PINTO WRAY JAMES LLP

LAWYERS | AVOCATS

VIA EMAIL: ESpears@lsuc.on.ca

April 7, 2014

Ms. Elliot Spears
Senior Counsel, Legal Affairs
Law Society of Upper Canada
Osgoode Hall
130 Queen Street West
Toronto, Ontario
M5H 2N6

Dear Ms. Spears:

RE: TWU Law School Accreditation Decision – Human Rights Legal Opinion

The Law Society of Upper Canada (the "Law Society") has asked us to provide a legal opinion on the following question:

What are the Law Society's obligations with respect to the Ontario *Human Rights Code* when deciding whether to accredit Trinity Western University's proposed law school?

Our opinion is organized as follows:

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65 Queen Street West, Suite 1155
Toronto, Ontario, Canada M5H 2M5
T 416 703 2067
F 416 593 4923
www.pintowrayjames.com
apinto@pintowrayjames.com

1. Executive Summary

We suggest the following four steps in terms of how the Law Society should view its human rights obligation under the *Code* with respect to the TWU Law School accreditation decision:

1. Review what accreditation of a law school means in the statutory context and determine whether accreditation entitles the Law Society to look at TWU's alleged discriminatory practices.
2. Consider the TWU Covenant's alleged discriminatory impact on various persons and how the Law Society's accreditation or non-accreditation decision would impact on those persons.
3. Consider the competing rights at stake and determine, having regard to *Code* jurisprudence, whether TWU Law School is entitled to lawfully discriminate because of its religious character.
4. Incorporate the conclusion in 3 into the overall discretionary decision of whether the Law Society should accredit TWU Law School.

The Law Society is the gatekeeper to the profession of law in Ontario. It has the ultimate responsibility for the training of lawyers in Ontario, one part of which involves accrediting law schools in Canada whose graduates may wish to practice law or provide legal services in Ontario. When considering whether to accredit law schools in Canada, the Law Society has a duty, amongst other things, to protect the public interest and maintain and advance the cause of justice and the rule of law. Accreditation of a law school is a discretionary decision.

Accreditation is not defined in the *Law Society Act*. The Law Society can take a broad or narrow approach to the meaning of accreditation. The broad approach considers all the law school's practices; the narrow approach focuses only on the law school providing the appropriate "standards of learning" for the purpose of entering the Ontario legal profession. Guidance to the proper approach to accreditation comes from the duties of the Law Society and the *TWU 2001* Supreme Court decision which held that a regulator is entitled to look at an institution's alleged discriminatory practices when regulating in the public interest.

The focus of the present controversy is on the requirement that students of the proposed TWU Law School sign a Covenant that appears to discriminate against several classes of persons: LGBT students most prominently, but also women and unmarried heterosexuals. The seriousness of the potential discrimination varies from pre-admission to post-graduation. Of most concern, while at TWU Law School, students, faculty and staff must adhere to the Covenant or risk disciplinary action including probation, suspension, and expulsion from TWU Law School.

Human rights law in Ontario is governed by the Ontario *Human Rights Code*, which has wide application to persons and organizations in both the private and public spheres. The *Code* provides protection from discrimination in specific areas (such as services, employment and membership in a self-governing profession) on the basis of prohibited grounds (such as race, age, disability, etc.). The *Code* regulates conduct, not belief. It is regarded as quasi-constitutional in nature because of its unique and fundamental importance. While the purpose of the *Code* includes the prevention of discrimination, the *Code* also provides for certain exemptions and defences for respondents in circumstances that amount to "lawful discrimination."

The *Code* is part of the general law and decision making bodies must take into account the *Code* in situations where human rights issues arise. While the alleged discrimination may be occurring in British Columbia, it becomes a concern for the Law Society here in Ontario because the

accreditation is taking place in this province. The Law Society is not sitting as a human rights tribunal. However, the Law Society is being asked to accredit a law school which engages in alleged discriminatory practices, so the only way to properly determine if discrimination may be taking place is to look at *Code* jurisprudence, including about balancing rights.

The most likely way in which the Law Society's accreditation decision may be challenged is through judicial review. Another approach would be for an individual to file an application before the Human Rights Tribunal of Ontario on the basis of discrimination in the area of vocational associations since the legal profession is a self-governing profession. The Law Society's defence would depend on showing that it did not discriminate against an individual on a prohibited ground including because its decision was made in compliance with *Code* principles. It is important therefore that the Law Society properly analyse, within the TWU Law School Proposal, what human rights issues are at stake.

The Law Society must also consider the *Charter*, which is part of the Canadian Constitution. The *Charter* and the *Code* are both important human rights laws but are distinct. Following the Supreme Court's decision in *Doré*, the Law Society must take *Charter* values into account in its discretionary regulatory decision-making. Conducting a *Charter* analysis and a *Code* analysis are two distinct inquiries. Here we focus on the *Code*, acknowledging that *Charter* jurisprudence contributes to the interpretation of the *Code*.

TWU Law School's inclusion of a Covenant that all students, faculty, and staff must adhere to raises a question of how to reconcile competing rights. An individual's right to be free from discrimination may compete with a group's right to restrict membership based on religious or other grounds. Whether the group's "associational" right trumps the individual's "non-discrimination" right, or *vice versa*, depends on the specific context and facts of the case. The Ontario Human Rights Commission has prepared a *Policy on Competing Human Rights* which lays out important principles and processes that may be considered by the Law Society when attempting to reconcile competing rights.

The question of whether TWU's Covenant is discriminatory according to Ontario law is important because the answer impacts on the Law Society's requirement to make its accreditation decision in compliance with the *Code*. The *Code* requires that the Law Society ask two questions to determine if the Covenant is discriminatory:

1. Does the TWU Covenant discriminate against anyone on grounds prohibited by the *Code*?

2. If so, is TWU Law School's proposal nevertheless lawful because of an exemption or defence available under the *Code?*

Ontario law provides an exemption for special interest organizations under s. 18 of the *Code*; and a defence to an allegation of employment discrimination under s. 24 based on a workplace requirement constituting a *bona fide* occupational requirement.

A series of cases over the last 30 years from *Caldwell* (1984) to *Whatcott* (2013) in courts and human rights tribunals provide the jurisprudence concerning legitimate exemptions and defences in human rights law. In three cases identified – *Caldwell*, *Steinbach Bible College*, and *Christian Horizons* – there was a requirement for an employee to adhere to a religious institution's code of conduct. In *Christian Horizons*, an Ontario employment case, the Human Rights Tribunal of Ontario found that the institution's imposition of a code of conduct on a lesbian employee constituted discrimination on the basis of sexual orientation. TWU Law School's Covenant applies not only to its employees but also to its students.

In order to determine whether TWU Law School is entitled to an exemption or defence under the *Code*, the Law Society should analyze, *inter alia*, TWU Law School's Proposal to the Federation of Law Societies as the Proposal represents an important statement of how the TWU Law School will operate. The Law Society should ask a series of questions that arise from the case law that will inform its decision about whether TWU, through its Covenant, is entitled to lawfully discriminate because of its particular religious character. That determination, one way or another, must be considered alongside any other discretionary considerations that Convocation may take into account in making its accreditation decision.

2. Law Society of Upper Canada

a. The *Law Society Act*

The Law Society is a not-for-profit corporation that derives its authority from its enabling statute the *Law Society Act*.[1] The Law Society's function is to ensure that:

[1] *Law Society Act*, RSO 1990, c L.8 ["*LSA*"].

(a) all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide; and

(b) the standards of learning, professional competence and professional conduct for the provision of a particular legal service in a particular area of law apply equally to persons who practise law in Ontario and persons who provide legal services in Ontario.[2]

In carrying out its functions, the Law Society must have regard for the following principles:

1. The Society has a duty to maintain and advance the cause of justice and the rule of law.
2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.
3. The Society has a duty to protect the public interest.
4. The Society has a duty to act in a timely, open and efficient manner.
5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized.[3]

The Law Society is required to licence applicants who apply for a class of licence in accordance with the Law Society's by-laws and who otherwise meet the requisite qualifications and requirements for entry to the Ontario bar.[4]

b. By-law 4 and Accreditation of a Canadian Law School

The Law Society's By-law 4 governs the licensing of lawyers to practice law in Ontario.[5] Section 9 states that an applicant seeking a Class L1 licence must have one of the following:

[2] *LSA*, s. 4.1.
[3] *LSA*, s. 4.2.
[4] *LSA*, s. 27(3).
[5] LSUC, By-law 4, Licensing.

i. A bachelor of laws or *juris doctor* degree from a law school in Canada that was, at the time the applicant graduated from the law school, an accredited law school.

ii. A certificate of qualification issued by the National Committee on Accreditation appointed by the Federation of Law Societies of Canada and the Council of Law Deans.[6]

By-law 4 defines "accredited law school" as "a law school in Canada that is accredited by the Society."[7] The *LSA* does not define "accredited." The Oxford English Dictionary defines "accredit" as "(of an official body) give authority or sanction to (someone or something) when recognized standards have been met."[8] As a verb in this context, "to sanction" means to "give official permission or approval for (an action)."[9]

Since accreditation means giving official approval to a law school for the purpose of licensing future graduates, the Law Society can take a broad or narrow interpretation to the meaning of accreditation. The broad approach would be to suggest that accrediting a law school involves taking an expansive view of what the law school is doing in term of its practices, ethics, and compliance with the law; quality of legal education and programs; and determination of its graduates' future fitness to practice law in Ontario. A narrow approach would be to take a restrictive view of accreditation within the functions of the Law Society, focusing only on the law school providing appropriate "standards of learning" for the purposes of entering the Ontario legal profession.

