decide.

24 The TWU application was approved by the
25 B.C. Quality Assessment Board, and it was approved for

1 meeting all the criteria, the quality assessment
2 criteria. The application was also approved by the
3 Federation of Law Societies. Thirdly, a special
4 advisory committee was struck that also gave its
5 approval.

6 What I've been hearing today is superimposing new
7 criteria, new criteria on what has already been approved,
8 and that is the issue of non-discrimination. Perhaps the
9 Federation and the B.C. Quality Assessment Board and all
10 other approving bodies should have taken this into
11 account earlier and maybe they will in the future, but we
12 have a situation where the application has met all of the
13 criteria and we, as lawyers, following the rule of law,
14 should acknowledge that they have done that and not
15 superimpose new conditions at the last minute dealing
16 with non-discrimination.

17 Much of what I've heard today is talking about
18 discrimination in the name of equality. Think about it.
19 Discrimination in the name of equality. That's what
20 you're ultimately going to be deciding upon, whether that
21 is appropriate or not.

22 TREASURER CONWAY: Thank you, Mr.
23 Silverstein. Next on the list is Mr. Evans.

24 MR. EVANS: I'm grateful to have our
25 three representatives here from Trinity Western. I've

1 had the opportunity to speak to President Bob Kuhn and
2 also to Janet Buckingham, and I appreciate those
3 opportunities.

4 Thank you, Treasurer, for convening this excellent
5 Convocation. I can't help but feel proud as a Canadian
6 and as a bencher to partake in this intellectual,
7 intelligent conversation. My participation is not as
8 good.

9 Canada is a fabulous country. How fortunate we are to be
10 part of this country, but we do have blemishes. I salute
11 Benchers Susan Hare and Avvy Go for their forceful
12 presentations. My heart goes out to our First Nations
13 and Chinese Canadians who have endured such suffering.
14 Let us not take our privileges and freedoms for granted,
15 but may we learn the lessons of our history.

16 In my view, sexual orientation has nothing to do with
17 religion. Homophobia has no place in the Christian faith
18 or in any civilized society. Jesus never said or taught
19 anything which was in any way homophobic. His teachings
20 are grounded on inclusivity. To me, one of his most
21 important teachings is that we should be non-judgmental.

22 I am a member of the United Church of Canada. The
23 Moderator of the church is a minister who is in a
24 same-sex marriage. Thousands of Christians, including
25 many clergy, are in same-sex marriages. Religion is

1 dynamic. It is rapidly evolving, just as society is
2 evolving and we as individuals are evolving. The members
3 of the churches of 1950 or even 1980 would hardly
4 recognize the institutions of today.

5 Religion and society will no doubt continue to evolve,
6 perhaps at an even more rapid rate. When the idea of
7 same-sex marriage first arose, I was skeptical. When the
8 concept was recognized by the legislation, I accepted it.
9 I now celebrate it as it allows people to live their
10 lives in a way that is true to themselves. I expect that
11 many of us have gone through or will go through this
12 evolution in our thinking.

13 I should make a caveat here in my remarks to mention that
14 our eldest daughter attended and was a student at Trinity
15 Western University and she received an excellent
16 education and great experience. Trinity Western
17 emphasizes the importance and virtue of morality. I
18 suggest these standards are equally important to the
19 heterosexual and homosexual communities.

20 Gays and lesbians do form part of the
21 student community at Trinity Western, and I think we've
22 been given the mistaken impression by some speakers
23 that they've been barred. That is not the case. They
24 are accepted, they are cherished and they're treated
25 with equality and respect. They are there because they

1 want to be there.

2 In a recent message from President
3 Robert Kuhn, and I hope you don't mind me quoting your
4 words because I don't want you to be too shy to say
5 them yourself, but Bob Kuhn says, and I quote:

6 "The essence of Christian values is
7 found in Jesus Christ, who taught us to demonstrate
8 love and respect for all people at all times,
9 regardless of their faith, the colour of their skin, or
10 their sexual orientation."

11 The Trinity Western covenant asks students to respect the
12 traditional Christian and societal definition of marriage
13 as being the union of a man and a woman. I respect this
14 traditional view of marriage and I also respect same-sex
15 marriage as permitted by recent legislation.