Some guidance is provided by the fact that the Law Society has a duty to protect the public interest and maintain and advance the cause of justice and the rule of law. In its own materials, the Law Society also acknowledges its public interest mandate to further equity and diversity values and principles in the Law Society's policies and practices.[10]

Further guidance is suggested by the Supreme Court decision in *Trinity Western University v. British Columbia College of Teachers*, where the Supreme Court indicated that it was within the

[6] By-law 4, s. 9(1) 1.
[7] By-law 4, s. 7.
[8] Oxford Dictionaries, "accredit" online: http://www.oxforddictionaries.com/definition/english/accredit.
[9] Oxford Dictionaries, "sanction" online: http://www.oxforddictionaries.com/definition/english/sanction.
[10] Law Society of Upper Canada, Equity Initiatives Department, FAQ, online: http://www.lsuc.on.ca/faq.aspx?id=1034#q1213.

jurisdiction of the BC College of Teachers ("BCCT") to consider the alleged discriminatory practices of Trinity Western University when considering the public interest:

> While the BCCT was not directly applying either the *Charter* or the province's human rights legislation when making its decision, it was entitled to look to these instruments to determine whether it would be in the public interest to allow public school teachers to be trained at TWU.[11]

Accordingly, the Law Society will have to determine which approach best accords with its statutory purposes and legal responsibilities.

We note that the *LSA* only provides the Law Society with a mandate to accredit law schools *in Canada*. That the Law Society does not inquire into the practices of non-Canadian law schools appears to follow from the fact that, pursuant to the *LSA*, those law schools are prevented from seeking and the Law Society is prevented from granting accreditation to them.

3. Trinity Western University

a. Overview

Trinity Western University ("TWU") was established by statute in 1969 as a Junior College to carry out the following purpose:

> The objects of the College shall be to provide for young people of any race, colour, or creed the first two years of university education in the arts and sciences with an underlying philosophy and viewpoint that is Christian and to assist students to transfer to senior colleges and universities.[12] [Emphasis added.]

The general direction and sponsorship of the College came from the General Conference of the Evangelical Free Church of America.[13]

TWU states on its website that it is a private Christian university legislated by the BC Government to serve the public. Its mission is as follows:

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[11] *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 at para. 27 ["*TWU 2001*"].
[12] *Trinity Junior College Act*, SBC 1969, c. 44, s. 3(2) ["*TJCA*"]. This Act was amended by the *Trinity Western College Act Amendment Act, 1985*, SBC 1985, c. 63, changing the name to Trinity Western University.
[13] *TJCA*, s. 3(3).

> As an arm of the Church, to develop godly Christian leaders; positive, goal-oriented university graduates with thoroughly Christian minds; growing disciples of Christ who glorify God through fulfilling the Great Commission, serving God and people in the various marketplaces of life.[14]

TWU is a private university and a registered charity, incorporated under the BC *Society Act* thus rendering it a not-for-profit organization.[15]

b. Community Covenant Agreement

At the heart of the present controversy is TWU's Community Covenant Agreement (the "Covenant"), which prohibits, among other things, "sexual intimacy that violates the sacredness of marriage between a man and a woman."[16] The full Covenant is in the Record before Convocation.

All students are required to sign the Covenant prior to being permitted to register for classes. TWU describes the Covenant as a solemn pledge creating a contractual agreement and relational bond.[17] The prohibitions on enumerated conduct apply both on and off campus. Violation of the Covenant and its standards of conduct may result in disciplinary action including probation, suspension, and expulsion from TWU. [18]

The Covenant has changed somewhat since 2001 when the Supreme Court of Canada considered TWU's Community Standards document, as it was then titled.[19] In 2001, the Supreme Court made no reference to there being a mechanism under the Community Standards document to discipline or expel a TWU student. The Court simply acknowledged, "There is no evidence before this Court that anyone has been denied admission because of refusal to sign the document

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[14] TWU, online: https://twu.ca/about/.
[15] *Society Act*, RSBC 1996, c 433.
[16] TWU, Community Covenant Agreement, August 2009, online: http://www.twu.ca/studenthandbook/university-policies/community-covenant-agreement.html.
[17] *Covenant*, p. 1.
[18] TWU Student Handbook, Student Accountability Process, online: https://twu.ca/studenthandbook/university-policies/student-accountability-process.html. See also: TWU Student Handbook, Student Accountability Policy, Possible Actions, online: https://twu.ca/studenthandbook/university-policies/student-accountability-policy.html#actions.
[19] *TWU 2001* at para. 4.

or was expelled because of non-adherence to it."[20] Indeed, it appears that the Covenant was thoroughly reviewed and revised in 2009.[21]

c. Discrimination Concern Regarding the Covenant

Enforcement of the present Covenant would appear to discriminate against three groups:

LGBT persons who wish to practice sexual intimacy during their time at TWU but are prohibited from doing so (both on and off campus) even if they are legally married (and, unlike in 2001, same sex-marriage is now legally recognized in Canada). This aspect of the Covenant appears to constitute discrimination on the basis of sexual orientation.

Women who would be prohibited from obtaining an abortion (since this contravenes the requirement to uphold a person's "God-given worth from *conception* to death"). This aspect appears to constitute discrimination on the basis of sex, since only women can get pregnant and, by implication, seek an abortion.[22]

Unmarried heterosexual persons who wish to practice sexual intimacy during their time at TWU. This aspect of the Covenant appears to constitute discrimination on the basis of marital status.

The level of concern regarding discrimination varies from pre-admission to graduation:

Time Frame	Prior to Attendance Prior to Employment	During Attendance During Employment	Graduated Law Student Former Employee
Discrimination Concern	Won't bother to apply to be a TWU Law student or won't apply for a job at TWU Law School *because* of Covenant	LGBTs can't engage in sexual intimacy… Women can't obtain an abortion… Unmarried	For lawyers: speculative and no evidence at this point whether simply because they attended TWU Law School that they would discriminate as members of the legal

[20] *TWU 2001* at para. 22.
[21] TWU Website: https://twu.ca/governance/presidents-office/community-covenant.html.
[22] *Brooks v. Canada Safeway Ltd.*, [1989] 1 SCR 1219 at 1244.

		heterosexuals can't engage in sexual intimacy… without breaching the Covenant which may lead to discipline, suspension or expulsion	profession For ex-employees, if they discriminate in future their conduct may be captured by human rights legislation if it occurs within a social area, but no different than any other member of the population
Level of Discrimination Concern	Some Concern because of impact on prohibited ground	High Concern as Covenant in effect at this time	Speculative Concern

4. Human Rights Law in Ontario

a. Overview of the Ontario *Human Rights Code*

Human rights law in Ontario is governed by the *Human Rights Code*.[23] The *Code* applies to every person in Ontario, including provincial public and private institutions. "Person" is broadly defined and includes an individual as well as a corporation.[24]

The Preamble to the *Code* states that it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The *Code* aims to create a climate of understanding and mutual respect for the dignity and worth of each person.

The *Code* provides protection from discrimination in the following five "social areas":

- employment
- goods, services and facilities

[23] *Human Rights Code*, RSO 1990, c H.19 ["*Code*"].
[24] *Code* s. 46 and *Legislation Act, 2006*, SO 2006, c 21, Sch F, s. 87.

- accommodation (housing)
- membership in a vocational association (including a self-governing profession)
- contracts

There are 17 "prohibited grounds" of discrimination under the *Code*:

- race, ancestry, place of origin, colour, ethnic origin
- citizenship
- creed
- sex
- sexual orientation
- gender identity
- gender expression
- disability
- age
- marital status
- family status
- receipt of public assistance (in accommodation only)
- record of offences (in employment only)

The *Code* regulates conduct (in the above social areas and in respect of the prohibited grounds). It does not regulate thought, belief, or conscience. The *Code* has primacy over any other statute in Ontario (generally, in cases of conflict, other legislation must conform to it); and is viewed by the courts as being quasi-constitutional in nature because of its unique and fundamental importance.[25]

The *Code* prohibits both direct and indirect discrimination. Section 9 of the *Code* provides that: "No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part."

[25] *Code*, s. 47(2). See also: *Tranchemontagne v. Ontario (Directors, Disability Support Program)*, 2006 SCC 14 at para. 33 ["*Tranchemontagne*"]. The Court cites *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 SCR 566 at para. 18 and *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 SCR 145 at 158.