16 I do not disagree with the covenant, but I do understand
17 that gays and lesbians would feel excluded by the
18 covenant. I have, therefore, suggested to the president
19 that the covenant be amended or expanded to respect
20 Christian marriage as a union between two people, or
21 simply to respect marriage, and I diverge a bit from
22 Bencher Callaghan in making this suggestion.

23 In Rotary, we have a saying. It's really a line in a
24 Rotary song. "When something is wrong, let us straighten
25 it out." We try to repair the fault, not destroy the

1 situation.

2 I anticipate that if the covenant is
3 amended, such a change would have a positive impact for
4 all students at Trinity Western, including the
5 potential future law students. I acknowledge that
6 there are differing points of view in dealing with
7 challenging issues.

8 It is my hope that discrimination will
9 continue to diminish in Canada with the worldwide
10 lessons derived from the horror of the Holocaust in
11 World War II, and peacefully through our Charter of
12 Rights and Freedoms which is becoming more and more a
13 reality in the everyday lives of Canadians.

14 Is Trinity Western University a perfect
15 institution? No, it is not. Are there any perfect
16 institutions? No, there are not. I believe there is
17 room for improvement for all of us as individuals and
18 for all institutions.

19 I sincerely hope that we all, working together to share
20 our varied opinions, will achieve a result which is
21 satisfactory to the legal community, the Christian
22 community, and the university community including all the
23 students. To do what we can to benefit the students
24 makes our efforts worthwhile.

25 TREASURER CONWAY: Thank you, Mr. Evans.

1 Mr. Bredt, followed by Ms. Boyd, who is presently the
2 last speaker on the list. I'm not encouraging other
3 people. We'll go to the phones after Mr. Bredt to see
4 if there's anybody on the phone that wishes to add to
5 the discussion. Mr. Bredt, please. MR. BREDT:
6 Treasurer, fellow benchers, and our visitors from
7 Trinity Western.

8 Like many of you, I have found this
9 issue to be a very difficult one. My starting point is
10 my own strong personal view that discrimination against
11 individuals based on their sexual orientation is wrong
12 and should not be supported.
13 And in this regard, I've acted pro bono on a number of
14 important cases. I acted in the M. and H. case, and my
15 friend Andrew Pinto and I brought a case involving access
16 to the health care system for lesbians and so forth. So
17 the first right at issue here, the right not to be
18 discriminated against based on sexual orientation is one
19 I strongly believe in.
20 The second right at issue, the right to freedom of
21 religion, is a right that I have to confess I personally
22 have less affinity for, but perhaps because I'm not a
23 religious person, and so for me, at the outset, the
24 easiest approach to this issue would have been to simply
25 go with my heart and take the position that

1 discrimination based on sexual orientation is wrong, and
2 we should not accredit, but I'm not there yet. I'm
3 struggling with this issue. I have to be frank with
4 Convocation. I am struggling.

5 I'm struggling with the breadth and the scope of
6 religious freedom. Religion is protected in the Charter,
7 both under s.2(a), freedom of religion, and under s.15.
8 The same rights that we're talking about here, the rights
9 of sexual orientation, in the same section, they
10 expressly protect freedom of religion and it's a right
11 not to be discriminated against on the basis of religion.
12 Now, the rights of the Charter are not absolute. It's
13 important to note that both s.2(a), freedom of religion,
14 and s.15, are subject to s.1, and s.1 says that there are
15 reasonable limits prescribed by law that can be
16 reasonably justified in a free and democratic society.

17 So although we recognize both, the rights to
18 non-discrimination on the basis of sexual orientation and
19 the right to freedom of religion, both of those can be
20 restricted under s.1.

21 When I look at Trinity Western University, I say it
22 clearly discriminates on the basis of religion. I mean,
23 I wouldn't go to this university. I'm not of the
24 Christian faith. It discriminates against people of the
25 Jewish religion. If you're a devote Jew, you would not

1 go to this institution.

2 And incidentally, what I would say, it,
3 as an aspect of the claim, it discriminates on the
4 basis of sexual orientation and marital status, but it
5 clearly -- the whole notion of a religious institution
6 is that people are entitled to get together on the
7 basis of their faith in religious institutions and in
8 educational institutions.

9 And when you look at religious institutions, many of them
10 are accepted in our society. We have Jewish day schools.
11 People of the Jewish faith are entitled to send their
12 children to be educated in a Jewish environment in the
13 Jewish faith, and they're entitled to exclude people of
14 the Muslim religion or the Christian religion, and from
15 that sense, they're discriminating on the basis of
16 religion.