The *Code* has provisions that provide for an exemption from the application of the *Code* or provide a statutory defence therein – what may be termed "lawful discrimination." Broadly speaking:

- An *exemption* is available to a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination that wishes to restrict its membership to persons who are similarly identified.

- A *defence* is available to an organization that wishes to discriminate in employment on the basis of a reasonable and *bona fide* qualification ("BFOQ").

The sections of the Ontario *Code* that are germane to the TWU Law School situation in terms of establishing an individual's right to be free from discrimination and providing an organization with an exemption or defence are:

- Section 1 (equal treatment without discrimination in services);
- Section 5 (equal treatment without discrimination in employment);
- Section 6 (equal treatment without discrimination in the area of vocational associations, which includes membership in a self-governing profession);
- Section 18 (exemption from the *Code* for a special interest organizations); and
- Section 24 (defence to discrimination in employment based on a reasonable and *bona fide* qualification – BFOQ).[26]

b. Interpreting and Applying the *Code*

When Convocation makes its decision whether or not to accredit TWU Law School, it is doing so under the authority of By-Law 4, section 7. The *LSA* defines Convocation as "a regular or special meeting of the benchers convened for the purpose of transacting business of the Society."[27] Accreditation is a discretionary decision, not an adjudicative one. The question, therefore, arises as to whether and how Convocation must interpret and apply the *Code*. We have been unable to identify a case on point where an administrative body making a discretionary decision considers the *Code*.

[26] See Appendix "A" for these provisions from the Ontario *Human Rights Code*.
[27] *LSA*, s. 1(1).

On the one hand, the *Tranchemontagne* decision suggests that the Law Society is legally required to interpret and apply the *Code*. This approach would suggest that, even though the *Code* is not the "governing statute" of the Law Society, the *Code* is binding law on the Law Society because it is fundamental, quasi-constitutional law:

> The *Code* is fundamental law. The Ontario legislature affirmed the primacy of the Code in the law itself, as applicable both to private citizens and public bodies. Further, the adjudication of *Code* issues is no longer confined to the exclusive domain of the intervener the Ontario Human Rights Commission ("OHRC"): s. 34 of the *Code*. The legislature has thus contemplated that this fundamental law could be applied by other administrative bodies and has amended the *Code* accordingly.[28] […]
>
> The presumption that a tribunal can go beyond its enabling statute – unlike the presumption that a tribunal can pronounce on constitutional validity – exists because it is undesirable for a tribunal to limit itself to some of the law while shutting its eyes to the rest of the law. The law is not so easily compartmentalized that all relevant sources on a given issue can be found in the provisions of a tribunal's enabling statute. Accordingly, to limit the tribunal's ability to consider the whole law is to increase the probability that a tribunal will come to a misinformed conclusion. In turn, misinformed conclusions lead to inefficient appeals or, more unfortunately, the denial of justice.[29]

On the other hand, *Tranchemontagne* may be read as confined to the exercise of a statutory tribunal engaged in adjudication, whereas Convocation is engaging in a non-adjudicative discretionary and administrative decision.

We believe that, whether or not *Tranchemontagne* applies, the real question is "is it necessary to consider the *Code* to determine the dispute that is before Convocation?"[30] The *Code* is part of the general law and decision making bodies must take into account the *Code* in situations *where human rights issues arise*.[31]

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[28] *Tranchemontagne* at para. 13.
[29] *Tranchemontagne* at para. 26.
[30] *CUPE Local 1999 v. Lakeridge Health Corp.*, 2012 ONSC 2051 at para. 75.
[31] *Eagleson Co-Operative Homes Inc. v. Théberge*, 2006 CanLII 29987 (Ont. Div. Ct.)

In our view, while there may be other aspects of accreditation for Convocation to consider other than the discriminatory impact of the TWU Covenant, the central controversy regarding TWU Law School's proposal is the requirement that all students, faculty and staff sign the Covenant which imposes a code of conduct that appears to discriminate against a class of persons. The alleged discrimination may be occurring in British Columbia, but it becomes a concern for the Law Society here in Ontario because the accreditation is taking place in this province. The accreditation decision may affect whether TWU law graduates have their law degrees recognized as coming from an accredited institution.

To be clear, the Law Society is not sitting as a human rights body: there are no litigants before Convocation; the Law Society cannot offer any human rights damages or remedies; and no legal determination regarding the *Code* can occur. However, the Law Society is being asked to accredit a law school which engages in alleged discriminatory practices, so it is entitled to consider those practices (*TWU 2001*), and it has a duty to, *inter alia*, protect the public interest. The only way to properly determine if discrimination may be taking place is to look at *Code* principles. In order for the Law Society to come to a view about whether TWU Law School would be engaging in discriminatory practices it must look at *Code* jurisprudence.

While acknowledging that the accreditation decision is discretionary not adjudicative, if accreditation of TWU Law School occurs, then LGBT persons (among others) could claim that the Law Society has given its stamp of approval to a law school that practices discrimination. Conversely, if the Law Society does not accredit due to concerns around discrimination, then TWU and its supporters could claim that the Law Society has prioritized LGBT (and other) rights and discriminated against them on the basis of religion. Accordingly, we believe what the *Code* jurisprudence says about balancing rights will help provide guidance to Convocation in properly analyzing the TWU Law School situation.

c. Challenging the Law Society's Accreditation Decision

The most likely way that a party may challenge the Law Society's accreditation decision is through judicial review. The Law Society's discretionary decision will be scrutinized including with respect to how it considered TWU Law School's alleged discriminatory practices. However, another approach would be to claim breach of section 6 of the *Code* which provides the "right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination" based on the various prohibited grounds including creed, sexual orientation, gender and marital status.

If the Law Society does not accredit TWU Law School, a future TWU law graduate who is denied a license to practice law in Ontario on that basis may file an application against the Law Society for discrimination in the area of vocational associations on the basis of their creed.

Conversely, if the Law Society does accredit TWU Law School, a claim by a person who is negatively impacted and wishes to practice law or offer legal services in Ontario may make the following argument: his or her opportunities to be licensed in Ontario are more restricted by the Law Society's accreditation of a law school that engages in discriminatory practices.

Assuming an applicant before the Human Rights Tribunal of Ontario ("HRTO") was able to demonstrate a *prima facie* case of discrimination, it would then fall to the Law Society to defend its decision. In our view, the success of the Law Society's defence would depend on showing that it did not discriminate against an individual on a prohibited ground including because its decision was made in compliance with *Code* principles. Accordingly, we again suggest that Convocation must have regard to *Code* jurisprudence in order to properly analyze, within the TWU Law School Proposal, what human rights issues are at stake.

If the challenge to the Law Society instead proceeded under section 4 of the *Code* (i.e. accreditation as a "service"), it would appear that the Law Society's defence may be that, in making its accreditation decision, it is not offering a "service" under the *Code*. The HRTO has held that the content and decision of a statutory decision does not constitute a "service" under the *Code*.[32] In any event, even if the HRTO were to find that the Law Society's accreditation decision constituted a service, the defence would be conducted along the same lines as in respect of section 6 (vocational association).

d. The *Code* versus the *Charter*

The *Code* and the *Canadian Charter of Rights and Freedoms*,[33] are both important human rights laws but are distinct. The *Code* applies to private and public activity within a social area (employment, services, vocational association, etc.) where a prohibited ground may be implicated. The *Code* is not part of the Constitution of Canada but is accorded quasi-constitutional status by virtue of a primacy clause and its importance to fundamental rights.

[32] *Dallaire v. Les Chevaliers de Colomb – Conseil 6452*, 2011 HRTO 639 at 29, citing *Zaki v. Ontario (Community and Social Services)*, 2009 HRTO 1595 at paras. 7-10.
[33] *Canadian Charter of Rights and Freedoms*, Part I of the *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

The *Charter* is part of the Constitution of Canada. It is the supreme law of the land and all federal and provincial/territorial laws, and government action under those laws, must comply with the *Charter*. The *Charter* does not directly regulate private activity or activity where there is no state involvement. Law societies and quasi-governmental institutions like universities may be subject to the *Charter* where they are found to be implementing a specific governmental policy or program, or exercising statutory authority.[34] Moreover, in *Doré v. Barreau du Québec*, the Supreme Court directed that law societies must take *Charter* values into account in their discretionary regulatory decisions.[35]

In sections 15, 2(a) and 1, respectively, the *Charter* guarantees equality and freedom of religion, both subject to such reasonable limits as can be demonstrably justified in a free and democratic society.[36] The *Charter* and human rights laws have strongly influenced each other. Accordingly, it is correct to observe that, while the *Charter* does not regulate private activity directly, *Charter* jurisprudence has had a significant impact on the interpretation of human rights laws which, in turn, regulate private and public activity in the provinces and territories.

In summary, despite the *Charter* and the *Code* being fundamental human rights laws, a *Charter* analysis and a *Code* analysis are distinct and involve different inquiries. In this opinion, our focus in only on the *Code* although we recognize that *Charter* jurisprudence has contributed to an interpretation of the *Code*.