17 So an element of religious freedom carries with it the
18 ability for people of the same faith to get together on a
19 faith-based basis and to exclude from those institutions
20 people who don't share the faith and to discriminate
21 against the people of those faiths on that basis.

22 And what I need to understand more here are what are the
23 limits within which TWU is entitled to discriminate on
24 the basis of religion? I'm troubled by the examples. I
25 have to say I'm very troubled by the examples that Linda

1 Rothstein gave us. If there was a religious institution
2 that discriminated against their adherents on the basis
3 of race, I don't like that. If there is -- Ms. Rothstein
4 talked about a yeshiva that separated men and women and
5 said, you know, they can't study together. I don't like
6 that.

7 Ms. Minor suggested that it's okay to discriminate at the
8 primary or the secondary levels, but colleges and
9 universities are different. I need to understand why. I
10 need to understand why in law we can draw those kind of
11 lines.

12 And so my first question here, and I say
13 this honestly as someone who is struggling, and I am
14 struggling with these issues, they're not easy issues,
15 what does Trinity Western say are the limits on the
16 scope of freedom of religion, and how do they fall
17 within those limits? That's my first question.

18 The second issue that troubles me about this, the
19 question we have before us now, is what we do as a Law
20 Society if we choose not to accredit Trinity Western and
21 a graduate of Trinity Western applies to our licensing
22 process.

23 At present, when a graduate from an
24 unaccredited institution applies to us, he's directed
25 to the National Committee or she's directed to the

1 National Committee on Accreditation, and as I
2 understand it, I haven't participated in it, but my
3 understanding is what the National Committee does is
4 they look at the substantive law that was studied and
5 make a determination whether that are [sic] the same
6 topics that we require accredited institutions in
7 Canada to study.

8 So if you studied in France and you
9 studied the civil law, but you didn't study the common
10 law, you'd be directed to go away and to study the
11 common law. If you didn't study Canadian
12 constitutional law, you would be directed to go away
13 and study Canadian constitutional law, but I don't
14 believe or understand that the National Committee
15 process makes any inquiry into the law school or the
16 legal institution where the studies take place and
17 determine whether those institutions discriminate on
18 the basis of religion or other factors, because the
19 decision we make here today, it seems to me, if we're
20 going to say that you cannot -- we will not accredit a
21 religious institution, because to me, it's additionally
22 offensive here that the religious institution
23 discriminates not only on the basis of religion, but
24 there's a religious tenet that suggests, "Well, we're
25 going to discriminate on the basis of sexual

1 orientation and marital status," but when we come back
2 to it, essentially, I think what we are getting at here
3 is that we would not accredit a religious institution
4 because by definition, a religious institution is going
5 to be discriminating against people that are not of
6 that faith.

7 And the arguments that we're making
8 about access, those arguments apply equally to people
9 who are not of the Christian faith. Not only are
10 people from Trinity Western who are of the same-sex
11 orientation would not be comfortable there, someone who
12 is of the Jewish faith or Muslim faith would not be
13 comfortable there either. So I -- there is multiple
14 grounds of discrimination here.
15 So when I come back to my point, which is the question of
16 what we do with the NCR [sic] process, I don't believe
17 that we make inquiries into it.

18 And so my second question, and this is
19 in part to Trinity Western, but also in part to the
20 people here who are more familiar with the process than
21 I am, is that if we refuse to accredit, does that mean
22 that a graduate of Trinity Western is in a worse
23 position than a graduate of a religious school from
24 outside of Canada?
25 So if someone applies for an accreditation process from a

1 faith-based institution outside of Canada, as I
2 understand it, they go to the NCR [sic] process, there's
3 no inquiry made into the fact that it was a faith-based
4 institution, and they get admitted to our process. Is
5 that what's going to happen to a Trinity Western student,
6 or is a Trinity Western student essentially going to be
7 denied entrance entirely?

8 My next question: If the National Committee were to
9 inquire into the religious nature of the institution and
10 deny access to our licensing process, would that itself
11 constitute a breach of freedom of religion? And I raise
12 this question because it seems to me that one approach
13 that the National Committee could take is to say, "You're
14 right, Mr. Bredt. We should be making these inquiries,
15 and we should have a different standard for people that
16 come from religious institutions in Canada than we would
17 have for people who come from religious institutions
18 outside of Canada," and I say if they start making those
19 inquiries, do those inquiries themselves violate freedom
20 of religion?

21 And my last question is: If we deny accreditation to
22 Trinity Western and its students are in any event able to
23 gain access to our licensing process, and in a discussion
24 I had with Ms. Rothstein which has got me thinking,
25 Linda, thank you, these are not easy issues, what she

1 suggested to me was yes, these people -- let's not
2 accredit because we're participating, we're giving
3 sanction to discriminatory conduct by accrediting, and I
4 have a concern that she may well be right in what she
5 says, but then what I say is that if we refuse
6 accreditation and the students graduate and they come to
7 the NCR [sic] and the NCR says, well --

8 TREASURER CONWAY: NCA.

9 MR. BREDT: Sorry, the NCA, and the NCA
10 process might -- "You studied all our topics. You
11 don't need to do anything. Come on in to our licensing
12 process," then what I ask is, is that approach to the
13 problem itself in the public interest? And it may well
14 be, but I think it's something that we need to think
15 about here as we grapple with these difficult issues.
16 I thank you, Treasurer.

17 TREASURER CONWAY: Thank you, Mr. Bredt.
18 I'm going to go to the phone right now and just see if
19 there's anyone on the phone that wants to be added to
20 the speakers' list.

21 Is there anyone on the phone that wishes
22 to be added to the speakers' list at this time,
23 considering that there's one speaker left on the list
24 at the moment?

25 MR. WRIGHT: Yes, Treasurer. Brad

1 Wright.

2 TREASURER CONWAY: Okay. So Mr.
3 Wright, I'm going to let you go right now. Mr. Wright,
4 you're on.

5 MR. WRIGHT: Thank you. In my high
6 school yearbook, it said that my probable destiny was
7 Pope Brad the First. I don't think that will surprise
8 too many of you.
9 If we allow religious freedom to trump other rights, then
10 no other rights can be protected. There are no protected
11 rights that cannot be sidestepped or sidelined under the
12 guise of religious freedom.

13 I think Mr. Mercer made a telling point
14 when he pointed out that we should not allow
15 discrimination to occur at one removed from us when we,
16 as the Law Society, would not allow that discrimination
17 ourselves. If we allow the discrimination to occur at
18 one removed from us, there's no end to it. There is no
19 end to it. What religious freedom means is freedom of
20 your own conscience. That's not the same thing as
21 imposing it on others.

22 It is incongruous that law students, who
23 will become members of a law society in Canada where
24 they are required to respect and uphold laws, to sign a
25 covenant wherein they thumb their noses at some of the

1 most hard-won and important laws in the land.

2 Now, for thousands of years, religions held that it was
3 perfectly justifiable and proper to engage in human
4 sacrifice. It was, for hundreds of years, it was
5 perfectly proper to ignore the commandment "Thou Shalt
6 Not Kill", and burn heretics at the stake. For hundreds
7 of years, religions held, in the face of scientific
8 evidence to the contrary, that the sun revolved around
9 the earth.

10 No problem in believing that the sun does revolve around
11 the earth. There's no problem in believing that other
12 people are heretics. The problem arises when you impose
13 your religious views on other people to their great harm.

14 When two freedoms bump up against each other, we need to
15 come down on the side of the freedom that does the least
16 harm and the freedom, the protected right that does the
17 least harm in this circumstance is the one that prevents
18 institutions, particularly legal institutions, from
19 discriminating against other protected rights.

20 Now, I missed part of it, so if this point has been made,
21 interrupt me, but the very finest Treasurers that the Law
22 Society has ever had, one of the very finest human beings
23 I've ever known would not have been allowed to go to that
24 university. That's in a word ludicrous.

25 We'd like to think that we're independent actors, but the

1 reality is humans and human societies obey the laws of
2 physics. It's our hubris that thinks we don't.
3 Biologically speaking, embryos all start off female. If
4 X chromosome is present, then at about the six-week mark,
5 the embryo receives the chemical bath which converts
6 about 52 percent of them into males. That's an extra
7 step. It's a complication. As a result, there is a
8 slightly larger number of male embryos that miscarry
9 because of this extra complication.