Following *Doré*, and in light of the lack of guidance from case law as to how to incorporate a human rights analysis into a discretionary administrative decision, it may be suggested that we should focus on "*Code* values." This would require decision makers who are called upon to exercise their statutory discretion to do so in accordance with *Code* provisions. The *Code* is comprehensive legislation that not only prohibits discrimination but also provides exemptions and defences within the *Code*. The *Code* has its own internal balancing, which must, therefore, be regarded when examining how to ultimately fulfill the administrative body's statutory objectives.

[34] See: *McKinney v. University of Guelph*, [1990] 3 SCR 229; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 at paras. 42-43; and *Pridgen v. University of Calgary*, 2012 ABCA 139 at paras. 78-99.
[35] *Doré v. Barreau du Québec*, 2012 SCC 12 ["*Doré*"].
[36] See Appendix "B" for the relevant *Charter* provisions.

5. Competing Rights

Exemption and defence clauses in the *Code* represent a legislative acknowledgment that, while discrimination on prohibited grounds is presumptively illegal, there are circumstances in which the impugned conduct may be lawfully excused because of other important values. For instance, an individual's right to be free from discrimination may compete with a group's right to restrict membership based on religious or ethnic grounds. Whether the group's "associational" right trumps the individual's "non-discrimination" right, or *vice versa*, depends on the specific context and facts of the case.

The Ontario Human Rights Commission ("OHRC") has recognized that a number of challenging human rights situations appear to be cases of "competing rights," which encompasses both *Code* rights and *Charter* rights. The OHRC has prepared a *Policy on Competing Human Rights* which lays out important principles and processes to consider when attempting to reconcile competing rights.[37]

The *Policy* sets out eight key legal principles that organizations must consider when dealing with competing rights:

1. No rights are absolute
2. There is no hierarchy of rights
3. Rights may not extend as far as claimed
4. The full context, facts and constitutional values at stake must be considered
5. Must look at extent of interference (only *actual* burdens on rights trigger conflicts)
6. The core of a right is more protected than its periphery
7. Aim to respect the importance of both sets of rights
8. Statutory defences may restrict rights of one group and give rights to another[38]

Policies of the OHRC are considered guidelines rather than binding law.[39] However, the HRTO has agreed that the OHRC's *Policy on Competing Human Rights* contains the "key legal

[37] Ontario Human Rights Commission, *Policy on Competing Human Rights* (January 26, 2012), online: http://www.ohrc.on.ca/sites/default/files/policy%20on%20competing%20human%20rights_accessible_2.pdf ["*Policy*"].
[38] *Policy* at p. 8.
[39] Section 30 of the *Code* authorizes the OHRC to prepare, approve and publish human rights policies to provide guidance on interpreting provisions of the *Code*. The OHRC's policies and guidelines set standards for how individuals, employers, service providers and policy-makers should act to ensure compliance with the *Code*. They

principles" concerning competing rights under the *Code*.[40] The OHRC's *Policy* may provide further assistance to Convocation in conducting an analysis of competing rights.

In *R. v. N.S.*, which was decided by the Supreme Court after the OHRC's *Policy* was released, the Court addressed the balancing of competing rights within the *Charter*.[41] This case was about the freedom of religion of a witness to wear a niqab when testifying in a criminal proceeding as against an accused's right to a fair trial. Rather than adopting either side's "extreme" position, the Court favoured a third way: "allowing the witness to testify with her face covered unless this unjustifiably impinges on the accused's fair trial rights."[42]

In its analysis of how a decision maker should seek to reconcile competing interests, the Court stated "The answer lies in a just and proportionate balance between freedom of religion on the one hand, and trial fairness on the other, based on the particular case before the Court." A decision maker should (1) be satisfied that competing interests are truly engaged on the facts; and (2) must try to resolve the claims in a way that will preserve both rights. This latter point involves considering accommodation options and whether alternative measures would avoid the conflict.[43] In so doing, the Court advises against simply choosing one or the other of equally "extreme" options. This guidance from *N.S.* may assist the Law Society in reconciling competing rights within its accreditation decision.

6. Human Rights and the Accreditation Decision

a. Special Interest Organizations and Relevant Jurisprudence

Within the Law Society's public interest mandate, it is entitled to consider alleged discriminatory practices at TWU. The *Code* requires that the Law Society ask two questions to determine if the Covenant is discriminatory:

1. Does the TWU Covenant, which all TWU Law School employees and students must sign and abide by, discriminate against anyone on grounds prohibited by the *Code*?

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represent the OHRC's interpretation of the *Code* at the time of publication: http://www.ohrc.on.ca/en/our_work/policies_guidelines

[40] *Kacan v. Ontario Public Service Employees Union*, 2012 HRTO 1388 at para. 32.

[41] *R. v. N.S.*, 2012 SCC 72 ["*N.S.*"].

[42] *N.S.* at para. 1.

[43] *N.S.* at paras. 30-32.

2. If so, is TWU Law School's proposal nevertheless lawful because of an exemption or defence available under the *Code?*

In Ontario, the TWU Law School imposition of a Covenant on its members would constitute discrimination unless TWU Law School meets the legal definition of a "Special Interest Organization" under s. 18 of the *Code*:

> **Special Interest Organizations**
> 18. The rights under Part I to equal treatment with respect to services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified.

In the 1995 Ontario Human Rights Board of Inquiry (the "Board") case *Martinie v. Italian Society of Port Arthur and Salvatore (Sam) Federico*,[44] the Board parsed section 18 into a three-part test as follows:

1. The organization seeking exemption must show it is a religious, philanthropic, educational, fraternal or social institution;

2. Which is primarily engaged in serving the interests of its members; and

3. That its membership is restricted to the persons identified as members.[45]

When interpreting human rights exemption clauses like section 18 of the *Code*, the Supreme Court of Canada has ruled that while such provisions limit individual rights they also confer and protect rights of association and, therefore, should not be given a narrow construction.[46]

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[44] *Martinie v. Italian Society of Port Arthur and Salvatore (Sam) Federico* (1995), 24 CHRR D/169 (Ont. Bd. Inq.) ["*Italian Society*"].
[45] *Italian Society* at p. 19.
[46] *Caldwell v. Stuart*, [1984] 2 SCR 603 at 626. See also: *Brossard (Town) v. Quebec (Commission des droits de law personne)*, [1988] 2 SCR 279 at para. 100.

The Ontario *Code* also provides a statutory defence in the area of employment where there is a reasonable and *bona fide* occupational qualification:

> **Special employment**
> 24. (1) The right under section 5 to equal treatment with respect to employment is not infringed where,
>
> (a) a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or disability employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment;

A series of cases over the last 30 years has developed the law regarding exemption and defence clauses in human rights legislation.[47] Full case briefs of these cases are provided in Appendix "D" to this opinion. These cases are directly relevant to the Law Society's task at hand as they address competing rights within the context of human rights exemption clauses.

It is interesting to note that the case law to date involving religious institutions has arisen almost entirely from Christian institutions. But just as there is no hierarchy of rights as between religious, sexual orientation and other rights, there is also no hierarchy of religions. The multicultural nature of Ontario is evolving. It is important for the Law Society to consider whether, if another faith community proposed a law school with its own covenant that, for *bona fide* religious reasons, appeared to discriminate on other grounds (e.g. gender segregation in instruction or differentiation along caste or racial lines) the same considerations regarding TWU's Law School accreditation should apply.

In contemplation of its accreditation decision, the Law Society should ask a series of questions that arise from the case law that will inform its decision about whether TWU Law School, through its Covenant, is entitled to lawfully discriminate because of its particular religious character:

1. Whether the *primary* purpose of the proposed TWU Law School is the promotion of the interest and welfare of an identifiable group or class of person on religious

[47] See Appendix "A" which includes the Ontario clauses and Appendix "C" for relevant provisions from other provinces.

grounds? What would that identifiable group or class or persons on religious grounds be? Does it make a difference whether the members of the identifiable group share the same faith? (*Caldwell*)

2. Who are the TWU Law School's "members" and is the TWU Law School *primarily* engaged in serving the interests of those members? Does TWU Law School restrict membership to the persons identified as those members whose interests it is primarily engaged in serving? (*Italian Society)*

3. What is the particular nature of the TWU Law School? Is it religious in character? Or is it more like a secular law school? Does the particular nature of the Law School justify the imposition of a code of conduct on all students, faculty and staff? (*Brossard*)

4. What is the TWU Law School's work or purpose? Is there a rational connection between the Covenant and the Law School's work or purpose? What degree of rationality is required (any minimal connection or something more substantial)? (*Nixon*)

5. What is the activity of the Law School? Is the activity as seen by TWU *fundamental* religious activity? (*Christian Horizons*)

6. Do the activities of the Law School further the *religious* purposes of TWU and its members? Do the activities of the Law School serve the interests of the TWU religious organization? (*Christian Horizons*)

7. What is the nature and essential duties of professors and employees at TWU Law School? Is there a direct and substantial relationship between the impugned parts of the Covenant and the abilities, qualities, or attributes needed to satisfactorily perform the particular jobs? What would be the consequences to TWU Law School if the impugned parts of the Covenant were not maintained? (*Christian Horizons*)

8. Does the activity of or at the TWU Law School constitute more of a religious activity or more of a commercial activity? Where in the spectrum would the activity of the Law School fall? (*Knights of Columbus*; *Eadie*)

9. What is TWU Law School's function? Is the TWU Covenant rationally connected to TWU Law School's function as opposed to just rationally connected to TWU's religious beliefs? *(Eadie*)

In three cases – *Caldwell*, *Steinbach Bible College*, and *Christian Horizons* – there was a requirement for an employee to adhere to a religious institution's code of conduct. While the present matter of TWU Law School is similar to the above-noted cases, it is also different in as much as TWU's Covenant requires both its employees and its customers (i.e. students) to adhere to a code of conduct. We have not been able to identify a case in Canada, other than *TWU 2001*, where imposing a religious code of conduct on *students* has been permitted, let alone on *students of different faiths*.

b. *TWU 2001*

TWU 2001 confirmed that it is within a regulator's public interest jurisdiction to consider discriminatory practices of a school seeking accreditation. This included considering TWU's Covenant; its impact on TWU students, faculty and staff; and the future conduct of TWU B.Ed. graduates teaching in the BC public school system. The majority held that in so doing, the BCCT should have considered both equality guarantees and freedom of religion in light of both the *Charter* and human rights laws.