10 By the way, it's the last time men are
11 more complicated than women. Born, we become much
12 simpler than they are, as they well know.

13 In any event, if something goes slightly
14 awry at that moment of the chemical bath, well, you
15 could end up with a live birth featuring somebody with
16 female sensibilities and male genitalia or the
17 opposite, and our First Nations' lovely expression that
18 describes somebody in that situation: Two-spirited.
19 They can no more choose their sexual orientation than
20 anyone else can. As the song says, they're born that
21 way, and it is grossly unfair, it is the fight of the
22 past to discriminate against two-spirited people.
23 I favour religious freedom. I favour freedom of
24 conscience, but that's an individual thing. We should
25 not be accrediting an institution, a legal institution

1 that will promote, sustain, spread discriminations that
2 we have relatively recently in our history successfully
3 fought.

4 Thank you very much.

5 TREASURER CONWAY: Thank you, Mr.

6 Wright. Ms. Boyd, you have the last word.

7 MS. BOYD: Thank you, Treasurer.

8 However, you may see more after I've spoken.

9 I wanted to say how glad I am that you folks are here
10 with us and actually hearing this conversation because I
11 think it shows you and the rest of the public how very
12 seriously we take this matter and how much it affects our
13 own consciences that we are really searching for the
14 right answer for us as an organization, and I certainly
15 am among those who is terribly torn about this situation.
16 As many of you know, my history is as someone who has
17 been very definitely actually on both sides of this
18 argument at different points in my career. So when I'm
19 listening this morning, I'm getting this awful dj vu of
20 the whole situation when I dared to say that I, the
21 attorney general, would not support the law of Ontario
22 that forbade the adoption of children by same-sex
23 couples.

24 I can tell you the ministry was somewhat
25 dismayed. I can tell you my political colleagues were

1 somewhat dismayed, but I had taken an oath as attorney
2 general, as you do in Ontario, that the main
3 consideration would be the consideration of supporting
4 and maintaining the constitution of Canada.

5 I didn't have very many friends that day, I can tell you,
6 and as it went on, it only got worse because by the time
7 it got to the Supreme Court, Mr. Justice Lamarre was so
8 outraged by my behaviour in not supporting our own law
9 that he actually appointed an amicus to support the law
10 at the Supreme Court.

11 And it wasn't until some four or five years later, I've
12 forgotten the exact dates, we'd long left government, I'd
13 long ceased to be a Member of Provincial Parliament, that
14 the Supreme Court indeed said that was right, that we
15 could not support that law, and it was, indeed,
16 unconstitutional. So Mr. Schabas talked about his scars.
17 I've got a few from that case.

18 And then about ten years later, I was asked by the
19 Ontario Government to look at the whole issue of
20 religious arbitration and cases of family law, and I was
21 strongly criticized, I have scars probably even deeper,
22 from my feminist friends who felt that women's rights
23 obviously trumped religious rights. So I know how
24 difficult this is personally, and it continues to be a
25 difficult issue for me.

1 I'm also going to "out" myself as a religious person. I
2 don't suppose it's very surprising that those of us who
3 continue to be religious people, and are here talking on
4 this, are members of the United Church of Canada.

5 --- Laughter.

6 MS. BOYD: Not a surprise to any of you. We continue to
7 struggle with it.

8 TREASURER CONWAY: Mr. Callaghan, I
9 think, is a member of a different --

10 MS. BOYD: Well, he said he was lapsed.
11 We're not.

12 --- Laughter.

13 MS. BOYD: So, you know, I don't think
14 it counts quite the same way, Treasurer.

15 TREASURER CONWAY: Your view on that.

16 MS. BOYD: We have struggled in our
17 denomination for many, many years over these issues, so
18 none of these arguments are new to us in terms of our
19 own personal lives and the kinds of things that we've
20 had to face within our own families, within our own
21 congregations, within our own churches. So there's --
22 we're probably more used to talking about them publicly
23 than people who haven't had that experience.

24 I'm going to ask you a couple of questions that I'd like
25 answered when you respond to us because they are really

1 based in that experience.

2 If, as a religious person, I believe that God created us
3 all and that God loves us all, then what do I make of a
4 human institution that tells people they can't be who God
5 created them to be? I have a problem with that, and I
6 don't see anything in your materials that helps me with
7 that. So I'd like an explanation for that.