TWU 2001 was an administrative law appeal, not a *Charter* or human rights case. As such, the Supreme Court did not conduct a human rights analysis to determine whether TWU would be exempt from human rights laws under section 41 of the BC *Code*. Instead, the majority assumed that would be the case. Indeed, the BCCT itself did not conduct a human rights exemption provision analysis.[48]

We suggest that while *TWU 2001* provides some guidance in terms of the present accreditation decision, the Law Society should consider the similarities and differences between the facts in that decision and the present Law School situation, particularly as human rights law has evolved since 2001.

Despite the majority's reference to the discriminatory impact of the Community Standards document on LGBTs, because of the way the discrimination concern was framed, the

[48] Based on an analysis of the trial, appellate and Supreme Court decisions.

discrimination experienced by affected TWU students, faculty and staff *while attending or employed* by TWU was not analyzed.

The majority's delineation between belief and conduct in *TWU 2001* is different from a case of competing rights where a decision maker must reconcile a group's associational and freedom of religion right to impose a religiously based code of conduct on a student or employee and that person's individual right to be free from discrimination on the basis of sexual orientation, sex and marital status.

Since *TWU 2001*, a number of subsequent cases have interpreted human rights exemption clauses, such as the *Christian Horizons* case in Ontario, which found that a lifestyle code of conduct prohibiting homosexual behaviour was not a reasonable and *bona fide* occupational requirement that could be imposed on employees despite the employer's religious beliefs. In the BC cases of *Eadie* and *Knights of Columbus*, the BC Human Rights Tribunal employed a spectrum analysis to conclude that the respondents' activities fell closer to commercial activities than religious activities when they were offering a service to the public. In our view, the question of whether TWU Law School would be entitled to receive an exemption must be based on the law as it presently exists, which includes *TWU 2001* and subsequent case law.

The Supreme Court's decision in *Saskatchewan (Human Rights Commission) v. Whatcott*,[49] confirmed L'Heureux-Dubé's analysis in *TWU 2001* (in dissent but not on this point) that human rights law rejects the separation of sexual orientation status from conduct, or identity from practice. It is contrary to law to separate a person's status from his or her conduct.

We observe that the trend in competing rights case law is to look for viable alternatives to extreme positions. In *Whatcott*, the Supreme Court struck down as unconstitutional certain provisions prohibiting hate speech that unjustifiably compromised the right to freedom of expression while upholding certain other sections of the Saskatchewan *Human Rights Code* that prohibited hate speech against homosexuals. In *R. v. N.S.*, as indicated previously, the Supreme Court suggested that allowing a witness to testify with her face covered is acceptable unless this unjustifiably impinges on the accused's fair trial rights. And in *Christian Horizons*, only that part of the employer's "Lifestyle and Morality Statement" was struck down having to do with preventing support workers from engaging in same-sex relationships, but the rest of the Statement was left largely intact.

[49] *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 ["*Whatcott*"].

7. From Human Rights Analysis to Discretionary Accreditation Decision

Having conducted a human rights analysis of the TWU Law School proposal, Convocation should be in a position to determine whether and to what extent discriminatory practices may be occurring. That determination, one way or another, must then be considered alongside any other discretionary considerations that Convocation may take into account in making its accreditation decision. That decision is ultimately about accrediting a Canadian law school. The Law Society is duty bound to make that decision in a manner that, *inter alia*, protects the public interest and maintains and advances the cause of justice and the rule of law.

We hope that Convocation will find our opinion of assistance in their upcoming deliberations.

Yours truly,
PINTO WRAY JAMES LLP

Andrew Pinto
apinto@pintowrayjames.com

Appendix A – Ontario *Human Rights Code* Excerpts

Services
1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

Employment
4. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

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

Special interest organizations
18. The rights under Part I to equal treatment with respect to services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified.

Special employment
24. (1) The right under section 5 to equal treatment with respect to employment is not infringed where,

(a) a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or disability employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment;

Appendix B – *Charter* Guarantees

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

    (*a*) freedom of conscience and religion;

    (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

    (*c*) freedom of peaceful assembly; and

    (*d*) freedom of association.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Appendix C – Exemption Clauses

British Columbia

41 (1) If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a physical or mental disability or by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or corporation must not be considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons.

Quebec

20. A distinction, exclusion or preference based on the aptitudes or qualifications required for an employment, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory.

Ontario

18. The rights under Part I to equal treatment with respect to services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified.

Appendix D – Jurisprudence

Below we present, in chronological order, the relevant decisions interpreting the various statutory defence and exemption clauses in the respective human rights legislation noted above.

Caldwell v. Stuart (*sub nom. Caldwell v. St. Thomas Aquinas High School*), [1984] 2 SCR 603

Twenty years ago, in the Supreme Court case of *Caldwell v. Stuart*,[50] McIntyre J. delivered a unanimous decision of the Court regarding the rights of a Catholic high school in BC to not renew a teaching contract of an employee who violated two of the Church's religious tenets: (1) marrying a divorced person; (2) in a ceremony outside the Church. This case engaged in a detailed human rights analysis on two key provisions of the then BC *Code*, sections 8 and 22.[51] The Court held that the employer was justified in its decision under section 8 and also exempted from the *Code* under section 22.

The Court characterized the issue under section 8 as whether adherence to the religious tenets was a *bona fide* occupational requirement of employment. The test to be applied is as follows:

> (1) *subjectively*, is the questioned requirement imposed honestly, in good faith and in the sincerely held belief that it is imposed in the interest of the adequate performance of the work involved and not for ulterior or extraneous reasons, aimed at objectives which could defeat the purpose of the Code; and
>
> (2) *objectively*, is the requirement of religious conformance by Catholic teachers [in this case], reasonably necessary to assure the accomplishment of the objectives of the Church in operating a Catholic school with its distinct characteristics for the purposes of providing a Catholic education to its students?[52]

The Court answered in the affirmative for both parts of the test:

> The religious or doctrinal aspect of the school lies at its very heart and colours all its activities and programs. The role of the teacher in this respect is fundamental to the whole effort of the school, as much in its spiritual nature as in the academic. It is my

[50] *Caldwell v. Stuart* (*sub nom. Caldwell v. St. Thomas Aquinas High School*), [1984] 2 SCR 603 ["*Caldwell*"].
[51] *Human Rights Code*, RSBC 1979, c. 186. Now sections 13 and 41 of the current BC *Code*.
[52] *Caldwell* at 622-23. See also *Ontario Human Rights Commission v. Etobicoke (Borough of)*, [1982] 1 SCR 202.

> opinion that objectively viewed, having in mind the special nature and objectives of the school, the requirement of religious conformance including the acceptance and observance of the Church's rules regarding marriage is reasonably necessary to assure the achievement of the objects of the school. It is my view that the *Etobicoke* test is thus met and that the requirement of conformance constitutes a *bona fide* qualification in respect of the occupation of a Catholic teacher employed in a Catholic school, the absence of which will deprive her of the protection of s. 8 of the *Human Rights Code.* It will be only in rare circumstances that such a factor as religious conformance can pass the test of *bona fide* qualification. In the case at bar, the special nature of the school and the unique role played by the teachers in the attaining of the school's legitimate objects are essential to the finding that religious conformance is a *bona fide* qualification.[53]
>
> Analysing section 22, the Court stated while it imposes a limitation on rights, it also confers and protects rights: that is, such an exemption clause may limit non-discrimination rights to Mrs. Caldwell, but confers and protects associational rights on the high school.[54]

Under section 22, a Court must determine the following:

(1) Whether the institution is a charitable, philanthropic, educational, fraternal, religious or social organization or corporation;

(2) Which is not-for-profit;

(3) That its primary purpose is the promotion of the interest and welfare of an identifiable group or class of persons on one of the enumerated grounds listed in the section; and

(4) Is granting a preference to members of that identifiable group or class of persons.