8 And I would say to my colleagues who may not be as
9 familiar with these religious arguments, that I really
10 refer you to page 110 of the BoardBooks, which is in the
11 dissent on the BCCT case from Madam L'Heureux-Dube, who
12 those of you who know Claire know that she's fond of
13 saying, "Well, when I dissent, the law changes in 10
14 years," and I want to read you a couple of things out of
15 her dissent.

16 At page 110 of BoardBooks, section 69, of the decision,
17 she says:

18 "I am dismayed that at various points in
19 the history of this case the argument has been made
20 that one can separate condemnation of the 'sexual sin'
21 of 'homosexual behaviour' from intolerance of those
22 with homosexual or bisexual orientations. This
23 position alleges that one can love the sinner, but
24 condemn the sin. But, in the words of the intervener
25 EGALE, '[r]equiring someone not to act in accordance

1 with their identity is harmful and cruel. It destroys
2 the human spirit. Pressure to change their behaviour
3 and deny their sexual identity has proved tremendously
4 damaging to young persons seeking to come to terms with
5 their sexual orientation'... The status/conduct or
6 identity/practice distinction for homosexuals and
7 bisexuals should be soundly rejected, as per Madam
8 Justice Rowles," in the original appeal decision. And
9 she quotes her at paragraph 228:

10 "Human rights law states that certain
11 practices cannot be separated from...a condemnation of
12 the person'... She added that 'the kind of tolerance
13 that is required [by equality] is not so impoverished
14 as to include a general acceptance of all people but
15 condemnation of the traits of certain people'... This
16 is not to suggest that engaging in homosexual behaviour
17 automatically defines a person as homosexual or
18 bisexual, but rather is meant to challenge the idea
19 that it is possible to condemn a practice so central to
20 the identity of a protected and vulnerable minority
21 without thereby discriminating against its members and
22 affronting their human dignity and personhood."

23 So I need more information from you about how, in the
24 religious context, you reconcile these two positions. I
25 really need to know that because I'm not seeing anything

1 that helps me and I realize that a lot of your
2 presentations may well have been designed for a
3 non-religious audience and that everybody is going to be
4 interested in that, but I'm certainly interested in that,
5 so I would like to know how you square that.

6 The other issue is that, of course, we talk only about
7 sexual orientation as a ground, but my understanding, my
8 reading of the community code is that it equally condemns
9 fornication and adultery.

10 Well, I actually would have thought that
11 might have posed a greater issue for us in some ways
12 because although there are certainly thousands and
13 thousands of lawyers across Canada who subscribe to the
14 notion of faithful, monogamous, opposite-sex marriages,
15 there may even be some in this room --

16 --- Laughter.

17 TREASURER CONWAY: Anything's possible.

18 MS. BOYD:

19 They can do that. That is their choice that they can
20 exercise and do exercise and defend in every aspect of
21 their lives all the time. Nothing is to prevent people
22 from doing that. And nothing would prevent those who
23 attend Trinity Western from, who truly subscribe to
24 that belief, from following that behaviour as well.

25 But as I understand it, if you sign this

1 community covenant, which you are required to do each
2 year, all of those behaviours are not allowed, and as I
3 understand it, people may be subject to expulsion as
4 the extreme penalty there. I need more information
5 about that. I need to know whether a second-year law
6 school who goes away somewhere for a world experience
7 in the summer and comes back and as a result of those
8 experiences, for any of those grounds, finds they
9 cannot in good conscience sign the covenant, have they
10 wasted two years of legal education?

11 I'd like to know what happens to them and what is the
12 process that Trinity Western would go through? I need to
13 know there's due process for people. I need to know what
14 happens there? And I don't have any information about
15 that. So I'd like to have that information.

16 The second, the next point I want to make, and it's
17 really for me a very important issue, is this issue of
18 religious rights versus public interest, and again, Madam
19 L'Heureux-Dube speaks about the public interest in a very
20 interesting way, and she talks about, again, Madam
21 Justice Rowles.

22 So at page 102 of your BoardBooks at
23 section 56, she talks about BCCT's public interest
24 jurisdiction being carefully described, and she said:

25 "The 'public interest' is not to be

1 defined nebulously but in relation to the particular
2 policy interest that the [BCCT] has jurisdiction over,
3 that is, establishing in the public interest standards
4 for the education, professional responsibility and
5 competence of its members who teach in public schools."