There was no disagreement that the high school satisfied the first three requirements; namely, that it was a religious, not-for-profit institution, the primary purpose of which was the promotion of the interests and welfare of an identifiable group or class of persons characterized by a

[53] *Caldwell* at 624-25.
[54] *Caldwell* at 625-26.

common religion. On the final step, the Court accepted that the identified group being given a preference was Catholic residents in the parishes served by the school. The Court upheld the Board of Inquiry's decision that the religious conduct qualifies as a "preference" within the meaning of section 22. Therefore, it was within the high school's religiously protected association rights under the exemption clause to not employ Mrs. Caldwell:

> The purpose of the section is to preserve for the Catholic members of this and other groups the right to the continuance of denominational schools. This, because of the nature of the schools, means the right to preserve the religious basis of the schools and in so doing to engage teachers who by religion and by the acceptance of the Church's rules are competent to teach within the requirements of the school. This involves and justifies a policy of preferring Roman Catholic teachers who accept and practice the teachings of the Church. In failing to renew the contract of Mrs. Caldwell, the school authorities were exercising a preference for the benefit of the members of the community served by the school and forming the identifiable group by preserving a teaching staff whose Catholic members all accepted and practised the doctrines of the Church.[55]

Brossard (Town) v. Quebec (Commission des droits de la personne), [1988] 2 SCR 279

Four years after *Caldwell*, the Supreme Court of Canada decided the case of *Brossard (Town) v. Quebec (Commission des droits de la personne)*,[56] which involved analysing a similar exemption clause in Quebec's *Charter of Human Rights and Freedoms*.

Brossard was another employment discrimination case, this time the issue being whether the Town of Brossard could attempt to combat nepotism by imposing a hiring policy that disqualified members of immediate families of full-time employees and town councillors from employment with the town. At the Court of Appeal, the hiring policy was deemed non-discriminatory by operation of section 20 of the Quebec *Charter*, being the similarly worded exemption clause noted above.

[55] *Caldwell* at 628.
[56] *Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 SCR 279 ["*Brossard*"].

At the Supreme Court, the majority stated: "Section 20 of the Charter deems non-discriminatory certain distinctions, exclusions or preferences which would otherwise constitute discrimination under s. 10."[57] Section 20 reads:

> 20. A distinction, exclusion or preference based on the aptitudes or qualifications required in good faith for an employment, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution, or of an institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory.

The majority parsed this section into two separate clauses. The first operating as a "*bona fide* occupational qualification" exception (similar to the BC *Code*'s current section 13, and Ontario *Code*'s section 24(1)(a)), and the second operating as an exemption clause for certain organizations giving preference to certain members (similar to the BC *Code*'s former section 22 and current section 41, and Ontario *Code*'s current section 18).

The first exception clause should be interpreted restrictively because, as the majority states, "they take away rights which otherwise benefit from a liberal interpretation."[58] After analysing the Town's hiring practice, the majority decided that it was not exempted under the first part of section 20 because "the aptitude or qualification it purports to verify is not 'required in good faith for' the 'employment'."[59]

The majority turned to consideration of the second part of section 20. The majority defined the purpose of the second branch as follows:

> In my view, this branch of s. 20 was designed to promote the fundamental right of individuals to freely associate in groups for the purpose of expressing particular views or engaging in particular pursuits. Its effect is to establish the primacy of the rights of the group over the rights of the individual in specified circumstances.[60]
>
> …

[57] *Brossard* at para. 44.
[58] *Brossard* at para. 56.
[59] *Brossard* at para. 86.
[60] *Brossard* at para. 100.

> I am not unaware that, on the basis of my interpretation, other non-profit institutions will also be precluded from invoking this exception. A university, for example, which one would ordinarily think of as a non-profit institution of an educational nature, cannot cite the second branch of s. 20 to justify discriminatory distinctions, exclusions or preferences unless the university has a primary purpose such as the ones described above.[61]

The majority decided that the Town of Brossard was not a "group" exercising any form of freedom of association in its discriminatory hiring practice for the purposes of the exemption under the second branch of section 20.[62] The majority concluded, generally speaking with regard to the interpretation of the second branch of section 20:

> I would agree that, as a general rule, the distinction, exclusion or preference practised by the non-profit institution to which the second branch applies must be justified in an objective sense by the particular nature of the institution in question.[63]

Schroen v. Steinbach Bible College, (1999) 35 CHRR D/I (Man. Bd. Adj.)

In *Schroen v. Steinbach Bible College*,[64] the Manitoba Human Rights Board of Adjudication found in favor of a Mennonite College which had terminated an Accounting Clerk after she revealed that she had converted to Mormonism. Ms. Schroen was offered a job at Steinbach Bible College (SBC), which trained students for Ministry and to become more effective Christians. The job application included a Statement of Faith, which she agreed to affirm. However, before starting her job, SBC learned that Ms. Schroen, who was raised Mennonite, had converted to the Mormon faith. SBC subsequently terminated her on the basis of her religious non-conformity and Ms. Schroen filed a complaint with the Manitoba Human Rights Commission.

The Adjudicator found that Ms. Schroen had been discriminated against but that the discrimination was based on *bona fide* and reasonable requirements or qualifications for the employment.

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[61] *Brossard* at para. 134.
[62] *Brossard* at para. 122.
[63] *Brossard* at para. 138.
[64] *Schroen v. Steinbach Bible College*, (1999) 35 CHRR D/I (Man. Bd. Adj.) ["*Schroen*"].

Citing the Supreme Court's decision in *Ontario Human Rights Commission v. Etobicoke*, the Adjudicator articulated the test for a *bona fide* requirement as follows:

> To be a bona fide occupational qualification and requirement a limitation,…, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interest of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of *The Code.*[65]

The first part of this test is subjective and counsel for all parties were in agreement that the subjective part of the test was met in this case. The Adjudicator agreed and found that the actions and intentions of SBC were *bona fide.*

Turning to the second part of the test from *Etobicoke*, the Adjudicator then considered whether the requirements for the occupation were reasonable. As a part of this inquiry, the Adjudicator considered not only the nature of the employment, but also SBC's objectives and how the job of accounting clerk relates to the overall functioning of the institution. He found that "everyone employed at SBC was expected to share in a faithful way with students espousing the Christian faith, as that was what SBC was all about."

After reviewing expert evidence with respect to Mennonite and Mormon dogma and finding that the two faiths are "diametrically opposed," the Adjudicator found that:

> Considering the unique role of an accounting clerk at SBC and the unique culture of SBC including its philosophy, mission, faith, beliefs, ethics and the acceptance and observance of the Statement of Faith are reasonable and necessary to assure achievement of the religious objects of the College, it is my view that the Etobicoke test has been met.

As a result, the Adjudicator found that the requirement that the account clerk be of the Mennonite faith to work at SBC constituted a *bona fide* and reasonable requirement and, therefore, did not violate the *Code*.

[65] *Ontario Human Rights Commission v. Etobicoke*, [1982] 1 SCR 202 at 208 ["*Etobicoke*"].

Vancouver Rape Relief Society v. Nixon, 2005 BCCA 601

Other than the Supreme Court's decision in *Caldwell*, the leading case on s. 41 (formerly s. 22) of BC's *Code* is *Vancouver Rape Relief Society v. Nixon*.[66] In this case, the British Columbia Court of Appeal upheld the right of a feminist non-profit organization to reject a transgendered volunteer by identifying itself in such a way as to exclude persons who lacked the experience of being treated as a woman since birth.

The Vancouver Rape Relief Society ("Relief Society") is a non-profit feminist organization "whose mandate is to provide services to women victims of male violence and to fight violence against women."[67] Ms. Nixon claimed discrimination as a post-operative male-to-female transgendered woman who was denied the opportunity to participate in the provision of peer counseling services provided by the Relief Society. Ms. Nixon was herself a victim of male intimate-partner violence and wanted to "give something back." After responding to an advertisement for volunteers, Ms. Nixon was successfully pre-screened to ensure that she agreed with the Relief Society's collective political beliefs. However, at the first training session, a facilitator identified Ms. Nixon as transgendered, based on her appearance. Ms. Nixon was then asked to leave because "a woman had to be oppressed since birth to be a volunteer at Rape Relief and […] because she had lived as a man she could not participate."[68]

Ms. Nixon was awarded $7,500 by the BC Human Rights Tribunal for her claim,[69] but the decision was set aside on judicial review.[70] At the Court of Appeal, the Honourable Madam Justice Saunders concluded that, "the behavior of the Society meets the test for 'discrimination' under the *Human Rights Code*, but it is exempted by s. 41."[71]

Citing *Caldwell*, the Court of Appeal confirmed that s. 41 preserves the right to associate by permitting the preference of one member of an identifiable group over another.[72] The Court concluded that s. 41 operates such that a group can prefer a sub-group of those whose interests it was created to serve, given good faith, and provided there is a rational connection between the

[66] *Vancouver Rape Relief Society v. Nixon*, 2005 BCCA 601 ["*Nixon*"].
[67] *Nixon* at para. 3.
[68] *Nixon* at para. 4.
[69] 2001 BCHRT 1.
[70] 2003 BCSC 1936.
[71] *Nixon* at para. 9.
[72] *Nixon* at para. 51.

preference and the entity's work or purpose. Leave to the Supreme Court of Canada was sought but denied.