6 And she goes on to quote the Act to a
7 certain extent. And it says, as some of our members
8 have:

9 "The BCCT fulfills the role of
10 gatekeeper to the profession of public school teaching
11 and is responsible for ensuring that its members meet
12 the expertly determined requisites for qualifying to
13 teach in the classrooms..."

14 And she goes on to say, section 57:

15 "Statutory interpretation of the BCCT's
16 'public interest' responsibilities should be purposive,
17 not nebulous. As the Manitoba Court of Appeal stated
18 in Lindsay v. Manitoba... 'The meaning of those words,
19 neither precise nor unambiguous in themselves, must be
20 construed in the context of the statute in which they
21 are found'. Philip J.A. went on to observe that: 'I
22 think there can be no doubt that the determination of
23 what constitutes the public interest is not "a matter
24 of policy" entirely within the jurisdiction of the
25 Board, nor is it a finding of fact. It is the

1 formulation of an opinion and, when acting within its
2 jurisdiction, it is a determination within the
3 exclusive...jurisdiction of the Board'."

4 The most persuasive argument I heard today was Malcolm
5 Mercer's argument about our jurisdiction and our
6 jurisdiction as the Law Society to determine in terms of
7 core values what the public interest was.

8 Public interest is not defined in our
9 Act. Every day, we have to make determinations of what
10 the public interest is with respect to the jurisdiction
11 that we have, and this is a very similar kind of an
12 issue, and so if we look at that and our jurisdiction,
13 we get a better idea of what our responsibility is in
14 making this very difficult decision.

15 So I would point out that there's a very big difference
16 between our jurisdiction and the Federation Approval
17 Committee's jurisdiction. The Federation Approval's
18 Committee jurisdiction gets its jurisdiction from the
19 policy that our Law Society and other law societies pass,
20 okay, but their jurisdiction is not with respect to the
21 public interest in the way ours is. They do not -- they
22 did not, and I want to be very frank, I believe very
23 strongly, that the Federation Approval Committee did not
24 have the jurisdiction to deal with the public interest
25 issue. It only had the jurisdiction to deal with the

1 educational program that was being presented according to
2 how we and other law societies had set it out for them.
3 Similarly, I'm interested in Mr. Bredt's discussion about
4 the NCR.

5 TREASURER CONWAY: NCA.

6 MS. BOYD: NCA. I'm sorry. He said it
7 so often. It's a kind of cash register. Now, I
8 understand.

9 --- Laughter.

10 MS. BOYD: NCA. Again, what we did as
11 law societies was pass a policy, pass jurisdiction to
12 the NCA that they would make decisions about how they
13 were going to judge applications from people who went
14 through law schools in other jurisdictions. Okay.
15 That's their jurisdiction.

16 Their jurisdiction, unlike ours, doesn't
17 require the kind of scrutiny that we might want to make
18 as a Law Society into accreditation. Their
19 jurisdiction is much more similar to the Approvals
20 Committee jurisdiction, to actually look at the
21 courses, look at the program, and see whether, in fact,
22 the elements are consistent with what people need to
23 know.

24 So I think we have to be careful about comparing apples
25 and oranges, and it would be lovely, given the confusion

1 that you've been hearing, all this, and the struggle that
2 we're all having, it would be lovely if we could pin on
3 one thing, that we don't have to worry about the public
4 interest in this case because somebody else has it,
5 because, in fact, when it comes to accreditation, only we
6 have the jurisdiction to decide what is in the public
7 interest.

8 And so any arguments that suggest somehow we can wiggle
9 out of that I would suggest are not correct, and I would
10 suggest that we all are going to have to search our
11 hearts very carefully around where the public interest
12 action lies and where it doesn't here, and I don't for a
13 moment assume that we're all going to end up in the same
14 place. I would be awfully surprised if we did, but I do
15 think we all have to do that work.

16 And I'm really hoping that the questions that we've
17 raised today here and the answers that we can expect from
18 TWU, both in writing and orally next time we meet, will
19 help to clarify some of those issues for us so that we
20 have the kind of information on which to base a
21 responsible decision under our jurisdiction.

22 Thank you, Treasurer.

23 TREASURER CONWAY: Thank you, Ms. Boyd.

24 No one else has put up their hands, so that concludes
25 the speakers' list. I just want to say a few things in

1 closing.