In *Nixon*, the BC Court of Appeal rejected arguments by the appellant that it should adopt the analysis in the Supreme Court's decision in *Brossard*, which was decided subsequent to *Caldwell*. The BC Court of Appeal chose not to apply the Supreme Court's analysis from *Brossard* on the basis that s. 20 of the Quebec *Charter of human rights and freedoms* "rolled the defence of *bona fide* occupational requirement and a group rights exemption into the same provision […] in a way that engaged the issue of justification for the group rights exemption."[73] The BC Court of Appeal saw no analogous requirement in s. 41 of the *Code* and, therefore, did not read the test set out in *Brossard* as determinative. A cursory reading of *Brossard* suggests, however, that the Supreme Court explicitly separated the BFOR analysis from the group rights exemption analysis in s. 20. Accordingly, while the British Columbia courts have declined to follow *Brossard*, the Supreme Court decision remains binding in Ontario.

Ontario (Human Rights Commission) v. Christian Horizons, 2010 ONSC 2105 (Div Ct)

The leading case in Ontario regarding section 24(1)(a) of the Ontario *Code* is *Ontario (Human Rights Commission) v. Christian Horizons*, decided by the Divisional Court.[74] Christian Horizons is a not-for-profit corporation that self-identifies as an Evangelical Christian ministry. It operates residential homes in Ontario and provides care and support services to individuals with developmental disabilities. It required that all members and employees adopt and sign a Doctrinal Statement that included a Lifestyle and Morality Statement prohibiting, among other things, homosexual relationships. The applicant at the Human Rights Tribunal level was Connie Heintz who was employed by Christian Horizons as a support worker. She was a person of "deep Christian faith" and also a lesbian. When Christian Horizons learned of Heintz's sexual orientation, they informed her she was not in compliance with the Lifestyle and Morality Statement. Ms. Heintz eventually resigned after commencing a medical leave of absence due to workplace stress surrounding the fall out after she came out to Christian Horizons.

At the Tribunal level, Heintz and the Ontario Human Rights Commission argued that she suffered discrimination in employment because she was terminated due to her sexual orientation,

[73] *Nixon*, para. 52.
[74] *Ontario (Human Rights Commission) v. Christian Horizons*, 2010 ONSC 2105 (Div Ct) ["*Christian Horizons* (Div Ct)"], var'g (*sub nom*) *Heinz v. Christian Horizons*, 2008 HRTO 22 ["*Christian Horizons* (HRTO)"].

and that the Lifestyle and Morality Statement violated the *Code*. Christian Horizons argued that it qualified under the special employment exemption in the *Code* (section 18), which permitted it to restrict hiring or give employment preference to individuals who identified with its creed, and that the Lifestyle and Morality Statement was a *bona fide* and reasonable qualification given the nature of the employment.

The Tribunal sets out its interpretation of the steps required for an organization to bring itself within the protection/exemption of s. 24(1)(a):

1. It must bring itself within the class of enumerated organizations;

2. It must establish it is primarily engaged in serving the interest of persons identified by one of the prohibited grounds of discrimination; and

3. It seeks to restrict employment to persons similarly identified.

If the organization passes this three part test, then it must satisfy the Tribunal that the qualification is justified by the nature of the employment.[75]

The Tribunal reviewed past jurisprudence regarding special employment exemption sections in human rights legislation and summarized the common themes running through these cases:

1. Most deal with religious schools where the persons served (students and families) were all adherents to the creed of the organization, and the purpose of the organization was religious indoctrination, education and formation;

2. The job of the employee to whom the qualification applied was to carry out the religious indoctrination, education and formation; and

3. The organizations were either private, or publicly funded religious schools which enjoyed Constitutional protection.[76]

With respect to the three-part test under section 24(1)(a), the Tribunal concluded: (1) Christian Horizons is a religious organization; (2) it is primarily engaged in serving the interests of persons

[75] *Christian Horizons* (HRTO) at para. 97.
[76] *Christian Horizons* (HRTO) at para. 109.

identified by disability, not persons identified by their creed; and (3) it restricts employment and gives preference to persons similarly identified by a common creed. Thus the Tribunal decided that Christian Horizons failed on the second branch of the test.

The Tribunal then considered whether the Lifestyle and Morality Statement was a reasonable and *bona fide* qualification due to the nature of the employment and decided that it was not. The Tribunal concluded that Ms. Heintz was discriminated against in employment on the basis of her sexual orientation.

The Tribunal's decision was appealed by Christian Horizon to the Ontario Superior Court of Justice, Divisional Court. The Divisional Court allowed the appeal in part, varied the Tribunal's Order, but ultimately upheld the Tribunal's decision that Ms. Heintz suffered discrimination in employment on the basis of her sexual orientation. The Divisional Court found that the Tribunal erred in its interpretation of section 24(1)(a) with respect to the second branch of the test – namely the primary purpose of the organization seeking protection/exemption under the clause – but that the Tribunal's decision (that the Lifestyle and Morality Statement was not a reasonable and *bona fide* qualification) was reasonable.

The Divisional Court went on to state the correct interpretation of the second branch of s. 24(1)(a):

> The language and purpose of the provision require an analysis of the nature of the particular activity engaged in by a religious organization to determine whether it is seen by the group as fundamentally a religious activity. This must be followed by an assessment of whether that activity furthers the religious purposes of the organization and its members, thus serving the interests of the members of the religious organization. If the organization falls within the exemption, a BFOQ assessment must follow.[77]

Despite its ruling on the Tribunal's error regarding the second branch of the s. 24(1)(a) test, the Divisional Court upheld the Tribunal's ruling regarding the reasonable and *bona fide* qualification, holding that the Lifestyle and Morality Statement was not a BFOQ:

> In the process conducted by Christian Horizons, however, there is no evidence that the leadership of Christian Horizons did a close examination of the nature and

[77] *Christian Horizons* (Div Ct) at para. 73.

> essential duties of the position of support worker and why adherence to a L & M Statement, including a ban on same sex relationships, is necessary in relation to those duties, or that such was taken into account by the employees when they made recommendations for the list to be included in the L & M Statement. It was just assumed that a morality code of some kind was required.[78]
>
> …
>
> A discriminatory qualification cannot be justified in the absence of a direct and substantial relationship between the qualification and the abilities, qualities or attributes needed to satisfactorily perform the particular job.[79]

Eadie and Thomas v. Riverbend Bed and Breakfast and others (No. 2), 2012 BCHRT 247; *Smith and Chymyshyn v. Knights of Columbus and others*, 2005 BCHRT 544

In *Eadie v. Riverbend Bed and Breakfast*,[80] a 2012 decision of the BC Human Rights Tribunal, a male same-sex couple filed a complaint alleging that Riverbend's owners discriminated against them on the basis of sexual orientation when their reservation was cancelled after the owners learned that they were gay. The respondents, invoking their freedom of religion, characterized the case as one about competing rights. They suggested that, because the B&B was run through their home, their genuinely held religious convictions required them to prevent behavior which God prohibited (such as sexual intercourse between persons of the same sex). The owners suggested that a valid distinction existed between one's home and a business (such as a hotel).

The Tribunal had no difficulty finding that the ground of sexual orientation was engaged by the complaint. The Tribunal also found that the Riverbend B&B was offering a service customarily available to the public. The Tribunal rejected the respondents' argument that a distinction should be made between sexual orientation and sexual conduct and that, had the complainants provided certain assurances that they would not engage in sexual relations, they may have been provided with accommodation. In the Tribunal's view, the Supreme Court of Canada had rejected the

[78] *Christian Horizons* (Div Ct) at para. 95.
[79] *Christian Horizons* (Div Ct) at para. 103.
[80] *Eadie and Thomas v. Riverbend Bed and Breakfast and others (No. 2)*, 2012 BCHRT 247 ["*Eadie*"].

legitimacy of drawing a line between sexual orientation and conduct: *Egan v. Canada*, and *TWU 2001* (L'Heureux Dubé J. in dissent, but not on this point).[81]

The Tribunal held that the complainants had proven a *prima facie* case of discrimination based on sexual orientation and that the burden shifted to the B&B owners to prove a *bona fide* and reasonable justification for their conduct.

The Tribunal noted that both parties relied on an earlier British Columbia Human Rights Tribunal decision, *Smith and Chyumyshyn v. Knights of Columbus*.[82] We consider *Knights* to be an important decision and relevant to the question of the proper interpretation of reconciling religious and equality rights in contested situations. Therefore, we quote, at some length, from the *Eadie* Tribunal's summary of the *Knights* decision:

> *Knights* involved a Catholic Mens' organization that rented out a hall located near the Parish church, on property owned by the Catholic Church and Archdiocese (para. 2). The Parish priest had the final say about what activities would take place in the hall. Parish Church groups had priority in renting the hall, but the hall was also rented to the general public. The organization's signage made no reference to any restrictions on the hall's use.
>
> The complainants in *Knights* were a lesbian couple who rented the hall for their wedding reception. The Respondents subsequently learned that the purpose of the rental was related to a same-sex wedding, which was contrary to the Catholic Church's teachings. The reservation was cancelled, and the complainants made alternate arrangements for the reception. The complainants acknowledged that, had they known that the hall was operated by a Catholic organization, they would not have rented the premises.
>
> The Tribunal concluded that the complainants had proven a *prima facie* complaint of discrimination. The Tribunal also found that the Knights had breached s. 8 of the *Code* by failing to accommodate the complainants to the point of undue hardship.
>
> In particular, the Tribunal held that:

[81] *Egan v. Canada*, [1995] 2 SCR 513. The *Eadie* Tribunal's perspective on this point was unanimously affirmed by the Supreme Court's 2013 decision in *Whatcott* (described below).
[82] *Smith and Chymyshyn v. Knights of Columbus and others*, 2005 BCHRT 544 ["*Knights*"].

a) The standard adopted by the Knights was that they do not rent the hall for purposes that are contrary to their core Catholic beliefs.

b) The function being performed in renting the hall not only included its rental, but also that the hall could only be rented and/or used for events that would not undermine the Knights' relationship with the Catholic Church.

c) The standard, given its purpose, was rationally connected to the function.

d) The standard was adopted in good faith and in the belief that it was reasonably necessary for the fulfillment of the purpose or goal.

e) Everyone is entitled to hold and manifest their own sincerely held religious beliefs and to declare those beliefs. However, this right is not absolute: see discussions paras. 94-106.

f) While accepting that the Knights could not be compelled to act in a manner contrary to their core religious belief that same-sex marriages were morally wrong, the Knights did not accommodate the complainants to the point of undue hardship. In particular, they did not consider the effect their actions would have on the complainants and did not take steps that would have recognized the inherent dignity of the complainants and their right to be free from discrimination (paras. 123-124).

The Tribunal adopted a "spectrum analysis" in respect of the third branch of the *Meiorin* test. At one end of the spectrum was a Catholic parish church and at the other end of the spectrum was a commercial space with no religious affiliation (para. 110). The Tribunal concluded that the Knights' hall fell somewhere between those ends of the spectrum:

> In the Panel's view, the issue presented in this case lies at neither end of the spectrum, but somewhere along the continuum, requiring a delicate balance. This was a Hall available to the public, regardless of religion; but it was also a Hall that could not be used for an event that was contrary to core Catholic beliefs.

> The Panel accepts that a person, with a sincerely held religious belief, cannot be compelled to act in a manner that conflicts with that belief, even if that act is in the public domain. This conclusion is supported by the Supreme Court of Canada's decision in *Trinity Western* and the Ontario Divisional Court's decision in *Brockie.* The Panel accepts that the Knights are entitled to this constitutional protection and therefore cannot be compelled to act in a manner that is contrary to their core religious beliefs. The Panel also finds that, although the Knights were not being asked to participate in the solemnization of the marriage, renting the Hall for the celebration of the marriage would have required them to indirectly condone the celebration of a same-sex marriage, an act that is contrary to their core religious beliefs. (paras. 112-113).

> The Tribunal went on to state that the Knights had to accommodate the complainants by taking steps which did not violate their beliefs, such as "meeting with the complainants to explain the situation, formally apologizing, immediately offering to reimburse the complainants for any expenses they had incurred and, perhaps offering assistance in finding another solution." (para. 124).[83]

Ultimately, in *Knights*, the Tribunal ruled that the Knights did not have to rent out their hall to a lesbian couple who wanted to have their same-sex marriage reception at the hall; however, the Knights fell short of their human rights obligations in terms of communicating the decision and ameliorating its effects on the couple.

An important aspect of the *Knights* decision, not referred to in *Eadie*, was the Knights' alternative defence that, under section 41 of the BC *Code*, they were entitled to prefer members of their own religious group in the renting of the hall, and that such a preference did not constitute discrimination under the BC *Code*. This defence was rejected by the Tribunal in *Knights*:

> As argued by the Knights, in order to bring themselves within the protections afforded by s. 41 of the *Code*, they must establish first, that they are a non-profit organization that has as its primary purpose the promotion of the welfare of an identifiable group characterized by a common religion, and second that, in denying

[83] *Eadie* at paras. 121-126.

the rental of the Hall, they were granting a preference to members of an identifiable group.

As we set out above, there is no question that the Knights are a not-for-profit organization, and that the Hall is operated on this basis. The Panel accepts that the purpose of the Knights is to promote the interests of the Catholic Church, a religious organization that may be entitled to the protection in s. 41 of the *Code.*

However, although the Knights are closely associated with the Catholic Church, the real issues is whether the Knights, in denying the Hall, were granting a preference to an identifiable group, namely those of the same religious affiliation. In the Panel's view, they were not and therefore the protection of s. 41 is not available to them.

The Hall was not only rented to those in the Catholic community, to members of the Knights and their families, or to those who share the Catholic Church's core religious beliefs. The Hall was available to the public, regardless of the person's or group's religious affiliation. There was no preference granted to the Knights or Catholics in the rental or access to the Hall. In fact, the evidence was clear that there was no preference granted to any individual or group based on religion. The evidence did not suggest that a person's religion factored into the rental agreement.[84]

Returning to the *Eadie* decision (the refusal by B&B owners, for religious reasons, to rent a room to a gay couple), the Tribunal characterized the B&B respondents concern as saying that they are "evangelical Christians whose religious beliefs prohibit them from permitting certain conduct which they believe to be immoral from occurring in their home. They say that their religious belief is that to permit such behaviour implicates them, morally and spiritually, in that conduct."[85]

The complainants, on the other hand, argued that unlike *Knights*, *Trinity*, C*aldwell* or *Christian Horizons*, the B&B owners, while conscientiously religious, were not a religious organization with a mandate to advance their religious values. The test was not whether the refusal to rent the room was rationally connected to the owners' religious beliefs but rather, whether it was rationally connected to the Riverbend B&B's function.

[84] *Knights* at paras. 132-135.
[85] *Eadie* at para. 128.

The *Eadie* Tribunal found that that the function of the Riverbend B&B was to offer temporary accommodation, without any express restriction, to the general public. It was the B&B owners' personal and voluntary choice to operate a business in their home that catered to the general public. The purported standard of restricting accommodation in single bed rooms to married heterosexual couples was not rationally connected to the public function or purpose of the B&B. The *Eadie* Tribunal also found, in considering the "spectrum" analysis adopted in *Knights*, that the Riverbend B&B case fell more towards the commercial end of the spectrum. The B&B was not operated by a Church or religious organization: "While the business was operated by individuals with sincere religious beliefs respecting same-sex couples, and to of a portion of their personal residence, it was still a commercial activity."[86]

The Tribunal made no finding on whether, if the owners had restricted their clientele to only the Christian community, it would have made a difference to the decision. Ultimately, the Tribunal found that the Riverbend B&B and its owners had breached the BC *Code* by failing to provide a service without discrimination on the basis of sexual orientation and by failing to accommodate the complainants.

Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC 11

The issue in *Saskatchewan (Human Rights Commission) v. Whatcott*,[87] was whether section 14(1)(b) of the *Saskatchewan Human Rights Code*[88] (a provision prohibiting hate speech) was constitutional in light of Whatcott's rights to freedom of religion and freedom of expression under the *Charter*. This case involved Whatcott's distribution of flyers denigrating homosexuality on the basis of his religious beliefs. A unanimous Supreme Court concluded that although s. 14(1)(b) did violate his rights under ss. 2(a) and 2(b) of the *Charter*, the infringement was justified under section 1.

Whatcott is relevant to the present matter for two reasons: (i) it addresses the balancing of competing *Charter* rights (freedom of religion and expression with equality rights); and (ii) it confirms the law's approach to sexual orientation versus sexual behaviour.

[86] *Eadie* at para. 165.
[87] *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 ["*Whatcott*"].
[88] *Saskatchewan Human Rights Code*, SS 1979, c S-24.1.

First, instead of placing internal limits on *Charter* rights and freedoms, the Court prefers balancing *Charter* rights under s. 1.[89] In carrying out this s. 1 analysis, the Court held that the prohibition in s. 14(1)(b) of the Saskatchewan *Code* against hate speech was a reasonable limit on Whatcott's freedoms of religion and expression and in this way upheld the equality rights of individuals on the basis of their sexual orientation.

Second, the Court adopted L'Heureux-Dubé's analysis in *TWU 2001* (in dissent but not on this point), that human rights law rejects the separation of sexual orientation status from conduct, or identity from practice. Accordingly, while it may be possible for homosexuals to refrain from homosexual activity, and while organizations may accept homosexuals but not their sexual activities, the law will treat a ban on homosexual activity no differently than a ban on homosexuals themselves.[90]

[89] *Whatcott* at para. 154.
[90] *Whatcott* at para. 123.