2 MR. LERNER: Treasurer, a point of
3 order. We would be remiss, this Convocation, if we did
4 not express to you our deepest condolences of your
5 recent loss of your father. I believe that all of us
6 here know of the close relationship that you enjoyed
7 with your father, and we recognize similar events as
8 they occur in our bencher family, and I rise on behalf
9 of us all.

10 FROM THE FLOOR: Here, here. Here,
11 here.

12 TREASURER CONWAY: Thank you.

13 Before we adjourn today, I would like to
14 remind benchers once again of a number of procedural
15 matters.

16 Benchers are all aware that benchers of
17 the Law Society of British Columbia are meeting
18 tomorrow, April 11th, to deliberate and vote respecting
19 the Trinity Western University matter. The Law Society
20 of British Columbia will be the first of four law
21 societies to do so. Our Law Society will be the second
22 on April the 24th, followed by the Nova Scotia
23 Barristers' Society on April 25th, and the Law Society
24 of New Brunswick on June 27th.
25 Given the continued interest surrounding Trinity Western

1 University's accreditation, you may be asked your opinion
2 on the issue and on the decisions of other law societies,
3 not speaking on behalf of the Law Society, but speaking
4 as individuals.

5 As I said at the beginning of
6 Convocation today, benchers should refrain from
7 expressing their views or considering any additional
8 submissions they may receive following today's
9 Convocation. They must also, I would ask you, I would
10 ask you to also refrain from reaching a final view
11 until Convocation makes its decision on April the 24th.
12 As the spokesperson for the Law Society, I will continue
13 to explain to the profession and to the public the
14 various steps we are taking to ensure that our
15 decision-making process is open, is transparent and is
16 fair. I would encourage you to do the same.

17 We invited written submissions from all
18 interested parties. Those submissions are available on
19 our public Web site, and were provided to Trinity
20 Western University. Today's Webcast is archived on our
21 Web site, and the transcript of Convocation will be
22 posted on the Web site.

23 The transcripts of today's proceedings will be
24 circulated, and I remind benchers that in order to vote,
25 you must be in attendance personally or by phone for

1 Trinity Western University's oral submissions on April
2 the 24th at 9 o'clock a.m.
3 Convocation, as I mentioned earlier, TW University will
4 be given the opportunity to respond to the points raised
5 by Convocation today on April the 24th.
6 Convocation will reconvene on April the 24th to make a
7 decision on the Trinity Western University application.

8 And before I adjourn, Mr. Porter has
9 asked for leave to make a few comments about the late
10 Honourable Mr. James Flaherty. Mr. Porter.

11 MR. PORTER: This has been a very
12 special day. Glorious to me. Worry. Been
13 acrimonious. It's been elegant. On this day, Jimmy
14 Flaherty died.

15 I just wanted -- we're like a
16 Parliament, and all things happen throughout a day, and
17 so somebody dies. I don't want the words about
18 Flaherty to wait for two weeks.

19 I just have two reminiscences, two
20 reminiscences only. One, he was attorney general for a
21 little, and Ian Binnie came to speak to The Advocates'
22 Society, and as you know Binnie, he has a seesaw voice.
23 Flaherty was short time attorney general:

24 "Wow, I see Jim Flaherty. The first
25 time I met Jim Flaherty, he was a slip-and-fall lawyer

1 for Whitby."

2 --- Laughter.

3 MR. PORTER: A Court of Appeal judge
4 told me that when Flaherty was in private practice,
5 after not being in politics for a little, he appeared
6 twice in two days, arguing a commercial contract of
7 insurance that was very complex, and that judge, just
8 recently retired, said it was the most able,
9 sophisticated argument they had ever heard. That's
10 what he thought.

11 So that's a side of Mr. Flaherty which
12 you might not expect. The side that we should remember
13 was that he grew and evolved and was quite special.

14 TREASURER CONWAY: Thank you, Mr.
15 Porter.

16 We are adjourned until April the 24th.
17 Thank you, Ladies and Gentlemen.

18 --- Whereupon Convocation adjourned at 3:25 p.m.

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I HEREBY CERTIFY THE FOREGOING
to be a true and accurate
transcription of my shorthand notes
to the best of my skill and ability.

Shari Corkum, CSR

Beverley Killen, CSR

Computer-Aided Transcription